The EXECUTIVE Constitutional Mandate

Demystifying The Fountain Of Honor: Presidential Powers Over Reach In Uganda

Isaac Christopher Lubogo

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First Edition

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D E D I C A T I O N

SAULIS POPULI SOLIS VEI…. THE WELFARE OF THE PEOPLE IS SUPREME

This book is dedicated to all those innocent souls, the unsung heroes of this nation who have given their lives, blood, tears and sweat for this nation Uganda. God bless their souls.

FOR GOD AND MY COUNRTY

OPENING SCHOLARY REMARK

When a counrty is hurtling towards its destruction merit and intergrity are sacrificed at the Alter of atavisitic ethnic jingoism camofaulegled through processes that are carefully choreographed to hoodwink the casual observers (Prof. PLO Lumumba)

In my much coveted book Obuntu Bulamu and the Law: An Extra Texual Aid Statutory Interpretation Tool (Lubogo 2020), I explain how Prof. Oloka-Onyango in *Ghosts & the Law, An Inaugural Lecture,* explores how the ghosts have infested the law in Uganda concerning, for example, judicial restraint and conservatism. He considers the Political Question Doctrine (PQD) as the essence of the ghost of *ex parte Matovu,* (in the case of ***Uganda v. Commissioner of Prisons, ex parte Michael Matovu***[1]), which influenced the outcome of most cases which even simply challenged the exercise of executive power. (which this book intends to achieve)

Thus, in the case of ***Opoloto v. Attorney General***[2] which concerned the dismissal of the then army commander for refusing to execute the order to attack the Kabaka's palace, the court held that the Ugandan president had inherited the prerogative powers of the British monarch to dismiss at will officers in its service.[3] This is a demonstration of the spill-over of the Western colonial influence on post-independent legal system in Uganda. The author contends that Matovu's case has found a way of holding the courts ransom in several court decisions.[4] In his judgment in the *Tinyefuza* case[5] in the Supreme Court, Justice Kanyeihamba observed that certain boundaries existed over which the Judiciary should not cross, he however, overruled the decision in *Opoloto's* case, arguing that "In this age of modernity, democracy and entitlement to human rights and freedoms, Opoloto's case can no longer be treated as good law.[6]

Prof. Oloka-Onyango (2017) in his book, *when Courts Do Politics: Public Interest Law and Litigation in East Africa,* considers how courts relate to and are affected by politics such as in the appointment of Judges by the executive. He contends that the present defenders of impartial judiciary would not easily claim that courts have nothing to do with politics. The political operation of the courts, he suggests can be determined by examining where the Judges come from, what they did prior to getting onto the bench, and how they got there. For those that rose through the ranks, their decisions in the lower courts could be examined. For those from academia, a review of their published works could be examined. Such analysis could help determine a Judge's ideological orientation, what he describes as judicial politics. The author dispels any guarantee of a status quo once a Judge has been appointed, and argues that such orientation and perceived loyalty to the appointing authority was prone to change.

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[1] [1966] EA 514
[2] [1969] EA 631
[3] (Oloka-Onyango (2015) *Ghosts & the Law, An Inaugural Lecture,* p.28
[4] Prof. Oloka-Onyango (2015), *Ghosts & the Law, An Inaugural Lecture.*
[5] *Major General David Tinyefuza v. Attorney General* (Constitutional Case No.1 of 1996).
[6] (Oloka-Onyango (2015) *Ghosts & the Law, An Inaugural Lecture, p.* 41

ABOUT THE BOOK

The first thing I would like to ask my readers is to imagine a different President in office. If they support the current President and believe those who oppose him are doing so for partisan or otherwise illegitimate reasons, they should visualize a President whom they completely distrust. Conversely, if they dislike the current President, they should conceive of the President in power as someone they support and that those opposing him are acting illegitimately. This exercise is helpful, I believe, for focusing attention on the underlying constitutional issues rather than upon the wisdom, or lack thereof, of a particular President's policies.

Views as to whether or not an exercise of presidential power is legitimate tend to be based less upon legal abstractions than upon perceptions of the particular President in power. Someone supporting a particular President, for example, is likely to believe that parliament should not have the power to interfere with the President's unilateral decision to send troops into armed conflict or that parliament should not have the authority to demand the President to extend or remove his term limits. Conversely, someone who believes a President's agenda is improperly motivated or ill-advised is more likely to support constitutional principles that provide significant checks and balances upon the President's exercise of power.

In this way, views on presidential power tend to be more variable than views on other constitutional issues because they intuitively relate to who is in power in a way that views on other controversial constitutional issues such as freedom of speech and assembly, or freedom of religion do not.

For this reason, this book on presidential power is well timed. Because the question of who will hold the Presidency after the next election should always be much in doubt, this is the perfect opportunity to examine the nature of presidential power as an abstract matter, rather than as a criticism or as an apologia of a specific President's actions. This is what I intend to do in this book.

Specifically, I contend that the power of the Presidency has been expanding since the founding, and that we need to consider the implications of this expansion within the constitutional structure of separation of powers.

No matter which party controls power. This book makes the descriptive case by briefly canvassing a series of factors that have had, and continue to have, the effect of expanding presidential power. It further suggests this expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth by the Framers.

The book offers some suggestions as to how this power imbalance can be alleviated, but it does not present a silver bullet solution. Because many, if not all, the factors that have led to increased presidential power are the products of greed and selfish needs.

Thus, this book ends with only the modest conclusion that regardless of who wins the Presidency, it is critical that those on both sides of the aisle work to assure that the growth in presidential power is at least checked, if not reversed.

MY INDIE PERSON THOUGHTS

My idle thoughts…

The story goes that Marcus Aurelius hired an assistant to follow him as he walked through the Roman towns square. The assistant's only role was to, whenever Marcus Aurelius was praised; whisper in his ear, **"You're just a man. You're just a man."**

They say two things define us. Our patience when we have nothing and our humility when we have everything. You know the greatest thinkers on the planet believe that they're habitual learners, habitual students of reality and of life. It was actually Maya Angelou who said, **"I've learned that I still have a lot to learn"** The person that we will become in 5 years is defined by the people we spend time with today, and the books that we read today. That's why who we associate with, who we spend time with, who we absorb our energy with will really define what's on our mind. Often what limits our learning is that we believe we already know. We already believe that we have knowledge. We already believe that we have answers but actually opening up ourselves to learn from the people around us, selectively choosing people who can be guides and wise advisors. We often find that this feeling of « knowing» makes us actually judge others and criticize others. And that's why we see that judging is critical but observing can be educational. And therefore, we should be so focused on improving ourselves that we don't have any energy to criticize anyone else. And when we're focusing on improving ourselves we surround ourselves by people who challenge the way we think and question the way we behave. And that's why if youre looking around and you find yourself being the smartest person in the room, change rooms, you're in the wrong one. You want to be around people who lift up the way you think, who lift up your mindset, who really take you to new dimensions and horizons that you could ever never imagine yourself. I believe that we should never let compliments get to our head and never let criticism get to our heart, because when we do that we can start to build with genuineness and authenticity. When we're humble we can actually grow and rise up and always feel that we re learning, always feel that we're developing, always feel that someone can share insight at any moment that can change our lives. Have you ever found it that similar situations keep coming into our life and actually nothing ever goes away until it teaches you what it needed to learn so, when we don't extrapolate lessons from situations we have to take this test again. We almost have to learn that lesson again.

Therefore, simultaneous or repetitive situations keep approaching in our lives. When we realize that we're students for life, instead of making people see how powerful we are, we want people to understand how powerful they are. And we learn how to empower others. We'll actually attract people to work with us to achieve our goals. That say it's better to know how to learn than to know. Because when we know how to learn it becomes a habit. It becomes a part of your mindset; it

becomes a part of the way that we daily navigate life. We're trying to draw lessons from every person, every situation, very interaction, every moment that can actually teach us something about ourselves, teach us something about society, tach us something about our world. Teach us something about how we can interact with space. And that's why Brain Herbert said: **"The capacity to learn is a gift, the ability to learn is a skill, but the willingness to learn is a choice."** Let's now begin to learn, Alvin joffer once said **"the illiterate of the 21st century will not be the individual who cannot read bit one who cannot learn, unlearn and re learn.**" We are not makers of history we are made by history long fellow said **"in this world a man must either be an anvil or a hammer"** meaning that you are either a molder of society, or molded by society.

We should never be thermometers that record or register the temperature of majority opinion, not thermostats and regulate the society, majority is not always right your conscience is always right, fear not to stand and take positions out sharply and clearly from the prevailing opinion.

Thomas Jefferson wrote "I have sworn upon the alter of God eternal hostility against any form of tyranny over the mind of man" Never be a mental slave this book will free you,

James Russell Lowell wrote "they are slaves who fear to speak for the fallen and weak. They are slaves who will not choose hatred, scoffing, and abuse, rather than in silence shrink from the truth, they are slaves who dare not be in the right with two or three" because in the end as Rev. Dr. Martin Luther puts it **"in the end we will not remember the noice of our enemies but the silence of our friends "**

Nothing in the entire world is more dangerous than sincere ignorance and conscientious stupidity, for Shakespeare wrote **"for sweetest things turn sourest by their deeds, lilies that fester smell far worse than weeds.**"

In my book treatise to my learned friend the Attorney at Law I quote Adolf Hitler and say Adolf Hitler realized that soft mindedness was so prevalent among his followers that he said "**I use emotion for the many and reserve reason for the few" and in Mein Kampf he asserted by means of shrewd lies, unremittingly repeated, it is possible to make people believe that heaven is hell - and heaven is hell…the greater the lie the more readily it will be believed."**

Lastly in men of good hope 1951 Daniel Aaron quoted religious leader Theodore Parker warning **"if powerful men will not write justice with black ink, on white paper, ignorant and violent men will write it on the soil, in letters of blood, and illuminate their rude legislation with burning castles, palaces and towns."** This book is re awakening for now and future generations to always make a distinction between the demagogue and the truly inspired.

ANNOTATED ACRONYMS

ADF	Allied Democratic Forces
AG	Attorney General
IBEAC	Imperial British East Africa Company
RWI	Research World International
MP	Member of Parliament
AIGP	Assistant Inspector General of Police
ARDS	Acute Respiratory Distress Syndrome
BC	Before Christ
BSD	Basic Structure Doctrine
CA	Constituent Assembly
CBE	Commander of the (Order of the) British Empire
CCEDU	Citizens' Coalition for Electoral Democracy in Uganda
CEC	Central Executive Committee
CDF	Chief of Defence Forces
CIC	Commander in Chief
CJ	Chief Justice
CMI	Chieftaincy of Military Intelligence
CMS	Church Missionary Society
CRC	Constitutional Review Commission
DCJ	Deputy Chief Justice
DISO	District Internal Security Organisation
DP	Democratic Party (Catholic, southern party)
DPP	Directorate of Public Prosecutions
EC	Electoral Commission
ECHR	European Convention on Human Rights
ESO	External Security Organisation
FBI	Federal Bureau of Investigations
FDC	Forum for Democratic Change
GCM	General Court Martial (military tribunals)
GISO	Gombolola Internal Security Organisation
GoU	Government of Uganda
HE	His Excellency
HM	Her Majesty

ICCPR	International Covention on Civil and Political rights
ICJ	International Court of Justice
IGG	Inspector General of Government
IGP	Inspector General of Police
IHR	International Health Regulations
IHR	International Health Regulations
ISO	Internal Security Organisation
ISPs	Internet Service Providers
JA	Justice of the Court of Appeal
JAFT	Joint Anti Terrorist Task Force
JCC	Justice of the Constitutional Court
JSC	Justice of the Supreme Court
KAR	King's African Rifles
KCCA	Kampala City Council Authority
KCMG	Knight Commander
KMC	Kira Motors Corporation
KY	Kabaka Yekka (Buganda royalist party led by the Kabaka)
LAP	Local Administration Police
LC	Local Council
LDU	Local Defence Unit
LRA	Lord's Resistance Army
MBE	Member of the British Empire
MERS-Cov	Middle East Respiratory Syndrome Coronavirus
NCC	National Consultative Council
NIRA	National Identification & Registration Authority
NRA	National Resistance Army
NRM	National Resistance Movement (Museveni's southern party)
NUP	National Unity Platform
OBE	Officer (of the Order) of the British Empire
OIC	Order in Council
OTT	Over The Top (OTT) tax
PBUH	Peace Be Upon Him
PISO	Parish Internal Security Organisation
PM	Prime Minister

POMA	Public Order Management Act
PQD	Political Question Doctrine
PRA	People’s Redemption Army
PRA	People's Resistance Army (alleged rebel group linked to FDC)
PS	Permanent Secretary
RC	Resistance Council
RRU	Rapid Response Unit
SARS	Severe Acute Respiratory Syndrome
SFC	Special Forces Command
UCC	Uganda Communications Commission
UDI	Unilateral Declaration of Indepedence
UGMP	Uganda Governance Monitoring Platform
UHCHR	UN office of the High commission for Human Rights
UHRC	Uganda Human Rights commission
UJSC	Uganda Journalist Safety Committee
UJSC	Uganda Journalists Safety committee
UK	United Kingdom
ULS	Uganda Law Society
UMSC	Uganda Muslim Supreme Council
UNLA	Uganda National Liberation Army
UNLF	Uganda national liberation front
UPC	Uganda People's Congress (political party)
UPDA	Uganda People's Democratic Army
UPDF	Uganda People's Defense Force (formerly the NRA)
UPF	Uganda police Force
UPM	Uganda Patriotic Movement
UPPC	Uganda Printing and Publishing Corporation (UPPC)
URA	Uganda Revenue Authority
USA	United States of America
USDS	United States Department of State
WHO	World Health Organisation

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CHAPTER ONE

UGANDA

The Republic of Uganda is bordered on the east by Kenya, on the southeast by Lake Victoria, on the south by Tanzania and Rwanda, on the west by the Democratic Republic of Congo, and on the north by South Sudan. It is also predominantly Anglican country with many different co existing ethnic groups.

UNMASKING THE TRUTH BEHIND UGANDA'S NAME (THE UNTOLD STORY OF IDENTITY)[7]

A lot of controversies have been raised concerning the origin of Uganda's name some alleging that it was derived from Buganda the then strong kingdom and others Rugandaa word among the Mpororo ethnic group that means clan.[8] This book has therefore adopted a comprehensive historical theoretical framework to analyze the question of Uganda's identity. Thus a contextual analysis has been done with the aim of establishing the potential source from which the identity was obtained through examination of the available literature on the subject.

Until the British extended their African colonial rule over the area, Uganda did not exist as an administrative unit. It was an area filled with Bantu-speaking groups of people that were grouped in centralized systems of administration.

The notion started with the coming of the Arabs at the coast of East Africa. The Arabs arrived at the coast around the 7th Century and by the 8th Century, they had introduced the Swahili culture after their mixture with Africans and Swahili became their language. The coast blossomed into a number of trading cities which included Mombasa, Mogadishu and Zanzibar.

At their height from the 12th to the 15th Century, the Swahili started trade with the African tribes deep in East Africa, Arabia, Persia and India.[9] Around 1843, a caravan of Arab traders led by Ahmed Bin Ibrahim, widely believed to have been the first Arab or non-African visitor to Buganda kingdom, arrived at the court of Kabaka Muteesa I.[10] Trade in Ivory had thrived at the coast so they moved deep in the interior in search for trading items. Bin arrived in caravan with mirrors, beads,

[7] Refer to Appendix A (Pictorial), *"The truth behind Uganda's name"*
[8]Saturday Vision. Mpororo, not Buganda gave Uganda its name. June 5th, 2021 by KiberuKahirita.
[9] Mark Cartwright, M. 2019,April 1. Swahili Coast.World History Encyclopedia. Retrieved from https://www.worldhistory.org/swahili-coast
[10]Daily Monitor. Guns and Ivory: How Arab traders uncovered the heart beat of Africa. Retrieved 22 Jun 2021.

jewellery and spices to trade but it was the guns on or the guns-that caught Kabaka's attention. Muteesa therefore welcomed Bin Ibrahim and became willing to trade with him.

Throughout the trade, "Uganda" was a Swahili word for Buganda used to refer to the land of the "Ganda" by the Arab and Swahili traders on the East African coast referring to the kingdom of Buganda deep in the interior of Africa.[11] When the Europeans arrived at the coast during the scramble and partition of Africa, Kanyeihamba asserts that, "the first Europeans to visit the region were accompanied by retainers from the coast who were Swahili speakers and as a result of their mispronouncing of the name Buganda by pronouncing Swahili -Uganda, the whole territory was later to become Uganda. The retainers found challenges in pronouncing the word "Bu" that dominated the Bantu speaking groups and as such, Buganda, Busoga and Bunyoro became Uganda, Usoga and Unyoro.

Upon settling in Buganda that was organized, the Europeans ended up adopting the same pronunciation of Uganda. Following unsuccessful attempts to retain its independence against British imperialism, Buganda became the center for the struggle to conquer other territories.[12]

After the promulgation of an Orders in Council, the British realized that there was need for a name of the area that they had conquered. In their brave move, "Uganda", the Swahili term for Buganda was adopted by the British and eventually, it became the name of the protectorate.[13] It's therefore worth highlighting in the strong sense that Uganda derived its name from Buganda the then strong kingdom in the region.

UGANDAN FLAG A GERMANY COLONIAL LEGACY MYTH?

The Ugandan flag was adopted on 9th October 1962, the date that Uganda became independent from the British Empire. It consists of six equal horizontal bands of black (top), yellow, red, red black, yellow and (bottom). A white disc is superimposed at the Centre and depicts the national symbol, a grey crowned crane, facing the hoist side. During the colonial era, the British used a British blue ensign defaced with the colonial badge, as prescribed in 1865 regulations. Buganda, the largest of the traditional kingdoms in the colony of Uganda, had its own flag.

However, in order to avoid appearing to give preference to one region of the colony over any other, the British colonial authorities selected the crane emblem for use on the blue ensign and other official banners. When the Democratic Party ruled the country, a design for flag was proposed. It had vertical stripes of green-blue-green, separated by narrower yellow stripes, and in the Centre had

[11]Uganda-Buganda.The Library of Congress County Studies; CIA World Factbook.
[12]H.B. Thomas and A.E Spenser.A History of Uganda Land Surveys Entebbe, 1938.Published in 1935 by Oxford University Press on the Authority of the Uganda Protectorate Government.
[13] The Proclamation of 1908, G 1909, 65. The Kingdom was to remain Buganda and the Territory Uganda.

the silhouette of a yellow crane. After the party lost the national elections on 25 April 1962 the newly elected Uganda People's Congress (UPC) rejected the former design and instead proposed the current design. It was based on the UPC flag, a tricolor having horizontal strips of red, yellow and black. Majority scholars are hesitant to assert the ideology that Uganda adopted her Flag colors from Germany during the colonial era however, it should be noted that it was a mere preference by the Minister for Justice Grace Ibiringia that the Ugandan flag adopts Germany colors with the UPC party colors as the winning party and was officially approved in 1962 but not any deeper historical events between Germany and Britain during the struggle and partition of Africa because even the Salisbury's African policy and Heligoland offer of 1890 was a treaty in which the British had a way and prevent Germany expansion towards Uganda & headwaters of the Nile by offering to cede the island to the Germans as an attempt to safeguard British interests in East Africa.

The British administration gave their approval to this before the country's independence. The flag on behalf of the British was designed by C. Todd, Professor of Fine Art at Makerere university. He also designed the Uganda Coat of Arms & various ceremonial items which he registered with the college of arts in London. The three colors are representative of native ethnic groups of Africa (black), Africa's sunshine (yellow), and African brotherhood (red)being a color of blood through which all Africans are connected. The grey crowned crane id fabled for its gentle nature and was also the military badge of Ugandan soldiers during British rule. The raised leg of the crane symbolizes the forward movement of the country.

THE FORGING OF UGANDA'S EXECUTIVE IMPERIAL MANDATE

My first occupation was to map the country.[14] -John Hanning Speke. Well into his third year of trekking inland from Zanzibar, in 1863, John Hanning Speke rounded the swampy western shores of Lake Victoria and stepped into a "rich garden", a "wonderful country, surprisingly rich in grass, cultivation, and trees."[15] He thus became the first European to set foot in the kingdom of Buganda. His adventure had little immediate impact on the peoples living on either Victoria's shores or the hinterland.

Upon his return Speke wrote his memoirs, journal of the Discovery of the Source of the Nile, and accompanied it with the first accurate map of what was to become the state of Uganda (Map 2a). It was this map that would lead British explorers, missionaries and colonizing bureaucrats to Buganda and its neighbours.

Speke's map also foreshadowed the spread of British "rule of law" in Uganda. Kampala, a small

14 John Hanning Speke, Journal of the Discovery of the Source of the Nile (Edinburgh: W. Blackwood and Sons, 1864).
15 Id. at 266 & 272.

village near the old Buganda capital, would become the colonial capital. Buganda itself, rendered in fine detail by Speke's cartographer, formed the pillar of the new colony. Britain's imperial mandate would soon envelop three other Kingdoms-Toro, Ankole and Bunyoro-in separate treaties. Eventually the swaths of uncharted lands would fall to direct civilian or military rule by the colonial government. Speke's map is thus the original representation of the monolithic image of a hierarchical legal system, maps are familiar metaphors for legal systems, families or traditions.

CONSOLIDATING THE IMPERIAL COLONIAL EXECUTIVE MANDATE.

When Lugard first secured the Kabaka's agreement to cede some sovereign powers to the Queen, he faced a pragmatic dilemma. How could he and a handful of Europeans control a disciplined, militarised kingdom numbering a few hundred thousand? His solution expounded in The Dual Mandate in British Tropical Africa was quite simple: indirect rule.[16] Colonial administrators would first seek out local chiefs and secure their loyalty by written agreement, sweetened with gifts of firearms and gold. In return, these native leaders would use their authority to implement British policies. A British colony would thus require only a skeleton crew of colonial administrators to liaise with the native authorities, the so-called "traditional chiefs", and backed by the King's African Rifles, an armed force of Africans trained and led by European officers. For Speke and Lugard, Buganda seemed the ideal chiefdom "of a type ... not unfamiliar to Europeans": authoritarian, centralized and obedient. [17] They need only secure the Kabaka’s loyalty to control the kingdom. Buganda thus became the cornerstone upon which to build the colonial state of Uganda.[18]

The Uganda Agreement formalized the existing Baganda nobility into four levels beneath a European administrator, called the District Commissioner, each of which corresponded to an administrative unit. The ten sazas, major chiefs under the Kabaka, of Mutesa's time were doubled to twenty and their roles expanded to administering law, maintaining roads, raising taxes paid directly to the colonial Commissioner and supervising "native affairs"[19] In return, the Kabaka would pay them a regular cash income.

The Lukiiko was the legislative body of Buganda composed of three Ministers of the Kabaka, the twenty saza chiefs as ex officio members, as well as three "notables" from each saza and six others all chosen by the Kabaka.[20]

The Lukiiko, or a sub-committee of it, would be a court of appeal from the saza chiefs' courts. The

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[16] See Lugard

17 William Malcolm Hailey, An African Survey: A Study of Problems Arising in Africa South of the Sahara, rev. 1956 (London: Oxford University Press,1957) at 478.

[18]"Uganda" is the Swahili word forBuganda.

[19]Monis &Read, *supra*.

[20]*Id*.at16.

gombolola court was the lowest native court and mostly dealt with civil matters like family and land disputes. Decisions by the gombolola chief could be revised by the saza chief in his court and then the Lukiiko itself. This Agreement restructured their administration and delimited the kingdom's borders.[21] The new legal order did not limit.

The 1902 Uganda Order in Council granted "Her Majesty power and jurisdiction in the Uganda Protectorate" and placed its administration solely in the hands of a Commissioner appointed in London. The Order also created a High Court of Uganda with full civil and criminal jurisdiction over persons in Uganda in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India. But when "natives" were parties, the court must rely on "customary law" so far as it was (i) applicable, (ii) not repugnant to justice and morality, and (iii) consistent with other government statutes and regulations. [22] Customary law was supposedly distinct from statutory laws created by the British Parliament or the Lukiiko. [23]

The Native Authority Ordinance[24] of 1905 created "native courts" supervised by a European officer who was not to interfere with the courts' application of customary law, "save where their actions were contrary to justice or morality or to the laws of the Protectorate. [25] This ordinance effectively tied native chiefs to colonial administrators since "... once salaries replaced customary payments, the chief was in the pay of the native administration, it was to the District Commissioner that he naturally turned as his master".[26] Thus the Uganda Agreement and Uganda Order in Council created a bifurcated system of justice with a formal (civil law) court staffed by professional judges for Europeans and an informal "native" (customary law) court headed by chiefs or native authorities for Africans.

Before looking at the bifurcated state legal system in 1966, however, it is first necessary to retrace how customary law was invented as a distinct type of state law. Early native courts were largely free from direct colonial interference. In Buganda, civil disputes over family and land issues began in the gombolola court headed by the gombolola chief directly below a saza chief (see Table 1).

Looking back on his time as a gombolola chief in the 1940s, W.P. Tamukedde wrote:

I presided over the legal courts and we superintended the prisons and so forth. All these duties incidentally made us more powerful than the present [1970s] chiefs. After arresting ... a law-

[21] The Crown signed similar treaties with the *Two,* Ankole and Bun*yoro* kingdoms: see *Toro Agreement 1900,* Buganda and United Kingdom,1900,Rev.LawsofUganda1951,vol.VI at *2; Ankole Agreement*

[22] Morris & Read, at 19.

[23] Id. at 20.

[24] See generally T.W. Bennett, A Sourcebook of African Customary Lawfor Southern Africa (Cape Town:] uta, 1991). 148 No.

[25] Ibid

[26] P. Tamukedde,"My Life as a Chief and District Commissioner" in Robertson, A.F.,ed.,*Uganda's First Republic :Chiefs, Administrators and Politicians,1967-1971* (Cambridge:AfricanStudiesCentre,Cambridge University,1982)at58.

breaker, we tried him in our own courts and if he was convicted we sentenced him to serve in the prison we supervised and often made him work for our own personal benefit.

A typical court day began at 11:00 a.m. since most litigants were poor peasants who walked long distances to see the gombolola chief. In his court, Tamukedde relied on a mixture of an English penal code[27] and "customary" Ganda law. Despite his gombolola chief title, he did not determine customary Ganda law himself and relied on the oral testimony of male Baganda elders.[28] The elders would recount their community's ancient practices, from which Tamukedde would draw legal principles to resolve the dispute in question. He would then give an oral judgment and impose a sentence- subject to revision by the District Commissioner. Gombolola chiefs also jailed convicts in makeshift prisons (a British invention), imposed a fine or coerced free labour from the poorest. No one supervised Tamukedde in his day-to-day duties, nor were there any other institutional checks on his fused executive-administrative-judicial powers over his sub-county.

Tamukedde represented a new figure in colonial Uganda: the native administrator.[29] Despite his chiefly title, Tamukedde was not born noble.[30] After the Uganda Agreement of 1902, the Kabaka appointed Tamukedde's father as one of the ten new saza chiefs. Since chiefly positions were now by the Kabaka's appointment under British influence, his father taught him both courtly Ganda manners and British morals.

The two influences are evident when he recalled how he "used to play together with the children of peasants without any distinction in the true spirit of sportsmanship."[31] Tamukedde continued his colonial education at King's College, an English-language boarding school,[32] and then overseas at British and American universities. [33] At just 24 years old he was appointed a gombolola chief and began his duties administering customary law described above. At about this time Michael Matovu was made Pokino, the saza chief of Buddu province in Buganda.[34]Their stories were similar to a generation of Baganda, Batoro, and Banyoro boys educated in Etonian boarding schools who would staff the "native" bureaucracy in the colonial government. But while Tamukedde threw his lot in with the colonial government, Matovu placed his loyalty in his Kabaka's Lukiiko.

While the British administrators justified the chiefly Buganda hierarchy as the traditional system in

[27]*Penal Code* (No.7of1930) &*Criminal Procedure Code*, No.8 of 1930(these replaced the Indian Penal Code imported from Britain's more established eastern colony in 1919).

[28]Tamukedde, *supra* at 117.

[29] Chinua Achebe perfectly captures the tension between the ambivalent loyalties of independence-era African leaders. "No man can deny," he wrote, "that Chief the Honourable M.A. Nanga, M.P. was the most approachable politician in the country." Part chiefly tradition and part modern leader, Nanga's authority was built purely on personal relations: Chinua Achebe, A Man of the People (London: Heinemann, 1966) at 1.

[30] While not a noble born, he was raised that way. As he recalled," ... we used to play together with the children of peasants without any distinction in the true spirit of sportsmanship.": see Tamukedde, supra

[31] Id. at 54.

[32] About King's College", online: King's College, Budo <http:/ /www.kcbudo.sc.ug>.

[33] Tamukedde, supra

[34] Like Achebe's chief Nanga, Matovu carried a customary title (pokino) and a colonial title (saza): W.A. Crabtree, "The Languages of the Uganda Protectorate" (1914) 13J. Royal Afr. Society 152 at 164-65

Buganda, it is important to note that Baganda clan leaders at the time of Speke's visit with Mutesa had very few of the absolute powers later invested in them by the British. Traditional leaders like Matovu and Tamukedde had one face turned to a glorified Buganda past and another turned to a modern future as the key administrators-in-the-field for the British colony of Uganda. For example, an Englishman observed that in pre-colonial Buganda "a little judicious bribery could ensure victory and was unhesistantly practiced."[35] Tamukedde admitted that "gift giving" was still common in 1940s gombolola courts.[36] While he accepted the gifts, Tamukedde claims to never have let this affect his judgments. His claim is not based on the principle of judicial impartiality, one of Lewis's civilizing principles of English law.[37] Rather, Tamukedde knew the colonial government would remove chiefs from their posts for "corruption".[38] By stamping out bribery, the colonial government ensured that chiefs relied solely on it for their livelihoods. More than anything, this shifted chiefs' loyalties from families and clans, to district commissioners and the colonial state in the 40 years.

LEGITIMIZATION OF COLONIAL EXECUTIVE MANDATE

If traditional chiefs like Tamukedde embodied colonial power on the ground, then customary law legitimised the entire colonial project. Speke's map is the first European attempt to order the fluid borders of the peoples living on northern shore of Lake Victoria. But even Buganda's relatively stable geographic borders had both fluctuating borders and "tribal" porosity across those borders. The proximate cause of Obote's coup was his decision to permit two "lost counties" in Buganda to vote on whether to return to the Bunyoro kingdom. Moreover, many non-Baganda migrants, especially Rwandan Tutsis, worked in the fields of Buganda and carried with them their own laws, identities and loyalties from the Rwandan realm.

The British divided their Uganda Protectorate into four provinces, each composed of defined tribes bounded within discrete geographic areas. This tribal mapping presumed geographically distinct tribes that each possessed a unique customary law. This customary law was likened to medieval English common law as a "primitive" or "undeveloped" system of rules reproduced from oral retelling by (male) elders. For example, Justice Peason described an idealized Buganda, where "the members of the [Superior Native] Courts being the superior elders in each Principality or Province, native custom is, I presume, in the breasts of the courts."[39] Thus African customary law residing in the Baganda chiefs was seen as a primitive common law, an embryonic collection of rules with the potential to evolve towards the English ideal.

[35] H.R. Hone, "The Native of Uganda and the Criminal Law" (1939) 21 J. Comp. Legs. & Int'l. L. 179 at 186.
[36]Tamukedde, *supra*
[37] Lewis, *supra*
[38]Tamukedde, *supra*
[39]*Kagimu v. Lukiiko* (1949) N.S.D.25.

COURTING THE KABAKA'S EXECUTIVE MANDATE

Speke's sportsmanship easily blended with the Kabaka's love and passion for hunting this even further precipitated speaks love for Buganda kingdom and his casual cruelty all made a strong impression on Speke and later English visitors.[40] Buganda appeared to them like medieval Albion, rough and barbaric, but pregnant with the promise of enlightened rule. Speke was even convinced that Mutesa and the Ganda nobles belonged to an aristocratic race with possibly "a small residue of European stock". Speke betrays this prejudice often. For example, he consistently mistranslated Mukaabya, Mutesa's birth name, as "monarch" in the English sense.[41] Thus Speke decided that the noble Mutesa and his subjects ("every Muganda seems by instinct to be a sportsman") deserved the same enlightened rule England had bestowed upon India. His book and its map helped later British explorers, missionaries and bureaucrats in grafting a civilizing state on the Buganda kingdom.

Mutesa was the last truly independent Kabaka. He had just won a decisive victory in a civil war against powerful clan chiefs that pitted Christian and Moslem against unconverted Baganda. [42] His internal weakness and threats from the neighbouring Bunyoro kingdom forced him to seek British military strength to consolidate his rule. Mutesa died in 1884, a decade after Speke left and six years before Frederick Lugard, the consummate colonial administrator, arrived as representative of the Imperial British East Africa Company.[43] Lugard built the first permanent British structures in Buganda, a fort and then Luzira prison on hills overlooking Kampala. He also negotiated treaties ceding Ganda self-government until the British grudgingly declared Uganda a Protectorate in 1894.[44] Six years later Special Commissioner Sir Harry Johnston consolidated British gains with the Uganda Agreement of 1900.[45] This treaty would form the basis of Anglo- Ganda relations until independence, fulfilling Speke's hope of making all Muganda "persons enjoying Her Majesty's protection" as subjects of the British Crown.

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[40] For example, Speke reported the king asking a page to take a cocked rifle and test it on a passerby.

[41] Sean Redmond, Book Review of journal of the Discovery of the Source of the Nile by John Hanning Speke (1997) 3J. Afr. Travel-Writing 87.

[42] The Buganda civil war, fuelled by the slave and ivory trade introduced by Arab traders, lasted from 1857 to 1899. The Kabaka's succeeding Mutesa managed to consolidate the authoritarian institution he first created, but only with the help of British mercenaries. This would ultimately cost Buganda its independence with the Uganda Agreement of/900: see generally Holly Elisabeth Hanson, Landed Obligation: The Practice of Power in Buganda (Portsmouth, N.H.: Heinemann, 2003) at 93-121.

[43] Lugard, *supra*

[44] *London Gazette,* 19 June 1894

[45] Revised Law-sof Uganda 1951, vol. VI, at 12.

"personsenjoyingHerMajesty'sprotection"assubjectsoftheBritishCrown.m

THE BIRTH OF THE KABAKA AND HIS CHIEF'S EXECUTIVE OVERREACH

Customary laws, however, were no mere repositories of rules remembered by tribal elders. Chanock argued that customary law was created by the struggle of native authorities to contain the vast social and economic changes in the first half-century after the Uganda Agreement 1900.[46] Buganda, for example, moved from an economy driven by the slave and ivory trade during Mutesa's time to the cash-cropping and small industry economy of the 1950s. Economic changes saw a largely agrarian Buganda shift to a capitalist economy based in urban centres.

Young women and men left their villages for new urban centres to work at wage-paying jobs. For chiefs who had derived their authority from a captured peasantry and for older males who most benefited from the practice of bride-presents, this change towards individualized economic relations and nuclear families was a serious economic threat.

Chiefs reacted to this economic upheaval by inventing "a retroactive fantasy" that likened customary laws to a set of "ancient" tribal roles.[47] For example, chiefs portrayed customary marriage as "an idealized version of traditional marriage, honed down into 'roles', with which they sought both to preserve their position and to provide the necessary moral stabilisation for urban dwellers."[48] This had the added advantage of fitting with preconceived European ideas of African laws as primitive English law. In 1960, J.P. Musoke, the omulamu={j (Minister of Justice for Buganda), wrote that the "validity of customary law ... is not merely the 'Conscience' of each individual judge but a body of roles of human conduct which have their roots in antiquity."[49] This fit with English descriptions of customary marriage as a paternal union in which husbands had property-like rights enforceable against wives in court.[50]Haydon, a former Buganda judicial advisor, even claimed, "beating of wives was a time-honoured Ganda tradition"![51] Two examples from Buganda family law illustrate how Ganda chiefs appropriated the rhetoric of roles to mask "ancient laws" invented to limit the new economic freedoms of young men and especially women.

The Marriage Act of 1902[52] and a later Marriage of Africans Act [53]copied the existing English law but made some changes, like permitting polygamy for Africans. Not many people married under

[46] Chanock, *supra*
[47] Id.
[48]Chanock, *supra at 193*
[49] Preface, E.S. Haydon, *Law and Justice in Buganda* (London: Butterworths,1960) at v
[50] Morris & Read, at 368.
[51] Haydon, supra at 104
[52] Cap. 211
[53] Cap. 212 (This Act permitted Christian Africans to marry without the formalities of the Marriage Act, but with the same punishment of up to five years' imprisonment for bigamy by having contracted another marriage under customary law).

either act other than Europeans and a relatively small set of educated, Christian Africans.[54] Most people instead married under the customary law of their tribe administered by native courts. A customary marriage was "a union, potentially or actually polygamous, involving a contract between a bridegroom and the bride's father" including a bride-price paid by the bridegroom to the father,[55] Since there was no need to register marriages, a couple could also avoid its costly procedures. If litigated marital disputes reflect a preferred regime, then customary marriage was vastly more popular than statutory marriage. In 1936 alone, the colonial mid-way point, civil courts heard cases 2,002 civil cases and native courts heard 35,665 cases.[56]

The first example comes from Haydon's confused description of the two parts of bride-price made by a groom to his betrothed's family.[57] The first part, ebintu lry'obuko, includes gifts for the girl's relatives like "one prime goat ... bark cloth for girl's mother ... 2-4 gourds of beer", but a groom with a wage-paying job could pay in cash instead. The second part, omutwalo, is a sum in hard cash that is less than the value of the ebintu lry'obuko. Haydon remarked that Baganda confusingly referred to the entire bride-price, gifts and cash, as the omutwalo. If customary law is the evolving set of ancient Ganda rules, then how does this present day use of omutwalo square with the two distinct parts of an ancient bride-price? The simple answer was that it did not.

In urbanizing Buganda, bride-price was fluid and contested by young men working for wages in cities.[58] Since their financial security no longer depended on economic rights controlled by a girl's father, young men could simply pay-off a family or not even pay a bride-price at all! Chiefs responded to this change by both increasing the bride-price and converting it into hard cash to compensate fathers for their fading economic rights over their daughters. Haydon himself mentioned two earlier accounts from 1889 and 1911, which only mention animals, bark-cloth and beer as the bride-price.[59] If these were accurate, then it appears that omutwalo was a recent invention by village fathers to capture some of the cash wealth of urban men. But Haydon's rule-seeking English eyes were blind to the way chiefs changed custom to include cash payments as part of an inflated bride-price.

The second example was the Kabaka himself, who reshaped custom to benefit from the Wills Law of 1916.[60] The Act provided for written wills signed with two witnesses, but did not invalidate the

[54] Morris & Read, supra at 360.
[55] Id.
[56]The lopsidedness held in criminal cases as well, where civil courts5,693 cases and native courts heard 68,000: Hone, *supra* at 192.
[57] Haydon, *supra* at 93.
[58] Chanock provides an illuminating comparative analysis between Malawi and Zambia: see Chanock, supra at 192-216.
[59] Id. at 90.
[60]*Wills Law of /916,* Rev.L.,1951, vol.VII,1233.

"traditional oral will" found in the customary rules of succession.[61] During Mutesa's time oral wills were affirmed when a man held a feast "providing a goat and a calabash of beer" in his heir's honour according to Haydon. [62] Other people at the feast "were witnesses essential to the validity of such a testamentary disposition." Then the man verbally willed his property to his chosen successor. If the clan leaders wished, however, they could always annul an oral will.

While Haydon's account of settled "ancient" practice was consistent with the idea of customary law as a repository of a tribe's legal rules, it masked how the Kabaka manipulated custom to give himself more power over inheritance at the expense of Baganda clan elders. The Kabaka signed the Succession Order, 1926, but never promulgated it because he did not want to openly encroach upon clan leaders' powers protected in an earlier treaty.[63]

The Succession Order forbade choosing an "heir" from outside one's clan, but permitted leaving parts of one's estate to anyone one liked. The law also granted the Kabaka new powers to alter this discretionary option for any will. In practice native courts applied the Succession Order, including the kabaka's powers of revision. By manipulating the "ancient "practice of succession, the Kabaka managed to capture clan leaders' traditional powers to revise oral wills by framing them as his ancient right and then mobilizing the weight of the colonial justice administration behind him.

Early colonial administrators believed oral customary laws would develop towards the English ideal under the civilized guidance of the District Commissioner. In 1937, H.R. Hone, the Attorney-General of Uganda, argued that, however widely the system of native justice may have differed originally in form and appearance from our own civilized system, it has in the last fifty years developed along similar lines to our own system and has indeed arrived at a stage in development ... in close approximation to our system.[64]

Like most early administrators, Hone strongly believed in the civilizing potential of British law. Each tribe's customary law progressed along a civilized arch, such that "the early English system is indistinguishable in many fundamental particulars from the native system of justice". [65] By likening African laws to a rule-based legal system administered by native authorities, Hone could justify it as a "primitive" form of English law that had to be guided by British oversight.

Magistrates and District Commissions thus limited themselves to shearing customary law of its more barbarous customs through the repugnancy clause. "Progressive" young chiefs like Tamukedde embraced this modernizing ideal and interpreted tradition as evolving towards the

[61]Morris & Read, *supra*at372.
[62]Haydon, *supra*at222.
[63] Morris Haydon, 168 at 222.
[64]Hone, *supra* at192.
[65] Id.

British legal principles they studied in English and American schools, and witnessed in the High Court of Uganda. [66]

The colonial state thus had to insulate British law governing Europeans from the barbarous influence of native law, at least until it progressed to the same level of civilization. The civil courts were at first ambivalent in extending their jurisdiction over the three kingdoms that had written treaties with the Crown.

THE BIRTH OF CUSTOMARY LAW AS AN EMBYONIC ENGLISH LAW

Uganda had to decide whether the Uganda Order in Council 1902 abolished the Batoro and Ankole chiefs' jurisdiction over "native" cases. They referred the question to the Secretary of State for Foreign Affairs in Westminster as required when an issue dealt with "the existence or extent of any jurisdiction of Her Majesty in a foreign country".[67] Their decision in **Katosi v. Kahizi**[68] confirmed the Secretary's opinion that the earlier agreements did, in fact, preserve the kingdoms' rights to hear such cases.

A year later the High Court heard a similar case where Justice Carter confirmed that the Kabaka retained all his traditional powers not expressly ceded to the Crown in the Uganda Agreement if 1900.[69] The High Court's hands off approach fit well with the idea of customary law as an embryonic English common law.

By the 1940s, however, this optimistic view was losing out to a cynical pragmatism. The growth of urban centres attracting wage labour placed enormous stress on extended family structures in rural villages. British administrators were having a difficult time controlling mobile labour, but did not want to spend much money to fit it. They responded in part by reforming the court structure with the Subordinate Courts Ordinance of 1940, which firmly placed native courts into a single hierarchy below the High Court.[70] This reformist trend was resisted by some, like Hone, who concluded his 1937 speech with a warning that "some imperfectly conceived and untried modernized system of primitive native law and custom" will jeopardize the "convergence of [customary and civil] systems, aided by the march of civilization and the standards it enforces".[71] But his stance was losing ground to the pragmatists, like Lord Hailey, author of the African Surory--the colonial equivalent of the Domesday book. Hailey accepted Hone's idea of progress and even

[66]Tamukedde, for instance, saw himself as a nationalist *and* an admirer of Europeans: see Tamukedde
[67] Morris & Read, *supra* at22.
[68](1907),1U.L.R.22(Ugan. H.C).
[69]*Kibuka v. Smith* (1908),1U.L.R.41
[70] Cited in*J. N.D.* Anderson, *Islamic Law in Africa* (London: Cass,1970) at 151
[71] Hone, *supra* at 179.

conceded the risk "of any attempt by a Colonial Power to impose its own concepts of law on peoples who are at a different stage of civilization". But, he countered, the economic and social institutions of European civilization have a dynamic quality which leads Africans (particularly those of a 'progressive' character) almost automatically to adjust their own custom to that which is characteristic of Europe.[72]

Codification of customary law, led by "progressive" Africans like Tamukedde, would speed up its evolution towards the English ideal.[73] And in extreme circumstances, civil courts judges should directly intervene to "progress" customary law.

Yet it was the Kabaka and his Lukiiko, not the British government or civil courts, who pioneered a codified customary law in Buganda. Soon after the Lukiiko was created by the Uganda Agreement of 1900, the legislature began to pass written statutes codifying its previously oral laws. Some of the first codified laws limited the right to sell and will away land to non-Baganda, or to churches and other religious societies.[74] Successive Kabaka's realized that codifying custom could reinforce their relatively weak power in Buganda, as the Succession Order example showed.

THE BIRTH OF THE KABAKA AUTHORITANIAN EXECUTIVE MANDATE

In 1926, well before Hone warned of the dangers of a unified, codified legal system, Kabaka Daudi Chwa envisioned a "Code of Buganda Native Law" to replace unwritten laws that he claimed would cause "bitter discontent among the more enlightened Baganda."[75] The institution of Kabaka that emerged by mid-century was far more authoritarian than during Mutesa's time.

Codified customary laws entrenched the Kabaka's privileges and stymied many of the "civilizing" goals that justified British control. Lukiiko laws limiting the upper value for bride-prices, for instance, were frequently passed to cap soaring prices in the new cash-run economic relations in cities.[76] But each successive law was resisted and contested by emerging social practices among young city-dwellers.[77] On the whole, however, codification proved an effective means to employ "custom" as a check on new socio-economic relations that threatened the Kabaka and his rural, patriarchal supporters.

The civil courts only caught up with this trend in the 1930s. The High Court in **R v. Baganda Cotton Company**[78] held that, "the terms of a treaty are not part of the municipal law... a treaty is not the creature of legislature and is not made by legislative authority so as to bind the subject or to

[72] Hailey, *supra* at641.
[73] Morris&Read, *supra* at73.
[74] *Possession of [LandLawof1908,* Rev.L.,1951, vol.VII,1219; *Land Succession Law of 1912,* Rev.L.,1951, vol. VII, 1225.
[75] Cited in Haydon, *supra* at, vii.
[76] Morris & Read, supra at 373.
[77] Chanock, *supra* at209
[78] *Rv. Baganda Cotton Company*1930) 4 U.L.R.34(Ugan.H.C.).

afford the subject rights in a court of law."[79] The ruling placed the native courts in a clear subordinate position to state law for the first time.

THE COMPLETE SURENDER TO COLONIAL EXECUTIVE MANDATE

The high watermark came in a 1959 High Court case, **Ndibarema v. Enganzi of Ankole**. [80] The Court cited Lord Justice Denning in another case, which showed how its view had shifted fully in favour of Hailey:

Although the jurisdiction of the Crown in the Protectorate (of Kenya) is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefitnitely so as to embrace almost the whole field of government [...] the courts themselves will not make out the limits [...] nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction [...] once jurisdiction is exercised by the Crown the courts will not permit it to be challenged.[81]

Any limits on the High Court's jurisdiction in the three kingdoms' treaties were now exposed to the creeping laws of the Crown. While the Court continued to defer to the colonial government, it no longer restricted itself from interfering with native law "even if an Order in Council or other legislative act appears to exceed the jurisdiction originally ceded by the treaty".[82] The Ndibarema decision thus cleared the way for the universal applicability of British colonial laws over all persons within the borders of Uganda.

By the early 1960s, two leading British commentators could conclude that customary law had "accommodate[d] itself to the changing outlook."[83] During this transition, colonial administrators moved, "from the zeal of a civilizing mission to a calculated preoccupation with holding power, from rejuvenating to conserving society, from being the torchbearers of individual freedom to being custodians protecting the customary integrity of dominated tribes."[84] State and customary laws then became primarily an instrument of colonial control over restive peoples.

The Magistrates' Court Act of 1964 formally created a unified legal system with a strict hierarchy of appeal, rather than informal revision.[85] The Act abolished all subordinate and native courts, replacing them with a magistrate's court with appeals to a Provincial Court and then the High

[79] *Rv. Baganda Cotton Company* (1930) 4 U.L.R.34(Ugan.H.C.).
[80] Cited in Morris &Read, *supra* at 23.
[81] *Njali Ltd v Attorney General* (1956), [1956}1Q.B.1[C.A.J[emphasis added].
[82] Cited in Morris&Read, *supra* note135at23.
[83] Id. at 369.
[84] Mamdani 1996, at 286.
[85] Magistrates' Courts Act, 1964, Cap. 36.

Court. All the courts' jurisdictions included customary law, English common law, and statutory laws of the Ugandan Parliament. "Civil customary law" was defined in the Magistrates' Court Act of 1964 as, "the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament."[86] The Act had attempted to bring this customary law under the unified hierarchy of a single judicial system. However, the Act exempted Buganda since Section 74(5) of the 1962 Constitution stated that the Buganda Courts Ordinance could only be amended or repealed with the Lukiiko. Needless to say, a hostile Kabaka, Mutesa II, resisted having his courts absorbed into the state judicial hierarchy. By 1 July 1965 the Magistrates' Court Act had been applied to all Uganda, except Buganda and Karamoja.

The magistrates' courts replacing native courts continued in practice to function with little reference to High Court precedent or procedure, despite codification of Buganda customary law and statutory reforms in 1940, 1954 and 1964. A 1957 High Court case in the West Nile District, Wango v Manano, illustrated the defacto separation of (former) native and civil courts.[87]Wango sued Manana for allegedly "stealing" his wife and demanded compensation. The sub-county (gombolola) court agreed and ordered Manana to pay compensation. On appeal the county (saza) court upheld the decision, but also fined Wango for agreeing to a higher bride-price than the legislated maximum. The Central Native Court (the district's equivalent to the Lukiiko) quashed this decision since Wango had not yet paid the bride-price in full, and thus was not married and had no right to compensation. The District magistrate made a revisional order upholding the Central Native Court decision, but on the different ground that the marriage had never been registered. Ultimately, the High Court rejected the magistrate’s order since Wango was married "according to native custom” based on the evidence that “the bride-price was greater than that permitted by the district council's by-law".

In Wango, the distinction was striking between the former native courts still staffed by Africans and the civil courts exclusively of Europeans. The African official without legal training in the sub-county court simply declared in favour of the aggrieved husband. The higher native courts focused on the bride-price itself. Did Wango pay too much or not enough? The courts relied on codified customary laws capping bride-price to decide the case. While the magistrate court was tempted to correct Wango's failure to properly follow rules for registering under the Marriage of Africans Act, the High Court recognized that this law had little practical effect in Wango and Manana's

[86]Cap. 211, s. 37(1).
[87] Wango v. Manano, [1958) E.A. 124 (H.C.); cited in Morris & Read, id. at 373, fn 40; see also D.D. Nsereko, "The Nature and Function of Marriage Gifts in Customary African Marriages (1975) 23 Am.]. Comp. L. 682 at 693-94.

community. Rather than impose a civil rule that is not obeyed, the Court approved, in a roundabout way, the first native court's instinctive decision.

At first glance, mapping the customary laws of Uganda by 1966 appeared to demand an egocentric projection. Every African belonged to a distinct tribe with a chief administering its unique customary law. This law was personal since it attached to an individual as a tribal marker. In the native court, a chief had only to pluck ancient rules from the memories of elders who formed "the breasts of the courts". Chiefs then simply applied the rules with an informal, simplified procedure. The colonial government would thus leave each chief to evolve his tribe's customary law in isolation towards its ideal end: English common law. This was consistent with a positivist ideology that saw laws as rules in a (benign) hierarchy beneath the constitution. So when custom evolved too slowly, native legislatures and the colonial government began to codify each tribe's law to speed up their evolution. Courts likewise took a more active approach to imposing state law directly on customary rules.

This gilded vision was belied by the arbitrary and harsh realities of the native courts in Buganda and elsewhere. Chiefs and native legislators drove the "retroactive fantasy" of customary law in their struggle to deal with the challenges presented by an urbanizing youth. Contrary to their rhetoric, customary law was largely a colonial creature with an essentially geocentric projection. The laws that chiefs created in native courts relied upon the territorial jurisdictions measured out by the colonial government. Within his sub-county gombolola chief Tamukedde re-interpreted custom as he saw fit, limited only by the oral testimony of elders and interventions by the District Commissioner in the name of morality. However, a chief's writ went no further than his administrative boundaries. "Educated" and "progressive" Africans, invariably living in Kampala, could escape customary law by opting for civil law like marrying under the Marriage Africans Act. If customary law could not prevent young people from migrating to new urban centres, it would retain the rights of fathers and landowners through codification led by the Lukiiko in Buganda. The Magistrates' Court Act reforms in 1964 did little to alter this geocentric projection because it continued to recognize customary laws as a valid source and perpetuated rural isolation from the civil law of the capital. While a useful reform, it did not breach the watertight judicial despotism of chiefs withholding the power to make arbitrary, if contested, decisions in the name of ancient customary rules.

THE BAKONZO CRISIS: A CHECK ON THE EXECUTIVE

Mount Speke rises nearly five kilometres high in the rain-soaked Ruwenzori mountain range along Uganda's western border. It is named after John Hanning Speke who was one of the first Europeans

to see it as he passed by on his search for the Nile's source. Europeans dubbed them the "Mountains of the Moon" after Ptolemy's famed description of a supposed equatorial range. The remote Ruwenzori were left unmapped well after Speke saw them and remained among the least visited places on the African continent. Their upper slopes are a formidable frontier to all but those who live there, the Bakonzo and the Bamba. When mapping the Ruwenzori range, elevation matters far more than latitude or longitude.

The spurs and slopes of the Rwenzori nurtured a long-simmering rebellion from the early 1960s to 1982. The conflict's roots can be traced back to the "creation" of the Toro kingdom with the Taro Agreement of 1900. Toro, Ankole and Bunyoro were each modelled (and modelled themselves) after the Buganda paradigm to maximize the privileges that flowed from British rule.[88] It reproduced the five-level administrative structure of chiefs under the Umukama (the Kabaka-like ruler).

Unlike Buganda, the boundaries given to the Toto kingdom in the Taro Agreement of 1900 did not include the Bakonzo and Bamba lands. Thus nearly half of the Toro district's population were not Batoro, but Bakonzo and Bamba living on the Ruwenzori slopes and in its valleys and adjacent plains. This might not have been a problem if the Batoro had not (with colonial encouragement) taken prime land, banned all but the Kitoro language, and kept most chieftainships, scholarships and hospitals. However, no saza chiefs and only 6 of 38 gombolola chiefs were Bakonzo or Bamba. By independence in 1962, the Batoro began to repress their neighbours with tacit support from Obote's new government, which needed Toro to counterbalance the strong Buganda kingdom.

The Batoro push for hegemony over its nominal territory created a backlash amongst the Bakonzo and Bamba. Isaah Mkirani, a primary schoolteacher, had founded the Bakonzo Life History Research Society to raise self-awareness of their grievances against the Batoro. Information gathered by the Society was then used to frame 232 The Toro Agreement, for example, was an almost complete copy of the Buganda Agreement. Toro Agreement, supra grievances in written petitions and as evidence for the Sembeguya Commission.[89] Mkirani started and led the Ruwenzururu movement's armed struggle in 1962, which soon spread all along the Ruwenzori range despite his capture by Ugandan troops that same year. Two years later, armed Batoro, supported by Ugandan police and soldiers, raided up the lower slopes of the Ruwenzori in tens days

[88]*The Toro Agreement, for example, was an almost complete copy of the Buganda Agreement. Toro Agreement, supra.*

[89]A government commission blamed the Ruwenzururu rebellion on the Toro government's antagonistic policies. Despite their leaders' declared desire for modestre form, the Batoro rejected all but unconditional surrender. The commission recommended negotiate settlement, which Obote's government rejected since it would alienate crucial Batoro support: see Uganda Government*SessionalPaperNo.1of1963* (Entebbe: Government Press, 1963) cited inid.at 484.

of looting and killing. Yet even this outrage did not mean the Ruwenzururu was a purely ethnic revolt.[90] Many wealthier Bakonzo peasants fled to the relatively safe plains after the raid and even within the movement itself one faction preferred negotiations over armed revolt. It was the poorest peasants in the upper arms of the Ruwenzori range who would form the spine of the Ruwenzururu rebellion when, in 1964, Mkirani and his followers declared a kingdom with him as king and set about consolidating their rebel state.

The Ruwenzururu consolidated their rebellion by creating local governance structures modelled on those in the Toro (and originally Buganda) kingdom. An old guerrilla fighter recounted why Mkirani was made king: "He was fighting a king. He could not fight him as a subject. Therefore, he had to become a king himself."[91]

Similarly, since they were fighting a hierarchical kingdom, they had to become one and adopted the 5-level paradigm of Buganda (see Table 1). But the Ruwenzururu also introduced novel democratic elements into their governance structures. [92] While chiefs at each level retained administrative and executive powers, the popular assemblies were given judicial and legislative powers. This reform split the fused powers found in Batoro and Baganda chiefs. The village assembly included all adult villagers and dealt with local matters and all higher assemblies were elected indirectly from the assembly below. The reforms created a rudimentary democracy in the Ruwenzori, although the king and chiefs retained significant power.

The new quasi-democratic assemblies challenged the state and customary legal system's hegemonic claims. Peasants were relatively free (although subject to intimidation by both Batoro and Ruwenzururu) to move across the de facto border, and thus choose between competing legal orders. In Ruwenzururu territory, its laws governed and were enforced by the army. Even in territory occupied by Ugandan.

A government commission blamed the Ruwenzururu rebellion on the Toro government's antagonistic policies. Despite the rebel leaders' declared desire for modest reform, the Batoro rejected all but unconditional surrender. The commission recommended a negotiate settlement, which Obote's government rejected since it would alienate crucial Batoro support: see Uganda Government, Sessional Paper No. 1 of 1963 (Entebbe: Government Press, 1963) cited in id. at 484. soldiers, peasants might obey the Ruwenzururu laws, especially in paying taxes to support the armed resistance. For the most part, however, the physical border corresponded to the frontier of state and rebel laws. Not only did elected popular assemblies make and adjudicate laws, they did so

[90] Mamdani 1996, supra note 13 at 196-200.
[91] Mzee Muhindo, quoted in Mamdani1996, *supranote*13at198.
[92] Id. at 199-200

without any written texts. Instead, "songs became the principle cultural form of the Ruwenzururu, and its youth its main cultural agency."[93] The songs often recalled specific events like assembly elections, demands made to Ugandan officials and their leaders' ideas and decisions[94] Political songs were sung by young people 8-15 years old in large groups composed by their schoolteachers guided by Ruwenzururu chiefs. Unlike other popular Bakonzo songs, only children sung them and had to memorize the lengthy and complex verses of each song. A typical song recalled Obote's failure to quash their rebellion:

- We are with you
- We are with you
- We are with you

The “content and structure" of these children's songs "reflect[ed] the demands to be made on those [i.e. children] for whom they were composed." School children and their teachers reproduced the quasi-constitutional norms of the popular assemblies, such as mandatory democratic elections, through the oral medium of song. Moreover, the Ruwenzururu invented this medium to perpetuate their new local councils and ingrain their values in children.

Not only did the Ruwenzururu challenge the state (and its legal system) through an armed struggle, they also replicated the Toro (and thus the Buganda paradigm) governance structures with notable democratic reforms to mobilize its people. Political songs written by teachers and performed by youngsters, however, were the secret to the movement's resilience in the face of two decades of state-backed violence. "Every assembly," Mamdani reminds us, "was charged with preparing songs that gave meaning to popular experiences. " the legal norms captured in those songs were not egocentric, however, as they applied to all people living in the people in the Ruwenzori whether or not they were Ruwenzururu. Songs passed relatively easily across the rugged kingdom and united otherwise isolated peoples. Since Ruwenzururu law was a geocentric construct, its authority ceased once a Mukonzo chose to descend to the plains and accept state law administered by Batoro. The no-man's land at where Toro plain met Ruwenzori slope marked the frontier of two competing geocentric legal orders.

The incomparable Tamukedde was appointed District Commissioner 1n 1967 with the special task of restoring "law and order" and seeing off the "self-appointed 'king' Mukirane (sic)".[95] He did

[93] Id.
[94] Peter Cooke & Martin Doornbos. "Rwenzururu Protest Songs" (1982) 52 Africa: J. Int'l Afr. Institute 37 at 39.

[95]Tamukedde was more concerned about soldiers from neighbouring Zaire who raided across the western border in violation of “Uganda territorial integrity." These soldiers, however, were chasing Bakonzo relations rebelling against President Mobutu's regime far to the west. Tamukedde and Mobutu's soldiers were both chasing the rebels that lived in the Ruwenzori range bifurcated by the Uganda-Zaire international border: Tamukedde, *supra at*70-1

succeed in capturing Mkirani, but the Ruwenzururu leadership fought on until a final political settlement in 1982 when the rebel army disbanded and its civilian councils were incorporated into the state system. The songs continued, however, and reproduced memories of old grievances and the political structures of the independent kingdom created to remedy them. As the National Resistance Movement was to discover in the late 1980s, the people of the Ruwenzori could conjure up a mountain kingdom from children's songs if their vital interests were threatened.[96]

THE RE SHAPING OF UGANDA BY THE EXECUTIVE

Only some of Uganda's legal multiplicity is represented to illustrate the concentric dissipation of state laws' authority as one moves away from the capital in Kampala. However, it goes a long way in dispelling the most persistent presumptions of the positivist ideology of the Ugandan judiciary. The idea of law as a system identified with, or identical to, the state fails to explain the spread of state law up to and after independence. Instead a map emerges of decreasing authority of government laws and increasing state violence in the effort to impose them on other laws.

Customary law was in fact a form of state law that nevertheless was largely independent of civil authorities. In Buganda, the Kabaka and his chiefs reinterpreted or codified customary law for their benefit. Moreover, the Ruwenzururu directly contradicted the High Court's claim in Matovu that Obote's coup was effective since there was no resistance to its new legal system. The rebellion had modelled itself on the Buganda paradigm and established a mini-kingdom detached from the greater state. Its seamless reintegration into Batoro would reveal how the validity of the state legal order did not depend on identification with the state (nor vice versa). In fact, the only time law was identical to the state was in the person of the military administrator for Karamoja. All powers of the state were fused in this official, but he had to resort to violence when confronted with the orality of the Karamojong.

Early colonial administrators envisioned law as a tribe's ancient rules reproduced in the oral memory of its male elders. Baganda chiefs perpetuated this "retroactive fantasy" while reinterpreting, and later codifying, rules to consolidate their newfound power. Even reforms that created a single judiciary failed to bridge the gap between former native courts and the civil courts as Wango v. Manano illustrated. In practice, the two systems operated in isolation, one in the city and one in the countryside, and thus Mamdani concluded that state law was bifurcated into "a modern power regulating the lives of citizens and ... a despotic power that governed peasant

[96]Arthur Syahuka-Muhindo,"The Rwenzururu Movement and the Democratic Struggle" in Mamdani &Oloka-Onyango, supra at 273.

communities.[97]

Thus customary law always occupied an uncomfortable place as not-quite-state law in Uganda. While men like Hone argued for keeping customary laws and courts distinct from civil laws and courts, later administrators and chiefs encouraged codification to make it popular and predictable (colonial shorthand for effective and valid, respectively). Yet by the time of Obote's coup, very little customary law outside Buganda had been codified. And so the laws governing the great majority of people's daily lives were unwritten. The Ruwenzururu and Karamojong merely confirm the relative rarity of written laws in the lives of most people. If a written form was a prerequisite for a rule's validity, then Uganda could hardly have been said to have a legal system at all.

At its most fundamental, a legal rule assumes that those it purports to guide share what Wittgenstein called a form of life. This is essential, as Hart argued, for shared behaviour to develop the normative force of law. Even in his critique of Kelsen, Finnis assumed the society in question was homogenous. But at what point can we say that a single homogeneous people had become two distinct groups with different forms of life? A persuasive answer relied on Hart's own metaphor of a balding head: when a new form of life develops, we will recognize it. In Uganda, the Ruwenzururu seemed like a distinct society from the plains-dwelling Batoro. But their principle difference, a respective reliance on song and written laws, was more form than substance since their songs were pragmatic inventions of a literate elite for an illiterate population spread across an inaccessible mountain range. The Karamojong, in contrast, did appear to have a form of life distinct from all other peoples discussed above. Whatever a "rule" might be to a Karamojong, it certainly was nothing like an ordinance or bride-price custom-though it was no less "law" for that, the bloodlessness of Obote's coup, with the exception of the army's destruction of the Kabaka’s palace, was striking. Why didn't the people rise up if they opposed Obote's gambit for total control in Kampala? The answer should now be obvious. Civil laws originating from the capital had little or no impact on the daily lives of most people. As the map's scale slides from small to large, state law fades away and is replaced by a myriad of laws oscillating between ego- and geocentric projections: nascent practices in urban centres, contested customary laws in villages, shari'a laws shying away from state meddling and the dominant orality at the map's frontiers. The High Court judges in Matovu might well have imagined this legal complexity in their circuits of the provincial capitals. Instead of engaging it, however, they raised Kelsen's handy foreign theory as an ideological shield to the threatening plurality outside the capital. Their choice would have lasting consequences in Uganda up to the present day.

[97] Mamdani 1996, *supra* at136.

CHAPTER TWO

THE PRESIDENCY FROM HISTORICAL TIMES TO PRESENT MODERN TIMES. ORIGINS OF PRESIDENTIAL POWERS, DECREE AND MANDATE.

THE PRESIDENCY

Presidential power can be defined as the executive authority granted to the head of state by the constitution. Both ***the word and the sword*** as pairs for imperialism paved way for colonialism in the world, which became the first instance for growing presidential powers wherever the seeds were sowed.

After Uganda was declared a British protectorate in 1984, and after the signing of kingdom agreements especially Buganda agreement, the colonial rule was formalized by the 1902 order in council and section 4 to 5 of the 1902 OIC provided for the office of commissioner assisted by the deputy commissioner who was to take over all the control of the administration of the protectorate and he was the representative of Her Majesty's government. Sir Harry Johnston therefore was the first leader of Uganda though he was doing so on behalf of queen and then later in the 1920 order in council, his title changed from Commissioner to Governor.

In Uganda's case, colonialism failed by commission and omission to lay profound foundations for the building of a nation out of the protectorate. The idea of 'protectorate', connoting to provision of protection to colonies, effected the nature of administrative establishment and running of Uganda. The elements that the colonial economy imposed were subjective and account for the makeup of the post-colonial chaos. The Sword and the Bible were catalysts that planted divisionism on which the colonial government survived. The Bible, plunged Buganda into civil war in the 1880s that left her divided and an easy prey, and in 1890s the incorporation into the British empire by captain Fredrick Lugard.

The divisions brought by the Bible soon crossed to embrace the protectorate and these divisions still plague independent Uganda, that's the legacy of colonialism! The period of 1890 and 1920, imperialism wielded the sword in earnest to pacify and secure her colonial possession, Uganda. A premium was put up by imperialism to establish law and order when the virtual purpose was to police the populace. This character cannot be mistaken for any other except colonialists because imperialism was intolerant of opposition and relied more on the sword other than dialogue. Therefore, the British conquered Uganda through use of force and fraud and these became a cancer

for generations.

Uganda's final geographical shape in 1920s, had people from three linguistic groups; *Nilotic, Sudanic* and *Bantu* from the two major language families- *Nilo-Sahara* and *Congo - Kordofanian*.[98] They were brought together into one central protectorate. The logical thing to do thereafter was unite these diversities but imperialism had no intention because it essentially survived on divided nations. This strategy therefore helped in consolidating and conquering of the Ugandan regions. Nationals like the Nubians formed part of the colonial army established in 1895.

Where force was not used to conquer, fraud was at play. This was done through fraudulent agreements between the British and Buganda, Bunyoro, and Ankore providing acceptance and establishment of a local constitution. A critical example of this is when in the 1926 Privy Council judgement in **Sobhuza II vs Miller**[99] where it was established that agreements with native rulers can never be binding on the British crown.[100] Ibingira to this effect observes that agreements lacked the force of law and bound the British government during its pleasure.[101]

From the triumph of conquest, the British moved to a stage requisite of power and that is administration. A dual system of administration was devised, that of natives authoritative and a central administration. The domain of native administration was delineated by boundary wherever possible, along ethnic lines in conjunction with the indirect rule policy.

Within the domain of native administration, Buganda was governed by the Uganda agreement of 1900 and the rest of Uganda by *the Native Authority Ordinance of 1919,* a constitutional arrangement which emphasized the division between Buganda and the rest of the country.

The 1900 agreement, powers came with the fragmentation of authority in strategic spheres of influence. The economic and administrative authority were mainly vested in the protectorate government and then some scattered powers were to the king of Buganda. The person of *"Her Majesty's government representative"* meant the commissioner, high commissioner, governor, or principal official of any designation who is appointed by her Majesty's government to direct the affairs of Uganda.[102] There was in addition to that direct control of land, especially the natural resources rich areas and other fertile lands in all regions of Uganda.

Later on in 1952, we see Andrew Cohen arriving as a governor and sought education and training of African administrators and placing of local governments on a stable, democratic and viable foundation and then in between there a Kabaka crisis of 1953 sparked off where by Governor

[98]Ladefoged, Glick and griper. Language in Uganda, part 1. Nairobi, oxford university press, 1971
[99] Privy Council Appeal No. 158 of 1924, from Swaziland Special Court Judgment.
[100] Quoted in G.S.K. Ibingira, "The forging of an African nation", p.13.
[101] Ibid, pp.14-15
[102] Ibingira, Forging of an African nation, pp. 18-19

Cohen wither recognition from him under the Buganda agreement. He declared a state of emergency and swiftly deported him in the United Kingdom. We see that after the deportation, the Lukiiko refused to select a successor Kabaka and the affairs of the kingdom were placed under regents.

It was not until May 1955 that Mutesa II was allowed to return with a new Buganda agreement of 1955 in place and the main feature of this constitution was that Buganda government was transformed in structure, if not in spirit, into a constitutional monarchy.

It was then at the height at of the human face reforms that Uganda's first recognized genuinely nationalist party, the Uganda national congress was set up on 2nd march 1952 by Ignatius musaazi and its thriving force was the desire to transfer power and authority from colonialists to indigenous Black Africans and it adopted a slogan `cry for self-government now' to give expression to these ideas.

Later on in 1954, the Democratic Party was also established as a national party and its main aim was addressing what was perceived to be the historical discrimination suffered by the peoples of Catholic faith under colonial rule. Events followed another up to the first constitutional conference that was held in September 1961 and there were delegates from HM government, the governor of Uganda in the own capacity and the Uganda government led by Ben Kiwanuka, the opposition UPC members of districts and urban authorities. All those that attended were ensuring that its interests were fully accommodated especially as the primary objective of the conference was the promulgation of a constitution providing for internal self-government.

The 1955 Buganda agreement propagated the same except that this time the governor had more powers of the high office. Executive authority still divided between native and protectorate authority but precedence was with the British authority. The powers of the Governor were all round. Although Buganda was just another province of Uganda, and although the agreement, as noted earlier, bound the British crown at its pleasure and was not justifiable, Ibingira asserts that the agreements with African rulers were for political reasons strictly adhered to by the British rulers who departed from only in rare cases when it seemed in the best interests of peace, good government or imperial authority to do so.

The native traditional authorities had to be the agents of indirect rule. Peoples participation in or the creation of national institutions were not encouraged. For example, in 1922 there was a suggestion that an African central assembly would be formed to provide all natives of Uganda with a single political forum but this suggestion was vetoed by the governor. Through the power allocated through the 1955 agreement, he also vetoed the meeting proposed for the leaders of Buganda, Busoga, and Toro. In 1925. when both the legislative and executive councils were established by

1920 OIC. The Africans to this end did not get access to the legislative council until 1944 and the executive council until early 1950s

Therefore, representative institutions were opposed by imperialism and the basis of colonial state was autocracy.[103] These tendencies flowed to the proceeding time of the next (ceremonial) presidents of Uganda. Apart from the periodically elected parliament, the constitution provided for a cabinet drawn from and responsible to parliament.

The powers of the presidency can be traced back to the first legislation of Buganda. Buganda being the central kingdom and epitome of government among the native people. Although the Buganda constitution provided expressly for the Kabaka as the head of Buganda government expressed under Article 2 of the 1955 Buganda agreement, Article 4 of the 1955 Buganda agreement recognizing the office of the Kabaka. The power to appoint ministers under 13 and 30 (1), termination of powers traced in Article 19 (2), with the 1955 constitution of Buganda, the corner stone for the establishment of presidential mandate, its foundation can be analyzed in lieu of the presidential rear of Uganda.

The president elective by Parliament from among the 5 sub-national monarchs. Kabaka (president) Muteesa II in-statement as the President of the new Uganda one could say attracted all hungry hounds for power which created the revolution of military rule or involvement as shall be discovered. The formation of political parties[104] as to contest for the presidency and the coming up of different political personalities Obote, John Kakonge, Itesot Cuthbert Joseph Obwangor. Well as Muteesa legitimately got presidential powers, although there was no universal suffrage, the next president Obote opened a new chapter to military rule.

Hegel, while discussing the subject of African barbarianism said the, *"history of the world is none other than the progress of the consciousness of freedom, a progress whose development according to necessity of its nature, it's our business to investigate."* and it is with this notion that in the consciousness of freedom, the political landscape of Uganda started taking turns from reign to reign motivated each by a certain consciousness of what ought to be.[105]

Furthermore, Africans while enforcing the idea of owning or acclaiming their history and in advancing their world spirit with pride. Hegel commented, as having a character *"difficult to comprehend, for the very reason that in reference to it, we must quiet give up the principle which naturally accompanies all our ideas the category of universality"* [106]but to what end this statement

[103] The first Africans to be appointed to the Executive Council in 1952 were Mukasa and kulubya, to the Legislative Council in 1945, Kawalya-Kagwa, Zirabamuzaale and NyangabyakiAkiiki.
[104] Uganda People's Congress, UPC Youth League, Kabaka Yekka
[105] G. W. F. Hegel, The Philosophy of History, trans. J. H. Clarke (New York: Dover, 1956).
[106] Olufemi Taiwo Exorcising Hegel's Ghost, Africa's challenge to Philosophy (1998)1. African studies quarterly 4

holds truth, is subject to debate. Because the infestation of character to what Hegel throws these lines, by witness of history and the separate sense of African civilization, is not a doing of Africans per Se.

Through exercise of the transition process, Obote successfully instated himself in power under the demise of the interim constitution of 1966 behind the guard of *"we the people of Uganda hereby assembled in the name of Uganda"*[107] perhaps this action alone was not enough, within the threats from the aggrieved parliament to impeach him and other ministers of corruption for example Idi Amin. On 22 Feb 1966, in a statement to the nation by the prime minister Obote assumed all government powers and suspended Sir Edward Muteesa II allocating to himself almost unlimited powers under the state of emergency rules. (the gold scandal). In addition to forceful acquisition of power, Obote furnished his presidency with nearly unlimited power, stating himself as head of state, commander in chief, leader of national assembly of the majority party. Article 37(1)[108] afforded him powers in office in perpetuity as the only way he could leave office was by resignation. The essential elements in the 1966 constitution, we can say, the office of presidency was merely inherited by virtue of his numerical strength of the party in the national assembly. Having direct control over the legislative assembly, added to that is the law-making power with the equivalence of an act of parliament. With the power conferred in him (Obote) by the Pigeon hole constitution he dissolved parliament and presumably under Article 73(1)[109] which effects *"the president may at any time prorogue parliament"* albeit, the exercise of this power was a bombshell style and the suspension was indefinite.

The subsequent exercise of power continued inherently to Amin Dada through a military coup. Therefore, a presidential system is a form of government in which a head of government (President) leads an executive branch which is separate from the legislative branch. Being also the head of state, the head of government is elected or in some cases appointed by other authorities (Muteesa appointed by governor Andrew Cohen) is responsible to the legislature, which under normal circumstances cannot dismiss it except through impeachments which in my opinion is historically very significant in various parts of the world especially Africa.

In America the evolution of this office, started out by election from other delegates, was the president of the continental congress later, named the president of the confederation was the presiding officer of the continental congress, from the convention of delegates that emerged as the first transitional national government of the united states during the American revolution. This is

[107] By 55 votes of 4
[108] The Uganda Constitution, 1966
[109] Ibid

similar to the mode of the first presidential office in 1963 in Uganda, where the first president was elected to lead the new independent Uganda of 1962. Although the title of president in Uganda was so from the start, in the united states as formerly discussed took a permanent step to becoming the president of the united states upon ratification of the Articles of confederation in March 1781.

The evolution of the presidential power takes a turn at appointment or election of a different president. Every president may introduce new mandates to his liking. In America the president's office has constantly changed by presidents and completely restructured from the old normal.

Historian Edmund Burnett said it right when he said that,

"the president of the united states is scarcely in any sense the successor of the president of the old congress. The presidents of the congress were solely presiding officers, possessing scarcely a shed of executive or administrative functions, whereas the president of the united states is almost solely an executive officer, bearing likeness in social and diplomatic precedence, the two offices are identical only in the possession of the title." [110]

In Uganda now the first life of this office as already mentioned was 1963 by Muteesa II, held office from 1963–1966. The criteria of election being that every constitutional lead qualified, Heads of kingdoms. Including the Kyabazinga of Busoga authority qualified where to elections UPC. Caucus discussed the matter and came up in support of their vice president, civilian Wilberforce Nadiope the Kyabazinga of Busoga leaving Kabaka (who was president of UPC) without support. However, after much deliberation, the UPC. Grudgingly accepted support Muteesa, a more powered by Obote.[111]

The election of Muteesa was indeed a ceremonial gesture to call the racing sentiments among the Buganda. This being a tactic used in India as well as the united states and elsewhere in the world to elect previous political prominent. Well-argued by prof. Gordon wright. What can be the functional equivalents of monarchy in countries like the united states as India which have lost that institution irretrievably? Once such is the ceremonial presidency which can be safely bestowed upon some prestigious & cooperative member of the former ruling elite for the various satisfaction of the rest of the group. Under the 1963 constitution of the republic of Uganda, the president replacing the Monarch as ceremonial head of state were elected by the national assembly for a 5 year term.[112]

In the Uganda context, the president and the prime minister having out rightly parallel agendas, the office was faced with indisputable political turmoil. The zeal to further personal interests greatly created clashes and I can say the first president did not even warm the seat. The mesh among the

[110] Burnett 1941 p. 34
[111] Daily monitor wed, August 2013
[112] Morris, HF (1966) the Ug. Coustin, April 1966 journal of African Law. 10(2) 42-47

leaders fuzzed the dream of peaceful, democratic transition of power in little Uganda

The contrast here is, the united states presidency evolving from similar criteria as Uganda in the initial stage, Uganda to the left turn by presidency by coup and yet us maintained from election by delegates to a more stable universal surface system for clamity even though Uganda apparently exercises the same system

In pursuance of the presidential powers, the later president above through his pigeon hole constitution banished and outlawed all other political parties to consolidate his mandate as president and was the beginning of an error of terror and enormous tribulation for the people of Uganda.

This followed the rule of Amin dada who on January 25th 1971 ousted his predecessor in identical action. The situation became recurring by other presidents until to date where people hang in imbalanced suspension as whether the roots of the original sin of Uganda may shoot again.

PRESIDENTIAL MANDATE

Presidential mandate starts from establishment of a presidential office. As we appreciate the subject, we must know that there is no presidential mandate without presidential authority drawn under presidential office. Whereas we have discussed the past presidents in the last pages, perusing through their presidency, this part serves to concentrate on the legality of the presidency. The common feature in all Uganda's presidents is that they derived their mandate although differently but yet with scantiness of a constitutional mandate. Kabaka Muteesa II, almost hereditary go his from the 1955 Buganda agreement and the 1962 Ugandan constitution, which took effect at independence. The constitution provided for a complex system of devolution within Uganda. There are various understandings of the term presidential mandate in various parts of the world in terms of how it works.

The idea of presidential mandate is subjective & politically changed. Newly elected candidates mostly invoke the idea of mandate, specifically as a justification for execution of their ideas to which they may be popularly elected upon. Some are inclined to believe that every winner has a mandate to govern simply by virtue of winning their election. But this has to be in accordance with the law. Others however assert that the mandate is only as strong as the president's margin of victory. Translating to one with land slide victory to have decisive mandate and having freedom to enact his desired policies. However, one with a slim margin may have less weak mandate.

Modern scholars have written about the presidential mandate as a myth or a fictional device used solely as rhetoric to further a political agenda. After all there is no basis for the idea in written law. The words presidential mandate does not appear anywhere in the constitution academy. However,

the concept of president mandate is powerful not because it is any kind of legal statute, but because it is an idea of how power and leadership work in a representative democracy. Therefore, the president may be the most powerful person in a country, but the sources of their mandate (power) stems from the citizens. In which sense Uganda has seen a mixture of people power and appointed power.

In Uganda now the first life of this office as already mentioned was 1963 by Muteesa II, held office from 1963 – 1966. The criteria of election being that every constitutional lead qualified, Heads of kingdoms. Including the kyabazinga of Busoga authority qualified where to elections UPC. Caucus discussed the matter and camped in support of their vice president, civilian Wilberforce Nadiope the Kyabazinga of Busoga leaving Kabaka (who was president of UPC) without support. However, after much deliberation, the UPC grudgingly accepted support Muteesa, a move powered by Obote.[113]

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Under the 1963 constitution of the republic of Uganda, the president replacing the Monarch as ceremonial head of state were elected by the national assembly for a 95-year term.[114] In the Uganda context, the president and the prime minister having out rightly parallel agendas, the office was faced with indisputable political turmoil. The zeal to further personal interests greatly created clashes and I can say the first president did not even warm the seat. The mesh among the leaders fuzzed the dream of peaceful, democratic transition of power in little Uganda.

The contrast here is, the United States presidency evolving from similar criteria as Uganda in the initial stage, Uganda to the left turn by presidency by coup and yet US maintained from election by delegates to a more stable universal suffrage system though Uganda apparently exercises the same system. Therefore, to appreciate the concept of presidential mandate, we may have to take a drift from modern presidency and trans back to history and its modus operandi looking at various common wealth jurisdictions.

The word mandate connotes to the authoritative command. In politics a mandate is the authority

[113] Daily monitor wed, August 2013
[114] Morris, HF (1966) the Ug. Coustin, April 1966 journal of African Law. 10(2) 42-47

granted by the constituency, in this matter the state or people to act as its representative. On election night in 1980, the vice president elect informed the country that Ronald Reagan victory was

"...not simply a mandate for change but a mandate for peace and freedom, a mandate for prosperity, a mandate for opportunity for all Americans regardless of race, sex or creed, a mandate for leadership that is both strong and compassionate, a mandate to make government the servant for people in the way our founding fathers intended, a mandate for hope, a mandate for hope for the fulfillment of the great dreams…"[115]

This is not only an exaggeration as some writers put it, in the elation of victory, it should be in fact, the least expected if I may say, celebration of presidential mandate. It should serve this purpose because more can be done.

The presidential mandate of the president of Uganda is mainly invested in chapter seven of the 1995 constitution of Uganda. It then shoots back and forth between chapter six and eight penetrating legislative and judicial powers in what may seemingly be justified as checks and balances or contended to be mere presidential controls. To appreciate the concept presidential mandate, we may need to demystify the mandate.

Since the bloodline of Uganda presidency has very strong semblance with the historical days, in light of the 1980 speech of the vice president of America on the victory of Ronald Reagan, we may set the standard of presidential mandate to the mandate in that speech in line of the notorious past previous presidents.

The 1902 order in council played a concrete role in the establishment of presidential powers and creating the sense of entitlement by the president. in furtherance the 1902 OIC most eminently sawed the powers of leadership in the highest office. It vested the power of appointment and presidential discretion in the Governor, section 8 -10 effects the political economic and social powers in decision making to the governor alone. The powers of appointment of judicial officers stipulated in section 15 (1) and dismissal in the commission. This ghost haunted all presidents that came after 1962. And what about the 1920 OIC which were enforced directly the discretion and independence of the governor. (having the power to decide independently) which in other sense vests all power in one person. This does not differ much with the American mentality in the 1800s that only the president or presidential office could manage the state. From the 1902, 1920 and other agreements made in colonial Uganda, they served primarily in accordance to subject, to create a blue print for three fundamental presidential exercises.

[115] Robert a. Dahl, Myth of the presidential mandate

- Having unrestricted powers to appoint
- Control over funds in government
- Having control over the outcome of the legislation

Being the first colonial (parent) constitution, these rites followed in a trial and it was (would say) almost impossible to do away with this rite and they were maintained through tout independent Uganda. An impair-able aspect about the period of 1902 1nd 1920 as Justice Kanyeihamba described *"dictatorial and despotic if not in practice at least in law"*[116] though would flip this and say the same but mostly in practice.

FROM ONE SUPREME RULE TO ANOTHER

After a colourful wedding comes a long trying marriage.

The stories of independence throughout history in the world are painted in a manner that portrays the transition of power from one leader to another. The only difference is that the leader advocated for was one known to the people, one who fit in their skin, wore their grief and shared in their struggles. All the revolutions were geared to self-governance and the ability to choose their own leadership.

In the moment, it was more than justified to do so because these revolutions enabled different countries to reset their priorities and establish what they believe was best for their own interests. The ideologies adopted at these stages are so numerous they could not possibly be analysed in this paper. However, it can generally be agreed that they all pointed towards independence.

The independence story was only an event in the history of all the countries. It is celebrated around the world to this day as a day of liberation and self-governance. All the other 365/4 days is the struggle to realise the dream of the revolution. To this end, some countries have achieved greatly in their governance while others, let us just say, they became stagnant.

Of course, arguments can be sustained that the progress of some countries is attributed to how early they attained their independence and the civilization that they were exposed to at the time. This however does not account for countries that achieved their independence late but have still been able to grow in such a short period. It also does not account for countries that attained independence long ago and have for all this time remained stagnant in all spheres.

Human beings are naturally attracted to higher power or deity. When they still lived in isolation, this deity was the wilderness that surrounded them; the provision and protection it granted them in order to exist. When the early societies started forming, this deity was the community heads who provided protection from the environment that proven more hostile than hospitable. It goes without

[116] G.W Kanyeihamba, Constitutional and political history of Uganda (1894)

saying that throughout this time, there was a higher power still subscribed to which has over the years been codified as the natural school of thought.

Therefore, even in colonial times, the masters were the deity that ruled the colonies. Even when this rule was solely for their own interests, their harsh rule ensured submission. Even in the stories of the Old Testament in the bible, the Israelites often yearned for a leader. After having priests like Samuel, they required kings like Saul who proved dangerous.

In the same accord, even after successfully revolting against colonialism, many countries yearned a leadership of their own. It mattered not, at least for a time, if this leadership was good or bad, provided it was not the colonial rule. And indeed, most of the early rulers of newly independent countries did not do a great job. Make no mistake, those who led the struggles to independence laid a great foundation. The downside is that the first leaders who took on from them were never part of these struggles and therefore never understood the gravity of the dream.

To some countries therefore, the dream died with the liberation and cruel leadership was reborn, only that it spoke a familiar language and dressed in known skin. Therefore, when we look at most governments today, especially in Africa, it is hard to believe that the dream of the struggle still lives and breathes in the lives of the citizens or at least, the leaders.

This loss of the dream has tarnished leadership and soiled its purpose to the extent that the wrong has become the socially acceptable and most of the young generation born into it today take it to be gospel truth and therefore a way of living. Things like corruption and nepotism have been integrated in the daily lives of the many citizens around Africa that pruning it now seems almost impossible. It has become the light of the country and there is no amount of “darkness” now that can be harnessed to put it out.

Given that many leadership systems have a supreme leader, this paper will analyse how this position has been used to harness the dream or to fade it. Some states are headed by presidents, while others have kings and queens. This paper will follow up on countries with the president as the supreme leader. Close attention will be paid to the Ugandan supreme leadership and how it relates with the entire system of governance.

THE DIFFERENT POWER TRANSLATIONS IN UGANDA.

Uganda has undergone a turbulent power translation under different political parties and different personalities as am going to elaborate more on this hereafter. In respect to the ideal nature in which different power translation in Uganda, history has proven it right that as far as power translation is concerned, it’s very easy to prove rules of overtime characterized with the outstanding, embedded, competent, trained, educated young men who has been gaining power by all means thus including

appointments, through successful revolutions and many their powers and respected political parties have been ousted from power through successful coups which later followed their deposition from the office of presidency.

However it is worth noting that as far as power translations are concerned in my country Uganda, different Presidents have ruled Uganda some only attending of presidency for only recognized periods of time thus including days, months and others years since in most cases power only belongs to a particular group of people on either tribal or religion basis and with due regard Uganda has recognized different presidents acquiring power through questionable and intelligent means with the aid of their different political parties and these emphasis will be seen and explained hereafter.

In respect to describing different modes of government in Uganda since the **west minister mode of governance** thus articulating an aspect where some prime ministers were latter recognized as the head of state and in summary, on the aspect of enjoying the national cake, Uganda has experienced different leadership these includes the **Monarchical Rule(1962-1963),** followed by the **First Republic(1963-1979),** followed by **the Military Rule(1971-1979),** followed by **the Second Records(1979-1985),** followed by **Military Rule(1985-1986)** and eventually the coming of **the Third Republic(1986-present)** and these have been expounded on them as in the following ways with their preserved orders of governance in Uganda.

Uganda became an independent Commonwealth nation on October 9, 1962 under a constitution much influenced by the British. The constitution distributed powers between the centre and the regions, albeit disproportionately. The Buganda kingdom was given more powers at the expense of the other three kingdoms, namely the Ankole, Toro and Bunyoro, and the other districts. The powers granted to the four kingdoms also handicapped the Parliament, which was elected by direct universal suffrage, except for parliamentarians from Buganda who were indirectly elected through the Council of Buganda. Apart from the periodically elected Parliament, the constitution provided for a Cabinet, drawn from and responsible to Parliament, and defined the powers of major government organs, civil service and judiciary. One year later, an amendment introduced a ceremonial President to replace the Governor General as a head of state and Kabaka Mutesa became the first elected president on 9 October 1963.

However, it’s worth noting that from 1962-1963, the Queen of England, Elizabeth II was the head of state that was under the Uganda independence Act 1962 and also recognized the Monarch of other common wealth realm. Living in England, the Queen was represented in Uganda by the Governor General. Following that aspect, Uganda became a republic under the constitution of 1963 and that was the time when Monarch and Governor-General were replaced by the one Ceremonial

President who was also replaced by the executive president in 1966.

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THE MONARCH SYSTEM (1962-1963)

This was the first rule in Uganda under the attributes **of Queen Elizabeth II and it was established on 9th October 1962 and only pushed up to 9th October 1963** and only lasted for just a one-year period but it's believed that the rule recognized the office of prime minister who was by the then Dr. Milton Obote. This rule recognized the Governor as President in the monarchical system in Uganda and exercised most of the powers within the Monarch and his roles were designed by specific period of time(also known as terms) and was actually meant to serve at the pleasures of the monarch and not forgetting that his appointment solely on the advice of the cabinet of Uganda and that happened without any involvement of the British Government and when the office of Governor was vacant then the chief justice served as officer administering the government.

The royal house was in Windsor under the powers of the governor general by names of Walter Courts who is believed to have been born in 1912 and later died in 1988 but his attributes of office began on 9th October 1962 up to 9th October 1963 thus just a one-year period in office of head of state.

THE EVOLVEMENT OF WEST MINISTER MODE OF GOVERNANCE AND ITS APPLICABILITY IN UGANDA.

The West Minister parliamentary system is both a political heritage and a concept. Across the Commonwealth, the Westminster system as a political heritage was either 'implanted' by the colonial rulers or 'transplanted' by the settlers of British ancestry. As a concept, it represents a majoritarian system that constitutionalizes an institutionally marginalized opposition. The west

Minister system or Westminster model is a type of parliamentary system of government that incorporates a series of procedures for operating a legislature that was first developed in England, key aspects of which include an executive branch made up of members of the legislature, and that is responsible to the legislature, the presence of parliamentary opposition parties and a ceremonial head of state who is different from the government. A.V Dicey in his book *Introduction to the study of the law of the constitution* tried to alleviate fears over the spread of democracy by appealing to a constitution within which popular participation was restrained by parliamentary sovereignty, the rule of law, and informal constitutional conventions. In doing so, he provided the classic account of the place of the judiciary within what was to become the West minster Model.

Dicey examined the constitution to dispel this idea. The Westminster Model was to some extent an interpretation of constitutional history developed by conservative Whigs in response to anxieties about popular participation. If parliamentary sovereignty appears as a counter to popular participation, the rule of law is, for Dicey, something of a counter to parliamentary despotism. Legislators in parliament are constrained by a commitment to the rule of law. Dicey identifies the rule of law, rather narrowly, with known rules, equality, and respect for precedent. For a start, Dicey argues that government operates in accord with known rules rather than arbitrary caprice or even discretion. Dicey also argues that Britain, unlike its counterparts, has long boasted a notion of equality before the law, according to which all individuals are treated similarly regardless of class or rank. Finally, Dicey associates the rule of law with the way in which the principles that protect individual liberties have become entrenched over time through the decisions of judges. In his view, although some other states rely on enumerated powers and formalized rights, Britain's use of precedent is in fact a more effective way of ensuring individual liberties.

Dicey's constitutional views proved extremely influential among both academics and political actors. Dicey clearly defined the agenda for legal scholars and others interested in the constitution and the judiciary. Indeed, for most of the twentieth century the dominant image of the British political system was of a Westminster Model defined in terms of parliamentary sovereignty. Within the Westminster Model, the courts are expected merely to interpret Acts of Parliament to the best of their abilities. Judges are meant to rule in accord with the intention of the legislature: their decisions are meant to reflect how a given Act was designed to function. Judges are not meant to challenge, let alone overturn, legislation as they can in, for example, the US. Indeed, by combining parliamentary sovereignty with a concept of the rule of law that was based on precedent, Dicey's followers implied that a judge should never actually challenge an existing law, regardless of whether that law arose from a legislative act or from the past decision of a judge. Any attempt by the courts to reexamine the content of law appeared to be an abuse of power. Thus, the Westminster

majoritarian system as an adaptation in former British colonies in Africa, the Pacific, East and South Asian regions face a particularly tough cultural challenge. It is a very popular idea in these regions that the British-trained political elites engrafted the Westminster model upon people 'with very different social structures, religious texture and cultural values.

In Uganda, following the prior colonial legacy that saw the introduction and evolution of two ambits of colonial administrative tools i.e., the 1902 and the 1920 orders in council later saw the arrival of Sir Andrew Cohen in 1952 who tremulously increased African participation in their own governance where for the first time African representatives were seen on the legislative, However it was with sadness therefore that many Ugandans said good bye to Sir Andrew Cohen in 1957 at the end of his tour. Most would have wished to see him remain until independence. It's also worthy while noting that, his works weren't put to waste as his subsequent governors like Sir Walter Cutts who embraced and magnified on what Andrew Cohen had initiated and its therefore not surprising that by 1961, a committee under the chairmanship of Mr. JV Wild and one his report which came to be known as the Wild Report had recommended the Westminster model of Government and a cabinet of ministers responsible to the Legislature. The new Legislative Council would be known as the National Assembly and on its first meeting was to act as an electoral college for the election of the specially elected six members.

The 2nd constitution conference then opened on 2ndJune 1962 under the secretary of state with the governor of Uganda delegation from UK, representatives of kingdoms, districts and urban authorities then opposition DP and by this time, the minister committee had submitted its reports and a new constitution had been prepared on 1st march 1962 however some matters had not been settled for example the status of three other kingdoms that is Ankole, Bunyoro and Toro, then question of head to state among others.

The broadship membership of UPC opposed the idea that the party should not provide the head of state. However, after several discussions, it was resolved to give the office of head of state to one of traditional leaders especially to Kabaka Mutesa. Thus by the constitution of Uganda 1st amendment act no. 61 of 1963, it was stipulated that the president and vice president of Uganda would be elected for a period of 5 years by the national assembly and further that only traditional leaders would be eligible for the offices.

It should be noted that on 4th October 1963, Sir Edward Frederick Mutesa the Kabaka of Buganda and sir Wilberforce William Nadiope the kyabazinga of Busoga became the first president and vice president of independent Uganda respectively.

THE FIRST REPUBLIC (1963-1971)

The first republic came into existence in 1963 and served to the period of 1971. Within the attribute of change in power, under **the 1963 constitution**[117] , the president there replaced the Monarch as the one ceremonial head of state and in the same kind of appointment the president and prime minister was elected by the one national assembly for aiming of traditional rulers and the constitutional heads of districts aided to serve for a limited period of time that was only five years as the limited term of service.

Following the attributes and the eventual roles of the office of president by **1966**, and with that attributes their powers became distinguishable and increased thus followed by the eventual establishment of executive president, but the same rules applied to the 1967 and 1995.[118]

EDWARD MUTEESA (1924-1969)

Sir Edward Mutesa was a distinguished figure well recognized with his leadership aspects who ruled within the recognition of traditional customs, cultures and norms within Buganda tradition. He was born in 1924 and latter died in 1969. Back to his service he was a well-established figure in the political stature which made him attain the power by election in 1963 9th October up to 2nd march 1966 that's serving for the period of two years and 144 days. He attributed the aspect of political parties and he lived a leader under the **Kabaka YEKKA** Political Party which party recognized the office of prime minister of which this was under the one Dr. Milton Obote as the Prime Minister.

Obote was a legitimate leader with due aspects to manage Uganda and is believed that his well-equipped and legitimate minds with the influence of Uganda people's congress as the party of the candidate. Dr. Milton Obote was born 1925 and later died in 2005. Despite Milton Obote being recognized as a political lad and his office of the prime minister being respected and reserved by Edward Mutesa, this did not prevent Dr. Milton Obote from ousting him out of power and thus replacing him in office of presidency that's on 15th April 1966 and his power lasted to 25th January 1971 thus four years of service and 285 days coming up with the new political movement called the Uganda People's Congress.

THE MILITARY RULE (1971-1979).

The military rule was the rule under the well-equipped, determined and trained **General Idi Amin Dada** the field marshal, the conqueror, the champion, the supreme of law who ruled by decrees and he was sui generis to the law, to the extent that he made laws himself and in most cases he ordered

[117] 1963 constitution of the republic of Uganda.
[118] Constitution of the republic of Uganda, 1995 (As amended)

for implementations who aided for the basic development of his home Uganda.

General Idi Amin Dada was born in 1925 but sadly he later died in 2003 (PBUH) while in exile in Saudi Arabia. He had great tactical political ideologies and military ambition training which he successfully used to ascend to the office of presidency on 25th January 1971 and served as president to a later date that's the 11th April 1979 hence ruling for 8 years and 76 days under the Uganda armed forces and with him, he therefore abolished the office of prime minister and this left him rule supreme and sui generis.

The 1966 crisis had propelled Amin to the forefront of Uganda's political scenes so it was not surprise that upon the departure of Obote for a common wealth conference in Singapore, on the morning of 25th January 1971, the army announced that it had staged a coup-de-tat in order to save a bad situation from getting worse and so marked the onset of the period of militant politics that was to characterize the Amin regime and the coup listed 18 reasons of grievances against the Obote government more significantly violations of human rights through detention, lack of political freedom, state of emergency in the country, corruption, nepotism and tribalism among others

Less than a month after the coup, on February 20, 1971 Idi Amin issued an announcement in the name of officers and men of the Uganda army and air force in the Uganda gazette in which he elevated himself from the position of a major general to full general and suspended elections for at least five years stating "in view if the very bad state of affairs left behind by the last regime we fully appreciate that our government led by his excellence Major General Idi Amin dad is faced with a great task[119]

We also see that the armed forces and state intelligence agencies for example the SRC could carry out arrests, summary trials as well as execute sentences which not eroded the traditional policing function but also judicial powers, the implications of this decree were remarked upon by Justice Russell in the case of **Efulayim Bukenya vs Attorney General**[120].

The legal instrument that ushered in the Amin regime was a proclamation known as legal notice no. 1 of 1971 and its significance was the introduction of a constitutional legal order in kelsian terms as well as before legitimacy on the new regime

Amin's tenure which lasted eight years was marked by brutality, with hundreds of thousands of civilians killed and tens of thousands of Indians and Pakistanis expelled from Uganda because Amin believed they were exploiting the economy. Despite the above statement, no elections were held

[119] Declaration by the officers and men of the Uganda army and air force made to the nation on the 20th February 1971, The Uganda Gazzette (Feb.26, 1971)

[120](1972) HCB 87

Amin introduced a total dictatorship and within space of 2 years, he had completed in turning the country into absolute military institution. Although he released political prisoners detained by Obote,his first act was to suspend political party activities which secured by suspension of political activities[121]. In 1979, his eight years of chaotic rule came to an end when Tanzania and anti-Amin Ugandan forces invaded and topped his regime. Amin had launched an unsuccessful attack on Tanzania in October 1978 in an effort to divert attention from Uganda's internal problems. He escaped to Libya, eventually settling in Saudi Arabia, where he actually died in 2003. Given his connections with Qaddafi, Amin at first fled to Libya, taking his four wives and more than 30 children along with him. Eventually they moved to Jeddah, Saudi Arabia. He remained there until 1989 when he used a fake passport to fly to Kinshasa (a city in what was then Zaire and now is the democratic republic of Congo). Idi Amin died on August 16, 2003, after multiple organ failure. His family disconnected him from life support. Three years later, his character was famously captured by actor Forest Whitaker in an Oscar-winning performance in the 2006 film, the last king of Scotland (so named because Amin claimed to be Scotland's uncrowned king). In the end, the brutal dictator brought economic ruin, social unrest, and oversaw the murders of up to half a million people. There's no denying that his nickname "*the butcher of Uganda"* was well earned.

THE SECOND REPUBLIC (1979-1985).

The second republic in Uganda was also recognized as the pseudo charge of power in which the translation of power was conducted following the different attributes of minded people gained the office of presidency and these are as explained in the following ways as below and their time of service was limited by the hungry, power thirsty, war mongers and guided political activists these are as explained as hereafter.

The second republic was first under the reign of **Yusuf Lule** a very recognized political activist, with a very high sense of humor, morality whose yarn for presidency was achieved on an elect basis. Lule was born in 1912 but eventually died in 1985 (PBUH). The main constitution instrument that ushered in the UNLF government was legal notice[122] which effectively restored Article 1 of the 1967constitution. The government of Professor Lule was short lived surviving only 68 days as it was faced with interval wrangling and conflicts over ideology and policy the last straw came about as a result of dispute over appointments.

We shouldn't forget how some members of the NCC insisted that all presidential appointments must be ratified by the NCC on the premises that this was in accordance with the minutes of the Moshi conference were most politicians who attended saw Lule as the cleanest of the all despite the

[121] Decree, No. 14 of 1971
[122] No. 1/1979

fact that Professor Lule played a mere side role in the fight against Amin and people thought that there was no way he could have become the president. He in fact had not even come for the meeting. He was hastily invited for the conference and subsequently was named the president.

Having virtually boarded the liberation train at its tail end made Lule merely a puppet of various other forces. Unfortunately, Lule did not even know he had very limited powers and the real power were in the hands of nyerere and Paulo muwanga who was preparing the return of Dr. Milton Obote and the UNLF cohorts. So in trying to assert his authority as president, little did Lule know he was committing a grave mistake. On June 20, 1979, the NCC staged a coup removing lule as president for allegedly making wide ranging appointments in government without consulting them. Out of office, Lule went to exile in Tanzania where he was put under house arrest by President Julius Nyerere. The events surrounding Lule's removal as president were to result in the first constitution case since 1966 and this was the case of **Lutakome Kayira & Ors vs Edward Rugumayo & Ors**[123]

Subsequently, **Godfrey Binaisa** was named as his successor. He fell into the same trap when he tried to reshuffle Mwanga, Museveni and Ojok and they nearly got rid of him and a military commission by Mwanga and Museveni was put in place. The Military Commission created an identical commission that comprised on three members, two of who were judges and the other a long serving civil servant. But his body was merely cosmetic and real executive power remained with the military commission and basically army. The military commission then out in place a process of holding general elections that took place in December 1980. These elections are widely to have been rigged in favor of UPC and Obote

Ousting Godfrey Binaisa out of office of presidency paved way for **Paul Muwanga** who was born in 1921 but solely he died in 1991 PBUH but lived a civilian life and took over office of presidency on 12th may 1980 and he later resigned the presidential office on 22nd may 1980 making him a president for only 10 days ruling under the Uganda National Liberation Front (UNLF) and still during his regime the aspect of office of prime minister was still a story of tell therefore never existed.

On ousting Paul Muwanga out of office of presidency, this left the office for the power monger and braved **Dr. Milton Obote** II believed to have been born 1925 but unfortunately died in (2005) PBUH. However, he got powers of presidency on 17th December 1980 and was deposed on 27th July 1985 thus making his power lasting for a period of four (4) years and 222 days and he ruled under the Uganda People's Congress (UPC) party movement. The second government of Obote was characterized by a number of significant developments. Among these were attempts to revive

[123] Constitutional case No. 1/1979

the economy ravaged by several years of mismanagement during the Amin years. For the very first time in Uganda's history, a civil conflict broke out as a result of disagreements over elections. It is very difficult to separate patterns of violence against civilians from the general conduct of the civil war that began with in one year of Obote's return to power.

The second Obote regime was brutal, the events of January 1983 marked a key escalation in the targeting of civilians. Great appreciation to the influence of Museveni and NRA, public favor came to turn against Obote, who was overthrown in a coup d'état led by Basilio Olara-Okello on July 27, 1985. The contradictions and infighting of Obote's regime tore it apart internally.

MILITARY RULE (1985-1986).

This military rule was influenced and led by **General Bazilio-Olara-Okello who successfully led the eventual coup** leading to the eventual defeat of president Obote and his government and following the successful coup where General Okello proclaimed himself the President of the State of Uganda.

In articulating more about Bazilio-Okello was born in 1929 and eventually died in 1990 (PBUH) and he successfully took over the office of president on 27th July 1985 and was latter ousted from office Tito-Okello-Lutwa that was on 29th July 1985 under the rule of Uganda armed forces and hence making him being considered a leader for just and only 2 days and he ruled under the Uganda Armed Forces and his reign also its believed beyond doubt that the office of prime minister was still vacant and thus not recognized.

The presidential office was therefore by the **General Tito Okello Lutwa** believed to have been born in 1914 and latter died on 1996 but he assumed powers of the office of president on 29th July 1985 to 26th January 1986 under the Uganda Armed Forces but this time round for him he recognized the office of prime minister and thus he appointed Muwanga Waligo to attain back the lost glory of the ministerial office in the political structure in Uganda.

THE THIRD REPUBLIC (1986-PRESENT)

In respect to the attributes of the general rule is that the 1995 Constitution[124] provides that the executive is the head of state and is one elected by the popular vote and that's only for a limited period of five years. However, it's also worth noting that in the event of vacancy of the president, the vice president served as acting president.

The 9th president of Uganda is **Yoweri Kaguta Museveni** believed to have been born in (1944 to date) and it has been imposed to office in all elections starting with the 1996 election, 2001 election, 2006 election, 2011 elections, 2016 election and the most recent of 2021 election. He took

[124] Constitution of the republic of Uganda, 1995 (As amended)

over office on 26th January 1986 and is still the incumbent with 35 years and 55 days with the political party of National Resistance Movement (NRM).

It is also worth noting that following his eventual imposition into the office of president since 1986, President Yoweri K. Museveni has ably and systematically recognized the office of the prime minister and this has been occupied by a number of personalities these including the Kisekka, Adyebe, Musoke, Nsibambi, Mbabazi, Rugunda and currently Robinnah Nabbanja.

CHAPTER THREE

CONSTITUTIONALISM

WHAT IS A CONSTITUTION?

A Constitution is the basic law governing a particular society. It is the fundamental law and is regarded as essential in the governance and well being of society. Virtually every state of the world has a Constitution and all these are written except for countries like the United Kingdom (Britain). A Constitution may take many different forms i.e. It may depend on culture, religion and politics.

A Constitution is primarily concerned with the establishment of governmental power and how power is distributed between the various organs of government so that each organ should know the precise extent of its powers and that is important for its relations with other organs of government but most importantly for relations between those organs and the citizens to whom they owe these duties. That is why it is at times called a contract or compact between the governors and the governed. And in this context of immediate concern are individual Human Rights in society. It is the Grundnorm i.e. the very reason for the validity of other laws. It is the super law of the land from which all others stand to be tested.

Why do we call the Constitution fundamental?

i) All laws derive their authority from the Constitution and in this sense each law must be justified from the basis of the Constitution. If that law is inconsistent with the Constitution, then the law shall to the extent of that inconsistency be null and void.[125]

ii) It is concerned with the ultimate distribution of power. It defines how power is acquired in political, administrative and judicial offices, who may be elected, who may vote, what powers the holder of an office may enjoy and how he may vacate office.

iii) It spells out relationship between the individual and the government that is it shows rights and duties of individuals to the government and vice versa. In particular, it establishes the extent of the rights the individual is supposed to enjoy.

[125] Article 2 (2), Constitution of the Republic of Uganda, 1995 (As amended)

BASIC CONCERNS OF CONSTITUTIONS

1. The power to make law and the manner in which these powers are to be handled i.e. the Legislative authority of government.
2. Constitutions are concerned with the exercise of executive authority.
3. The manner in which legal and political disputes are to be settled that is the judicial system of government.
4. The Constitution is concerned with identifying fundamental rights and duties of individuals and how these should be enforced.
5. It is concerned with the issue of citizenship.
6. Most Constitutions look at the question of property and property rights including resources like land. It is concerned with public finance i.e. raising of revenue, expenditure, system of control against malpractices.
7. A Constitution will also concern itself with the phenomena of internal and external securities and with the different bodies that make up this security.
8. It is concerned with administration of the public sector for example Local government.

Whatever the specific issues the Constitution is concerned with, the guiding principle is that it should be able to move with the times without destroying its terms that is, it should be time less but flexible.

CHARACTERISTICS COMMON TO CONSTITUTIONS AROUND THE WORLD

1. Supremacy

By supremacy is meant the notion that the Constitution stands over and above any other law, institution, authority or individual in the country as such all the above must obey the essential elements of the Constitution.[126] All previous Ugandan Constitutions have stated that the Constitution is supreme. Under the notion of supremacy, the responsibility of interpretation of the Constitution lies with the Judiciary. Executive authority under the doctrine of supremacy must also be exercised under the dictates of the Constitution. Likewise, the power to make laws to the election of such authority should be done in line with the Constitution.

2. Perpetuity

The Constitution should be perpetual because it is designed as a broad instrument of government. There is a saying that the Constitution is made today in order to identify and address issues of

[126] Articles 2 (1) and (2) and 20 (2), Constitution of the Republic of Uganda, 1995 (As amended)

tomorrow i.e. a Constitution takes a long term view of issues and attempts to address the specific problems affecting a country at the time at which it is made but also to be flexible enough in order to take care of future developments.

3. Certainty

This means the provisions of the Constitution should be certain or definite. They should be well known and accessible in terms of language so that it can be understood and interpreted in order to enable society to deal with conflicts that may arise over the enforcement of Constitutional provisions.

4. Providing for change

Good Constitutions provide a mechanism which enables the instrument to change to accommodate new social and political economic changes and ensuring that the Constitution can accommodate those changes. There are different ways of providing for amendment of the Constitution. Some can be amended by simple majority of parliament e.g. in Britain, yet others may be amended by referendum while others may require special authority. Amendment is a theory of maintaining that the Constitution remains relevant by providing for a basic change.

SOURCES OF CONSTITUTIONAL LAW

Where we have a written Constitution, the primary source is the Constitution itself but in addition, there are a variety of other sources of Constitutional law.

i) Ordinary Legislation or laws passed on a daily basis:
ii) With unwritten Constitutions, this becomes the major source of Constitutional law. But even where there is a written Constitution, we must always refer back to the law for example the law provides for the freedom of association or speech. In this way the organic or supplementary laws make part of the Constitutional law.
iii) Decisions of courts of law or the Judiciary particularly the doctrine of precedent which provides for continuity. Decisions of judges are important especially where decisions of Court conflict or where the Constitution is written in general terms.
iv) The source of authoritative writings i.e. the opinions of leading Constitutional law authorities. Here courts look for opinions of authorities or books on Constitutional law.
v) Constitutional Conventions/custom; These are simply Constitutional practices which have been accepted over a period of time in civilized nations of the world. Professor Dicey has described Constitutional conventions as follows “Rules or practices that are not necessarily enforceable by acts of law because they are based essentially on consent or acquiescence rather than enforcement. Nevertheless, they are binding on those to whom they apply. The

most famous Constitutional convention was the pre-1945 convention in USA which stipulated that a US President could serve only 2 terms.[127] President Franklin Roosevelt broke this convention.[128]

CLASSIFICATION OF CONSTITUTIONS

There are two broad categories of distinction i.e. the form of the Constitution itself or the type of governance which the Constitution creates. With regard to the form of the Constitution the most obvious is written and unwritten Constitutions.

CLASSIFICATION BY FORM

Where a Constitution is written, then all the principles governing the allocation of power structures and functions of government are contained in one or more documents which together are described as the Constitution of that country. Where a Constitution is unwritten; most of the provisions of that Constitution are spread up amongst ordinary legislation, doctrines of common law, decided cases and constitutional conventions. Collectively, this collection of instruments could be called the Constitution. The most famous of this type is the Constitution of the United Kingdom.

Advantages of a written Constitution

i) It will give you everything about the Constitution in one single document.
ii) Usually the language, style or format will be uniform
iii) The principles and doctrines of a written Constitution are more likely to subsist and endure as opposed to those of the unwritten Constitution. This is mainly because with an unwritten Constitution and parliament as supreme body, such a Constitution can be easily amended by a simple majority i.e. written Constitutions have continuity.

The other classification of Constitutions is that between general and detailed specified Constitutions. A general Constitution is concerned with establishing a broad framework of government and it does this by laying down the main principles by which it will be guided and so it leaves room for interpretation, in contrast a detailed Constitution tries to cover every aspect of Constitutional government in a written instrument. Therefore, it will have detailed provisions as allocation of power, functions of government and so on.

The other classification is flexibility and rigidity. This one deals with the method of alteration. When we talk about the rigid Constitution, we mean that the methods for amendment are relatively

[127] The Twenty-second Amendment (Amendment XXII) to the United States Constitution limits the number of times a person is eligible for election to the office of President of the United States to two, and sets additional eligibility conditions for presidents who succeed to the unexpired terms of their predecessors.
[128] Neale, Thomas H. (2009). Presidential Terms and Tenure: Perspectives and Proposals for Change

more stringent. Rigid Constitutions are characterized by special procedures for amendment which often take a long time and involve in high majorities either at the legislature or through a national referendum. Flexible ones require a simpler process and have less majority requirements. The second feature of a rigid Constitution is the feature of entrenched clauses i.e. clauses beyond amendment which have been singled out for special protection. As opposed to rigid Constitution, flexible Constitutions are easy to amend. The best example is the United Kingdom Constitution because it needs a simple majority for amendment. In general countries have favoured rigid Constitution. This is because:

a) of the need to provide checks and balances over the allocation of power and resource between different organs of the state.
b) where you have a diversity of people or a large country and the issue of regional interests is an important one, you will then have a federal Constitution and under this Constitution, the Constitution will be made rigid in order to protect the regional autonomy of the federal units and to ensure that the central government does not override those special interests arbitrarily. For this purpose, therefore, the United States Constitution is considered a rigid Constitution because it cannot be easily amended.
c) Countries also need a rigid Constitution to protect young and growing institutions of government or where there has been a violent history characterized by abuse of people's rights and freedoms or civil conflict and war.

CLASSIFICATION BY TYPE OF GOVERNMENT

When we speak of government we refer to the way in which the power and functions of state authority are distributed among different state organs of government. There may always be various types of government but for the purpose of classification, we may talk about certain key indicators. First and foremost is the number of people participating in the top decision making of government, secondly, what type of ruler has the Constitution created i.e. a benevolent, autocratic or democratic ruler and thirdly, we look at the actual distribution of power between the organs of government and the different levels of the government.

Pursuant to the above factors, the first classification is dictatorial and democratic government. Generally speaking, a dictatorial government places absolute power in the hands of a single individual which individual generally rules without the will or consent of the people. People cannot involve themselves in determining their political destiny and other affairs. As such there are no elections or if they are there are usually no choice exercised. In such a government opposition to the incumbent is not tolerated and freedoms and rights of people are violated at the leaders will.

On the other hand, a democratic government is characterised by the dispersal of power amongst a variety of different organs. There are also periodic, genuine and free and fair elections. There is in general respect for the rights and freedoms of individuals. Lastly the powers and functions of the different organs of government are separated from one another.

U N I T A R Y C O N S T I T U T I O N S

The biggest distinction of a unitary Constitution is that all powers are centralized and the system of government in operation is a unified one whereby all powers and authorities are vested in a single central government, to the extent that the regions, district or local government have limited powers. These are powers that are conferred to them by the state and may be taken away by the central government without necessarily infringing the Constitution. The general characteristic therefore is concentration of power in the central government.

Unitary system Constitution tends to be more flexible and can easily be amended. The vast majority of African states employ unitary Constitutions. The idea of federalism was an idea which was rejected by most African states at independence and the arguments being made were that national unity was more appealing. In this case the idea of national identity and a national language were crucial. In between the federal and unitary system of government we have the idea of decentralization which is especially an idea that has gained prominence in the case of Uganda.

F E D E R A L V U N I T A R Y C O N S T I T U T I O N S

The basic distinction between a federal and a unitary system of government relates to the fashion in which various powers and functions of government are vested in the central governing authority and the regions which make up the country. The reasons which necessitate the establishment of a federal system are numerous but among them include:

i) The question of culture: Many federal states become so because they have divergent and different ethnic groups and cherished characteristics which they consider require special protection to secure their identity and allowing for their autonomous co-existence. In such circumstances, it may be felt that a unitary system will destroy those distinctions. Some of countries using or following it are Canada, Switzerland and former Yugoslavia.

ii) The size or expanse of the country: Size becomes a consideration because it is obvious that it is quite impossible for the central government to have effective control over such a vast country. As such, for ease of governance of these autonomous regions, federalism is granted. (Examples of federal states include Russia, USA, Nigeria, and Canada.

iii) The third reason can be found in the historical circumstances surrounding a particular country. So for example a country could have been formed out of several autonomous

states which considered it useful to give up some of their autonomy in order to form part of the overall larger unit.

Main distinctions of a federal constitution and a unitary constitution.

1. Generally speaking, the main characteristics of a federal government relate to the way in which power is distributed and there is often a clear demarcation as to what type of powers can be exercised by the federal government and those to be exercised by the different regions so that there is a distribution of power and any violation of the distribution can have grave Constitutional consequences.

There are different ways in which federal Constitutions may achieve this distribution:

i) To list the powers of the central government and by implication those powers not listed will belong to the states

ii) The Constitution may provide the reverse i.e. if it states the powers of the local governments, by implications, the powers so left are for the centre.

iii) To list the powers of both the centre and the regions and then state that any undistributed power shall be dealt with in a specified manner.

2. The second characteristic of a federal government is that rather than having a single Constitution, each state has its own Constitution as well as a central one. So each region is ruled upon its own Constitution but the federal Constitution draws the boundaries.
3. Usually federal Constitutions stipulated elaborate procedures for amendment. These are usually difficult to amend.
4. Federal Constitutions always make provisions for a neutral territory to be the national capital.

REPUBLICAN VERSUS MONARCHICAL CONSTITUTION

The distinction between a republican and a monarchical government is mainly in the manner in which the Head of state is elected. A monarchical system is a system of government where the head of state comes into power by right of his or her birth. He or she derives his authority or power by virtue of a royal lineage.

With respect to the kind of powers that are exercised a monarch can be either absolute or Constitutional i.e. a figurehead or an actual ruler. A Constitutional monarch will have his/her powers spelt out in the Constitution and those powers are largely ceremonial and executive powers are usually left to elected rulers. This is the more common type of monarchies that we have around. An absolute monarch in contrast exercises power absolutely without any necessary

reference to any other instruments or institutions of state.

Republican Constitutions are such that the leaders of a country are elected by the people and periodically changed by the people. It does not recognize distinctions related to birth. The emphasis is based on equality of all people and their eligibility to hold responsibility at all level.

THE PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

i) Fundamental rights in here in all citizens and are not granted by the state but are inherent in citizens by the very fact of their birth[129]

It was espoused by Lugakingira J in **Rev. Christopher Mtikila V AG of Tanzania**[130] that 'fundamental rights are not gifts from the state. They inhere in a person by reason of his birth and therefore prior to the state and the law'.

This means that these rights are merely re-stated but the Constitution does not purport to be creating them. They to that extent must be looked at in a different light from other legal rights. It is therefore important that the state should in no way always require permission from its organs and agencies like the Uganda Police in order for the citizens to enjoy these rights.

ii) The Constitution must be interpreted as a whole

It was settled by the Supreme Court of the US in **South Dakota V North Carolina**[131] that no single provision of the Constitution is to be segregated from others and to be considered alone but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the greater purpose of the instrument'.

Therefore, in law the Constitution is a wholesome legal document and all provisions must be regarded as constituting it. The normal logic in this canon is that in order to ascertain the true meaning and intention of the legislators, all relevant provisions must be considered. It is thus dangerous to consider any particular human right provision in isolation of all others and any court which tries to do this is bound to get an inconsistent conclusion.

iii) The Preamble and Directive Principles offer some guidance in interpretation

The Preamble and the National Objectives and Directives Principles of State Policy must when necessary be taken into account to supply the intention of the framers. But critically, this must be done without violating the meaning of the words used. The simple rationale to this canon is that the rights granted by the Constitution do not exist in a vacuum and are not an end in themselves. They are granted upon a given background and it would be lethal for any court to interpret the provisions in total segregation of the preamble and the Directive principles. In Uganda the basic importance of

[129] Article 20(1), Constitution of the Republic of Uganda, 1995 (As amended)
[130] Civil CaseNo.5 of 1993
[131] 192 US268 (1940) 448

this was stated by Egonda-Ntende J in **Major General David Tinyefuza V Attorney General**[132] wherein he stated that:

"*the binding values in this Constitutional dispensation are clearly set forth in the Preamble. These are unity, peace, equality, democracy, freedom, social justice and progress. In order to ensure that all citizens organs and agencies of the state never lose sight of those values and are firmly guided by these values in all our actions, a statement of National Objectives and Directives of State Policy was set forth. The first paragraph states 'The following objectives and principles shall guide all organs and agencies of the state…and persons applying or interpreting this Constitution or any other law… for the establishment and promotion of a just, free and democratic society" That ought to be our first canon of construction of this Constitution. It provides an immediate break or departure with past rules of Constitutional construction".*

This is further given life by Article 126[133] which recognizes that judicial power is derived from the people and that it must be exercised by the courts in accordance with the Constitution and 'in conformity with the law and with values, norms and aspirations of the people".

It was held by Kanyeihamba JSC in **Attorney General V Major Gen. David Tinyefuza**[134] that 'it is therefore important to know and appreciate the historical and contextual background to the Uganda Constitution and the manner in which it carefully demarcated responsibilities and functions amongst the various organs and institutions of state before applying its provisions to given sets of facts and circumstances". Oder JSC also shared a similar view and added that the preamble and the directives must always be borne in mind and noted that the preamble refers to the struggle of the people of Uganda against the forces of tyranny, oppression and exploitation. The same was done by the Supreme Court of South Africa in **De Clerk & V Du Plisses & Ors** [135]

iv) Where words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning.

Such language must be given its common and ordinary sense and natural sense means that natural sense which they bore before the Constitution came into force.

In the case of **R V El Mann**[136] court cited with approval Craies on Statute Law (6th Ed) 66 wherein the learned author states that' the cardinal rule for construction of Acts of Parliament is that they should be construed according to the situation expressed in the Acts themselves. The tribunal that has to construe an act of a legislature or in deed any other document has to determine the intention

[132] Const. Petition No.1 of 1997
[133] Constitution of the Republic of Uganda, 1995 (As amended)
[134] Const. Appeal No.1of 1997
[135] (1994) 6 BLR 124.
[136] (1969) EA 357

as expressed by the words used…If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences for in that case the words of the statute speak the intention of the legislature…we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment and that is when the words used are precise and unambiguous they are to be construed in their ordinary and actual sense. It is only when there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put on the words'.

v) Where the language of the Constitution is imprecise or ambiguous, then a liberal, flexible, generous and purposeful interpretation must be given to cure the ambiguity.

The rationale for this is that the Constitution is not an ordinary statute capable of amendment as and when the legislators chose.

This was best illustrated in **Unity Dow V Attorney General of Botswana**[137] where in Amissah J.P said that:

'The makers of the Constitution do not intend that it be amended as often as other legislation, indeed it is not unusual for provisions of the Constitution to be amendable only by special procedures, imposing more difficult terms of heavier majorities of the legislature. By nature, and definition even when using ordinary prescription of statutory construction, it is impossible to consider a Constitution of this nature on the same footing passed by a legislature which is itself established by the Constitution. The object it desires to achieve evolves with the evolving development and aspirations of its people'.

In **Salvatori Abuki V Attorney General**,[138] Okello J (as he then was) stated that 'If the purpose of the statute infringes a right guaranteed by the Constitution, that statute is declared unconstitutional. Where the purpose of the statute is purportedly within the Constitution, the court would go further to examine its effect. If the effect violates a right guaranteed by the Constitution, that statute is also declared unconstitutional'.

In **R V Big Drug Mart Ltd,**[139] the Supreme court of Canada stated that 'the interpretation should be a generous one rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter's protection'.[140]

[137] (1992) LRC 623
[138] Const. Petition No.2 of 1997
[139] (1985) DLR (4th) 321
[140] See also Attorney General V Momodou Jobe (1984) AC 689.

Connected to this cannon is the meaningful and effective rule. Under this, courts may expand the meaning of a phrase or term to accord it with the legislative effect. In **Tellis & Ors V Bombay Municipal Council,**[141] the petitioners argued that if they were evicted from their slum and pavement dwellings, that would violate their right to life under Article 21 of the Indian Constitution. They sought to argue that the right to life included the right to livelihood. The Supreme Court accepted their argument and added that 'if the sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away for example by the imposition and execution of the death penalty, except according to law. That is but one facet of the right to life. An equally important facet of that right is the right to livelihood. If the right to livelihood is not treated as part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live'.

This case and passage was quoted with approval and agreed to apply 'with equal force to the right to life as protected under the Uganda Constitution'. This was in **Salvatori Abuki V Attorney General**[142]. In that case, the petitioners were banished from their homes for 10 years after serving a prison sentence for contravention of the Witchcraft Act. The Constitutional court struck down the Act as being unconstitutional and inconsistent with the Constitution which guaranteed citizens from cruel, inhuman or degrading treatment, the right not to be compulsorily deprived of property and the right to life. The court took judicial notice of the fact that most people in Uganda live in rural areas and survive on the land. Court considered that the banishment provisions would have the effect of excluding the banished person from shelter, food by denying him access to land and that such a person is rendered a destitute upon leaving prison.

vi) The Constitution must be interpreted as a living document

This cannon enjoins the courts to interpret the Constitution having in mind present day circumstances. It also means that it is meant to cater for both the present generation and those unborn. In **Unity Dow V Attorney General**,[143] it was remarked that, 'the Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece. On the other hand, the courts must breathe life into it from time to time as occasion may arise to ensure the healthy growth of the state through it. We must not shy away from the basic fact that while a particular construction of a Constitutional provision may be able to meet the designs of the society of a certain age…it is the

[141] (1987) LRC (Const.) 351
[142] Const. Petition No.2 of 1997
[143] (1992) LRC 623

primary duty of the judges to make the Constitution grow and develop in order to meet the just demands and aspiration of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity'.

vii) The Harmonisation of conflict principle

This means that where two constructions are possible and one is very restrictive of the guaranteed rights and the other permissive then the latter is to be preferred of the two. In **Mtikila V AG of Tanzania,**[144] the court was encountered with conflicting Constitutional provisions. The Tanzanian Constitution granted every citizen the right to participate in the government of the country and the right not to be compelled to belong to or subscribe to a particular political party. However, an amendment was passed which barred any citizen from running for any political office unless they were members of and sponsored by one of the recognized parties. In holding that these two provisions read together could not bar independent candidates from standing held that

'*when a provision of the Constitution enacting a fundamental right appears to be in conflict with another provision of the Constitution…the principle of harmonization has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole and no one provision destroying the other but each sustaining the other...if the balancing act should succeed, the court is enjoined to give effect to all the contending provisions. Otherwise the court is enjoined to incline to the realization of fundamental rights and may for that purpose disregard even the clear words of a provision if their application would result in gross injustice…These propositions rest above all on the realization that it is the fundamental rights which are fundamental and not the restrictions".*

viii) Narrow construction to be preferred in case of derogation from a guaranteed right.

It is not in doubt that save for the rights mentioned in Article 44 which are stated to be non-derogable, the rest can be limited. But the power to do so is not at large and is not to be arbitrarily exercised by courts. Indeed, under Article 43, it is stated that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. Public interest is in turn stated not to permit among others any limitation of the enjoyment of those rights beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution.

This ordinarily means that all that a victim of infringement has to do is to plead that his right has been violated unreasonably. Once he does this, then the burden shifts to the alleged infringer to prove that this was in the circumstances reasonable and justified. In **Charles Onyango Obbo &**

[144] Civil Case No.5 of 1993

Andrew Mwenda[145], the two petitioners who were journalists in the Monitor newspaper were charged on two counts of publication of false news contrary to section 50 of the Penal Code[146]. They had run a story which among other had the head line 'Kabila paid Uganda in Gold, says report'. The particulars of offence had quoted a paragraph of the story that "President Laurent Kabila of the newly named Democratic Republic of the Congo (formerly Zaire) has given a large consignment of gold to the Government of Uganda as payment for services rendered by the latter during the struggle against the former military dictator, the late Mobutu Sese Seko". The petitioners claimed that section 50 was inconsistent with Articles 29 (1) (a) and (b), 40 (2) and 43 (2) (c) of the Constitution.[147]

Justice Mulenga espoused the fact that the protection of guaranteed rights is the primary objective of the Constitution and the limitation of their enjoyment is an exception to their protection and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. He stated on authority that the criteria to be satisfied includes;

a) the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right
b) the measures designed to meet the objectives must be rationally connected to it and not arbitrary, unfair or based on irrational considerations.
c) The means used to impair the right or freedom must be no more than necessary to accomplish the objective.

He was satisfied that Section 50 of the Penal Code Act making publication of false news a criminal offence did not satisfy that test. In his view there were two interests to be balanced here. The first was the freedom and self fulfillment from the exercise of the freedom of expression or from receiving information and ideas from those who impart it. The second is that the country as a democratic society derives the benefit of promoting democratic governance. He added however that although no doubt there was a non-quantifiable benefit of protecting the public, the Section to pass the test must have achieved the purpose of protecting them against real or actual danger and not merely speculative or conjectural danger of alarm or disturbance of the peace. He concluded that the second benefit was so much outweighed that it could not in any sense justify over riding the first interest of access to information.

He in showing that Section 50 used a measure which was not proportional at all to its apparent

[145] Const. Appeal No.2 of 2002
[146] Cap 120
[147] Constitution of the Republic of Uganda, 1995 (As amended)

objective, he noted that the section in fact prevented the publication of expressions likely to cause public fear, alarm or disturbance of peace even if it does not cause any such mischief. That accordingly, to criminalize the publication in this way was akin to killing a mosquito with a sledge hammer. He criticized an analogy that Berko JA had given in the court below that the essence of criminal law is that freedom of expression and speech should not be invoked to protect a person 'who falsely shouts fire, fire in a theatre and causing panic'. In his view, such a 'fire alarm' had to in fact cause panic and that panic had to prejudice the public interest. He also adverted to the fact that it would require with some sense of divine pre-science a person to measure what impact such a statement would have on the public. It was enough if it did not in fact cause any panic but was likely to cause it. This was an unacceptable provision. He also noted the unusual burden of proof of the section in that the prosecution did not have to prove guilty knowledge but instead to avoid liability one had to take provable measures to verify the accuracy of every statement, rumour or report before publishing it. He also considered the impossibility of calculating the public reaction that a certain publication will cause beforehand. He concluded that such a measure of restriction is not proportional to the mischief intended to be cured and could thus not be justifiable in a free and democratic society. He, as well as court held that Section 50 of the Penal Code Act was inconsistent with Article 29 (1) (a) and thus void. Court concluded that where a law places a limitation on a guaranteed right, it can only be valid if it passes the test laid down by Article 43

This limitation in Article 43 (2) (c)[148], cannot sustain the argument that what is acceptable and justifiable varies from society to society. Justice Mulenga in jettisoning this argument by the Attorney General in this case stated that clearly the Article presupposes the existence of universal democratic principles to which every society adheres. While there may be variations in application, the democratic values and principles remain the same. Legislation which seeks to limit rights in Uganda is not valid under the Constitution unless it is in accord with those universal principles.

ix) Where the rules of practice is rigidly applied will defeat the process of giving effect to guaranteed rights, they must be reasonably relaxed

This is perhaps best supported by Article 126 (2) (e)[149] which requires courts of law to dispense substantive justice without any undue regard to technicalities. Accordingly, it is the merits or substance of the petition and not the procedural technicalities that count.

Manyindo DCJ in **Tinyefuza V Attorney General**[150] stated that 'the case before us relates to the fundamental rights and freedoms of the individual which are enshrined and protected by

[148] Constitution of the Republic of Uganda, 1995 (As amended)
[149] Ibid
[150] Const. Petition No.1 of 1997

the Constitution. It would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This court should readily apply the provision of Article 126 (2) (e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities'.

It is surprising however that hardly a year after this very succinct statement of the law, the same court appeared to have abandoned this activism. In **Rwanyarare & Anor. V AG**[151] it said that, 'we do not see that Article 126 (2) (e) has done away with the requirement for litigants to comply with the Rules of procedure in litigations. The Article merely gives Constitutional force to the well known and long established principle at common law that rules of procedure act as hand maidens of justice'.

In **M/s Kasirye, Byaruhanga & Company Advocates V Uganda Development Bank**,[152] the Court of Appeal noted after reading Article 126 (2) (e) that 'we have underlined the words 'subject to the law'. This means that clause (2) is no licence for ignoring existing law…a litigant who relies on the provisions of Article 126 (2) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay un due regard to a relevant technicality. Article 126 (2) (e)[153] is not a magic wand in the hands of defaulting litigants'.

Whereas the present interpretation of Article 126 (2) (e)[154] remains shrouded by uncertainty, it appears that courts of law do insist on meeting procedural requirements and require a party to plead the Article after proving that he has not omitted procedural requirements. However, realistically speaking, it certainly cannot be right, at least when fundamental human rights are in issue, that courts of law should consider their hands tied and refuse to hear the merits of a Constitutional petition merely because some procedural lapse exists even when they can clearly ascertain the merits of the dispute before them. This would be a very unfortunate trend by our courts yet it appears to be the favoured one.

x) International Human Rights Conventions and Treaties may be used interpretation.

This cannon was well summarized in **Unity Dow V Attorney General,**[155] wherein the court remarked that although it is common view that conventions do not confer rights on individuals

[151] Constitutional Petition No.11 of 1997
[152] Civil Appeal No.2 of 1997
[153] Constitution of the Republic of Uganda, 1995 (As amended)
[154] Ibid
[155] (1992) LRC 623

within the state until Parliament has legislated and incorporated them into local law, those conventions may be referred to as an aid to construction of the Constitution and that it would be wrong for the courts to interpret its legislation in a manner which conflicts with international obligations.

The rationale is that whether ratified or not, these conventions contain universally recognized human rights to which no civilized nation can derogate from. Even when they are yet to be ratified, it is the clear duty of court to speed up this process by using them in interpretation of the Constitution.

xi) The Sui Generis Rule

The word 'sui generis' means in a class of its own. The Constitution stands on a very different footing from other legislation even though in fact the principles which govern other legislation for the most part (but not always) also govern the interpretation of the Constitution. It is the only reason why all other laws are subjected to it and why they are declared null and void to the extent that they are inconsistent with it.

It is also the reason why the language used is much broader and encompassing than that used by all other statutes. It is intended to cover rights and freedoms for all people without discrimination and because it is made for present generations and those unborn.

B A S I C S T R U C T U R E D O C T R I N E

This was an Indian Supreme Court principle stating that the Constitution of every country or Jurisdiction has the special feature that cannot be amended by its Legislative body. This is hidden in the reasoning that amending such provision would result into change of the drastic pillars of the constitution making it an unrecognizable. This was first affirmed by Jurist from Germany known as prof Conrad Dietrich. In his view, he argues that amending such provision would result into rewriting of the constitution which mandate is not placed in the hands of legislature. His idea was later inhaled by the judges of India and it became part of their jurisprudence in the 1960's and the 1970's which has since influenced the development of constitutionalism and the rule of law in the various democratic jurisdictions across the world. India, it was natured in the landmark case of **Kesavananda Bharati V state of Kerala**[156] wherein court noted that though the amendment power of parliament is not an limited it does not include power abrogate or change the identity of the constitution. Courts emphasis was that the constitution has specific feature form the spirit of the constitution and their unnecessary amendment would render the constitution unrecognizable as it loses dignity from the masses due lack of such a structure in its spirit. Therefore, any amendment

[156] AIR 1973 SC. Also cited as (1973)4SCC 225

which purports to alter such features is void and ought not to take effect as it tantamount to rewriting the constitution which mandate the parliament does not hold.

The decision in this case acted as a piece of spects to enlighten other judges in the land while addressing and determining any matter whose roots were fixed in the basic structure of the constitution. **In Minerva Mills V Union of India**[157] wherein Court observed that the basic foundation of every constitution in the democratic world is the dignity and the freedom of its citizens which is of supreme importance and cannot be destroyed by any legislation made by parliament. It therefore held that parliament has no power to repeal or abrogate or destroy the basic or essential features of a constitution. Because of its importance, its existence could not be suffocated in other jurisdictions but rather given life supporting machines to uphold the spirit if the Constitution which is the center for trust and belief in the supreme law. In South Africa, it was adopted in **Executive council of West Cape Legislature v The president of the Republic of South Africa and others**[158]wherein court explained the doctrine in the sense that "there are certain fundamental features of parliamentary democracy not spelt out in the constitution but which are inherent in its nature, design and purpose. There are certain features of the Constitutional order so fundamental that even if parliament followed the necessary amendment procedures it could not change them."

In their wisdom, the judges found it wise to uphold the basic structure of the constitution in order to retain its cognoscibility and respect from the masses. But it is worth noting that in all the cases stated above, courts are reluctant to specify the provisions that form the basic structure of the constitution. But important to note is that these provisions vary from country to country and on a case to case basis basing on the interests of the people in that jurisdiction not forgetting its history based on social, political and economic challenges in line with the natural objectives which one would refer to as the vision of the economy.

In Kenya its face was traced in **Njoya v Attorney General and Others**[159] wherein Court held that Parliament may amend as many provisions of the constitution as possible so long as the document retains the character as the existing constitution and the alteration of the Constitution does not substitute it thereof for another. In Bangladesh, in **Answar Hussain Chowdhery v Bangladesh**[160], it was said that call it as it may, basic structure or whatever, but that is the fabric of the constitution which cannot be dismantled by an authority created by the constitution its self.

[157] AIR 1980 SC 1789.
[158] CCT/95: [1995] 2ACC8; 1995(10) BCLR 12 89; 1995(4)SA 877.
[159] AHRLR 157

It's now no doubt that courts in the various jurisdictions do recognize and earn, reword respect to the basic features of the Constitution that form its fabric core centers for its strength in determining such a question, courts tend to draw attention to the preamble of the Constitution, National Objectives and Directive Principles of State Policy, the Bill of rights and the History of the Constitution.

In Uganda's Jurisprudence, the idea of the basic structure was much discussed **in Male H.K Mabirizi and Others v Attorney General and Others**[161]**.** Indeed, the basic structure does find its roots in the 1995 Constitution. The principal character of this Constitution which constitutes its fundamental pillars includes such principles as the sovereignty of the people, democratic governance, the constitution as the supreme legal instrument, a unitary state and the judiciary, Bill of rights ensuring respect for and observation of the fundamental rights and judicial independence. All these are upheld by the various constitutional provisions which I shall deal with later[162].

According to Remy Kasule these include sovereignty of the people, supremacy of Constitution, defence of the Constitution, non-derogation of certain rights, democratic principles especially right to vote, abolition of the one party state and independence of the judiciary while Justice Elizabeth Musoke JCC limited herself to only sovereignty of the people and the non derogable rights in the Bill of rights.

In his dissenting judgment, Kenneth Kakuru's view was broad which to him encompasses sovereignty of the people, supremacy of the Constitution, political order through a durable and popular Constitution and political stability based on the principle unity, peace, democracy, freedom, social justice and public participation. In his wisdom, he saw it necessary to add the rule of law, observation of human rights, regular free and fair elections, separation of powers accountability of government to the people, non derogable rights, the idea that land belongs to the people and cannot be taken away from them by government without appropriate compensation, the idea that the state holds natural resources in trust for the people, the duty of citizens to defend the constitution and abolition of the one party state.

It's worth noting that the Constitution permits its amendment and it's so loud on this matter as it underlines the various ways for its amendment under Chapter eighteen. **Article 259(1)**[163]is to the effect that "subject to the provisions of this constitution, Parliament may amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this chapter." The amendment of the constitution can only be done through an Act of parliament.

[161] Supreme Court Constitutional Appeal No 2 of 2018
[162] DCJ OwinyDollo in MALE mabirizi and Others v Attorney General Constitutional Petition No49 of 2017
[163]Constitution of the Republic of Uganda, 1995 (As amended)

This is critical point of consideration to the effect that the constitution cannot be amended without an Act of Parliament.

The 1995 Constitution therefore allows amendment of various provisions by parliament. These provisions are in three segments. The first segment or category is one that requires a referendum and these are provided for under Article 260.[164] The other contains provisions whose amendment requires approval of District councils and the support of two thirds of all members of Parliament at the second and third readings. The said Articles include Article 5(2), 152,176(1), Article 178, 189 and 197.[165] The last category of provisions is one that requires amendment by Parliament direct so long as it constitutes of at least two thirds of members of Parliament on the second and third readings. For these provisions, there is no need for a referendum or approvals by the District councils for these provisions are directly amended by Parliament.

The provisions in the first category have been noted to form he basic structure of the Constitution which means that they cannot be amended by the normal Constitutional process. Particularity, for this discussion, this paper shall focus on the provisions that can be amended by compliance to Article 260 since they form the basic structure of the constitution The Article provides that; the Bill for an Act of Parliament seeking to amend any of the provisions specified in Clause 2 of the Article shall not be taken as passed unless;

(a) It is supported at the second and the third readings in Parliament by not less than two thirds of all members of Parliament and
(b) It has been referred to a decision of the people and approved by them in a referendum.

These provisions are provided for under Article 260(2)[166] of the constitution and they include Article 1 which concerns the sovereignty of the people, Article 2 which is on the supremacy of the Constitution, Article 44[167] which concerns non derogable rights, Article 69 which is on prohibition of one party state, Article 74 and 75 which concern prohibition of one party state and right to choose a political system, Article 79(2)[168] which is on power of Parliament to delegate its law making powers, Article 105(1) which is on the tenure of office of the president, Article 128(1) which is on the independence of the judiciary and lastly is chapter sixteen.

As already noted, there amendment requires a referendum that is the support of the people and the support of two thirds majority votes of members of parliament. Going by the decision in the **British Caribean Bank v The Attorney of Belize**[169]such provisions form the fundamental principles of

[164] Ibid
[165] Ibid
[166] Constitution of the Republic of Uganda, 1995 (As amended)
[167] Ibid
[168] Ibid
[169] Claim No 597 of 2011

the Constitution and have been preserved for all times to come and that they cannot be amended out of the existence. Article 102(b), the cause of the historical event of 2017, does not form part of these provisions neither doesn't form part of the provisions under Article 261[170] or the second category. This means this Article could be amended by the normal Constitutional amendment process. Justice Stella Amoko remarks that this provision did not necessitate the requirement of the referendum meaning that Parliament need not to comply with Article 260.

IMPORTANCE OF THE BASIC STRUCTURE DOCTRINE

The basic structure doctrine has become a more significance way beyond the view and expectation of its proponents. The idea that though parliament has wide powers to amend the constitution, its powers are unlimited and does not extend to the power to tamper or do away with clauses which are basic to the structure of the constitution has now become of more importance as a safeguard against the actions and interventions of a party that may be controlling majority in Parliament abusing its majority position to eradicate, erode and diminish the structure of the Constitution by doing away with vital provisions. This may be due to their view that such provisions are becoming a wall against their retention of power or performing their desires by introducing provisions that benefit their desires of entrenching in powers for long.

Though many of the Constitutions prescribe expressly provisions for their amendment by describing an elaborate procedure, many of these provisions are not enough to afford it protection. This can occur where the governing party or group of people or ruling party has majority of members of parliament which circumstance they can rely on to pass any amendment which circumstance they can rely on to pass any amendment. Therefore, in such a situation, the express provisions of the Constitution shall be insufficient to afford the Constitution protection. **Sikiri, CJ in Kesavananda Bharat v State of Kerala**[171]explained the importance of the doctrine in guarding against the abuse of parliamentary majorities and warned about the likely consequences of such. He observed that;

"A political party with two thirds majority in parliament for a few years could so amend the constitution as to debar any other party from functioning, establish totalitarianism, enslave the people and after having effected these purposes make the Constitution un amendable or extremely rigid. This means that it would no doubt invite extra constitutional revolution."

Therefore, since that can be anticipated by the majority of the constitutional framers and the people, the need to protect the Constitution has driven the judiciary to apply the basic structure to protect and preserve the Constitution. In view, the basic structure is the only shield the people have through

[170] Constitution of the Republic of Uganda, 1995 (As amended)
[171] AIR 1973 SC

the judiciary to protect the spirit of the Constitution where it faces graduated stabbing by the majority members of the ruling party. Therefore, in circumstances where the separation of power doctrine has been violated where by the executive holds a root in the judiciary then the desires of the people to protect such entrenched provisions shall not succeed which may render the supreme law weak by losing its spirit.

Having considered that, it's the basis of the reasoning why the five justices of the Constitution court and the seven supreme Court were unanimously in deciding that Article 102(b)[172] of the Constitution is not part of the basic structure of the Constitution. In their finding, those that form the basic structure are those that are entrenched which were categorized and placed under the umbrella of Article 260.[173]

It's on this point that I shall now deal with the limitations of the basic structure doctrine as a mechanism for clear understanding of the doctrine.

ENTREACHMENT PROVISIONS AND CONSTITUTIONALITY

An entrenched clause or entrenchment clause of a basic law or constitution is a provision that makes certain amendments either more difficult or impossible to pass, making such amendments invalid. Overriding an entrenched clause may require a supermajority, a referendum, or the consent of the minority party. The term eternity clause is used in a similar manner in the constitutions of Brazil, the Czech Republic, Germany, Greece, India, Iran, Italy, Morocco, Norway, and Turkey, but specifically applies to an entrenched clause that can never be overridden. The Constitution of Colombia contains similar provisions aimed at making it difficult, but not impossible, to change their basic structure.

Once adopted, a properly drafted entrenchment clause makes some portion of a basic law or constitution irrevocable except through the assertion of the right of revolution. Any amendment to a basic law or constitution that would not satisfy the prerequisites enshrined in a valid entrenched clause would lead to so-called "unconstitutional constitutional law"—that is, an amendment to constitutional law text that appears constitutional by its form, albeit unconstitutional due to the procedure used to enact it or due to the content of its provisions.

Entrenched clauses are, in some cases, justified as protecting the rights of a minority from the dangers of majoritarianism. In other cases, the objective may be to prevent amendments to the basic law or constitution that would pervert the fundamental principles it enshrines. However, entrenched clauses are often challenged by their opponents as being undemocratic.

[172] Constitution of the Republic of Uganda, 1995 (As amended)
[173] Constitution of the Republic of Uganda, 1995 (As amended)

Over the years, the would have been entrenched provisions of the Constitution have been portrayed not to be. The government has occasionally amended the vital provisions of the constitution.

In 2005, Uganda's parliament overwhelmingly backed the removal of presidential term limits. This is a measure which critics said was designed to install President Yoweri Museveni for life. This move by the legislative arm of government sent chills in the authenticity and pride of the Constitution.

Interestingly, an overwhelming number of the legislators gave the move the bill a green light. A total of 232 MPs voted in favour of the motion, 50 against and one abstained. This was during the time when the parliament speaker was Edward Ssekandi. He would lead the parliament for the next five years and later become the vice president for the next ten years.

This amendment has been acknowledged as a regret by high dignitaries in the incumbent government. Chief Justice Alfonse Owiny-Dollo is recorded[174] to have intimated that;

"I don't think this thing of age limit was a big issue; but what I wept for this country was for the removal of the presidential term limits. That is where we lost it. The mistake we made in the Constituent Assembly was not to entrench, not to make it difficult for anyone to amend the provisions of the term limits… That one, I take responsibility and anybody else who was in the Constituent Assembly; that we should have secured, entrenched that provision so that if you want to amend that particular Article, you would go back to the people. We failed the people of Uganda as a consequence,"

Such an admission from a person so powerful in the government goes to show that the Constitution no longer holds the dream and is just a book where we can freely cross and rewrite our own dreams.

It is also recorded that in 2003, after a meeting at National Leadership Institute-Kyankwanzi, his ruling party initiated the process to amend the Constitution to remove the two presidential term limits. Each MP was paid Shs 5m 'facilitation' to consult the electorate about the amendments, without which President Museveni would not have been eligible to stand again in 2006.

At the time, some senior NRM members and Cabinet ministers opposed the move to remove presidential term limit clauses from the Constitution. Many of them were subsequently sacked from Cabinet. The Constitution was finally amended and the term limits removed in 2005.[175]

Again, in 2017, there was yet another shock wave regarding the removal of the age limit in the Constitution; another vital provision. Article 102(b), which provided for the age limit, was removed

[174]Daily Monitor, 14th October, 2020. I regret removal of term limits for president – Chief Justice, [online] available at; https://www.monitor.co.ug/uganda/news/national/i-regret-removal-of-term-limits-for-president-chief-justice-2480632 (accessed on 1st July, 2021)

[175] Ibid

from the Constitution in December 2017 after a controversial process that saw the police break up rallies of MPs opposed to the idea and MPs in favour given 'facilitation' to consult their constituencies.[176]

Results of an opinion poll released by Research World International (RWI) yesterday show that nearly seven out of 10 Ugandans did not support the removal from the Constitution of the 75-year age limit for presidential candidates.

The army invaded Parliament and got involved in a confrontation with dissenting MPs who were trying to filibuster the debate on the removal of the provision, leaving two of them requiring treatment abroad.

The process was challenged in the Constitutional Court through separate petitions by a group of MPs, the Uganda Law Society and an individual, Mr. Male Mabirizi, which petitions were consolidated during the hearing.

The Constitutional Court maintained the amendment by a majority decision of 4-1, and the Supreme Court, on appeal, also maintained it, albeit with a much closer majority decision of 4-3.

The courts ruled that consultation of voters was sufficient, even when some voters attacked pro-age limit MPs or forced others to flee from chaotic meetings. Afterwards, many of the pro-age limit lawmakers sought special protection from the State, claiming their lives were in danger. President Museveni proposed a lead car with army snipers, but the arrangement was shelved over costs and logistical overheads.

Before the 'age limit', as it came to be known, was removed from the Constitution, a poll commissioned by civil society organisations by Citizens Coalition on Electoral Democracy (CEEDU) and Uganda Governance Monitoring Platform (UGMP) showed that 85 per cent of Ugandans opposed the move.

The study titled; "Citizens' Perceptions on the Proposed Amendment of Article 102(b) of the Constitution", sampled 50,429 citizens in 80 constituencies across the country. It covered 22,926 females and 27,503 male respondents.

In the new poll for which interviews, RWI says, were done between April 12 and April 25, over a year after Parliament voted to remove the age limit by 317 voting in favour and 97 against, 65 per cent of the respondents said they did not agree with the decision.

Twenty-eight per cent said it was a good decision. Four per cent said they did not know whether it was a good or bad decision, while three per cent said they had no comment on the issue.

To generate these responses, the following question was put to the respondents: "Some people

[176]Daily Monitor, 6th May 2019, Voters fault MPs on age limit removal, [online] available at; https://www.monitor.co.ug/uganda/news/national/voters-fault-mps-on-age-limit-removal-1824194 (accessed on 1st July 2021)

think that presidential age limit was important and, therefore, removing it was bad, while other people supported the idea of removing the presidential age limit so that anybody can contest as much as he wishes. What are your views?"

The question was put to all 2,042 respondents who participated in the poll who, according to RWI researchers, were selected scientifically from across the country, taking into account demographic proportions according to age and region provided by official statistics.

Despite the disagreement by the majority of the citizens, the constitution was again tampered with and made to allow for a possibility of life presidency. This therefore begs the question; does the Constitution really still hold the dream? Or can we say that the country now no longer has the dream.

The story usually told to validate these atrocities is the liberation story of 1986. The incumbent president reckons that the country was in turmoil, 30 years after independence and his aim was to clear the air for a fresh Uganda. Today, for most people who were born after 1986, this story holds no relevance, given the current situation of things. If history was really that tainted with impunity as they put it, then the actions today would all be geared to ensure it never occurs again.

C O N V E N T I O N S

In **Liversidge V Anderson**,[177] the main issue was imprisonment without trial of the appellant Mr. Liversidge on orders of the Home Secretary empowered by Regulations under the Defence Act when he had reasonable ground of believing that he had a hostile origin. Liversidge challenged the order on grounds that the Home Secretary failed to give him the reasons for detention and that a minimum of such reasons would have been given to him under the law. The majority of court held that under those regulations it was only necessary for the Home Secretary to have reasons for detention but the Home Secretary was under no obligation to give those reasons to the appellant. Rather it was up to parliament to require the minister to explain these reasons if they wished in accordance with the convention of ministerial responsibility which convention stipulated that ministers of cabinet can be compelled by parliament to give reasons for any conduct carried out in execution of their ministerial duties.

C L A S S I F I C A T I O N O F C O N V E N T I O N S

These are of 4 broad categories of conventions.

1. Conventions related to the executive
2. Conventions governing the cabinet

[177] (1942) AC 246

3. Legislative or parliamentary conventions
4. Conventions governing Judiciary.

The majority of these conventions come from British constitutional law and many of them have been incorporated into the written Constitutional provisions which countries like Uganda have.

Examples of conventions:

1. **Executive/Royal Prerogative**

a) The first is that the Head of state should normally act on the advice of his or her ministers. This is the case where we have there is a honary head of state.

b) The second convention which applies in a multi-party system of government states that the Head of state should invite the leader of the party that enjoys majority support to form the government unless there are serious objections or reasons to such party taking the leadership of government.

c) The Head of state should always by convention give his or her assent to bills presented to him or her by parliament or legislature[178]

2. **Conventions governing cabinet/system of ministerial responsibility.**

a) The cabinet must be unanimous in the advice given to the state. Once cabinet has made a decision then every individual member of cabinet must abide by that decision in advising the president and the public. Furthermore, when in parliament, the cabinet must provide a united front even if an individual minister disagrees with the cabinet; he must take the common stand. Where he is unable to agree with the position taken, then he or she should resign. Individual members of Cabinet should therefore not disagree publicly in society. This is under the principle of collective responsibility.

b) The government especially in a multiparty system, must enjoy the support of the majority in the legislature or commons. If there is a vote of no confidence in the leader of the majority party or if the party by defections or by other means loses its majority in the House, then the government must be dissolved and a fresh general election be called in order to either renew the mandate or for the opposition to take over government.

c) Cabinet ministers must accept responsibility for the authorized conduct of officials in their ministry so if a minister delegates a person to do certain duties then the minister is responsible for his defaults and must account and protect their conduct. If there is a serious misconduct, the minister or officials responsible should resign.

[178] Article 91, Constitution of the Republic of Uganda, 1995 (As amended)

3. Conventions of Parliament/Legislative

a) The first and most fundamental convention is that of parliamentary immunity which says that the member of the legislature shall not be subject to civil or criminal processes for any utterances or statements made in the exercise of their functions as members of government. That immunity covers members of parliament so long as what they are saying or doing is covered by the rules of parliament.

b) Elected members in the House take precedence over nominees or ex-officio members of government. These are non-elected members and must succumb to the will of the elected members.

c) The 3rd convention that applies in multi-party system is that members of the opposition and minor parties must be given opportunity to be heard and that the Speaker of the House must be neutral as to the functioning of the House and he has the duty to give equal opportunity to members of the opposition to present their views.

d) Ordinary members of parliamentary or back benchers must have access to the front bench in the sense of being allowed to question ministers about various issues and the ministers must be able to satisfactorily answer the questions of the MPs.

4. Judicial Conventions

a) Proceedings that are ongoing should not be the subject of public debate in parliament or elsewhere as they may violate the principle of sub judice which is to the effect that a matter still in Court should not be subjected to public debate or discussion as this would damage or distort judicial proceedings.

b) Professional conduct of a Judge should not be criticized in parliament except on a substantive motion of impeachment i.e. for removal of a Judge.

CONSTITUTIONALISM

DEFINING CONSTITUTIONALISM

Constitutionalism is a compound of ideas, attitudes and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. Constitutionalism is the idea that government can and should be legally limited in its powers and that its authority legitimacy depends on its observing these limitations. It recognizes the need for government with powers but at the same time insists that limitation be placed on those powers.

Ancient Greece with its scholars such as Aristotle and Plato gave us the idea of modern state and government. It is a descriptive of a complicated concept, deeply embedded in historical experience, which subject the officials who exercise governmental powers to the limitations of higher law. The basic elements of constitutionalism are;

- Rule of law
- Judicial independence
- Human rights
- Separation of power
- Checks and balance
- Popular sovereignty
- Civilian control of military
- Responsible and accountable government

ORIGINS OF CONSTITUTIONALISM

THE MAGNA CARTA (1215)

Magna Carta, or "Great Charter," signed by the King of England in 1215, was a turning point in constitutionalism.[179] The Magna Carta, or "Great Charter," was arguably the most significant early influence on the extensive historical process that led to the rule of constitutional law today in the English-speaking world.

In 1215, after King John of England violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights. Among them was:

- the right of the church to be free from governmental interference,
- the rights of all free citizens to own and inherit property and
- to be protected from excessive taxes.
- It established the right of widows who owned property to choose not to remarry, and

[179] Refer to Appendix C, The Magna Carta

- established principles of due process and equality before the law.
- It also contained provisions forbidding bribery and official misconduct.

Widely viewed as one of the most important legal documents in the development of modern democracy, the Magna Carta was a crucial turning point in the struggle to establish freedom.

CONSTITUTIONAL LAW AND DEVELOPMENT IN AFRICA

In Africa, the main struggle since independence has been a struggle to create culture of Constitutionalism but there have been problems which mainly include:

a) Ethnicity (tribalism) i.e. politically favouring certain tribes.
b) Militarism i.e. the use of military force to resolve political disputes and conflicts.
c) Dictatorship evolving gradually into a personality cult and individualizing political power.
d) Political and legal illiteracy.
e) Customs or traditions.
f) Non-Separation of powers
g) Political intimidation
h) Human Rights violation.

CONSTITUTIONALISM FROM THE BIRTH OF UGANDA TO INDEPENDENCE.

Uganda before the coming of colonialists, had three indigenous political systems. the Hima caste system, Bunyoro royal clan system and the Buganda kingship system, however in 1894 the British succeeded in establishing a protectorate situated in Buganda. Constitutionalism in colonialism is about constituting rules, and thereby constituting its self the constitution to make a judgement. The judgement is about what to select in constituting rules. What rules to make, what rules to inherit, co-opt, what to colonize and what to leave out. It's about what rules to make secondary, derivative [180]. Hence colonial constitutionalism took its root with the enactment of the 1900 Buganda agreement. It was with the strike of pen that the masters chose what rules to impose, which areas to colonize, what to make secondary or primary. The constitutional structure of Uganda was drawn with the signing of 1900 Buganda Agreement. It established the commissioner as the head and overall leader on behalf of his majesty, gave Kabaka subordinate powers over his subjects and defined political presentation in the structure of government.

[180]Apter, David E. (3rd April 2013). the political kingdom in Uganda: a study on bureaucratic nationalism. Routledge, p.403.

THE 1902 ORDER IN COUNCIL.

The 1902 Order in Council was a very recognized and proved an important landmark in that the Order in Council was passed as an ordinance where new provisions in the administration of Uganda as an attribute aiding for the enactment of laws and regulations for the better administration of justice, equity good concise and morals thus the good governance.

However, dreaming back to our minds to its start, the 1902 order in council rule was the fundamental law of the protectorate which aimed in the exercising of power granted by her majesty's government provisions under the foreign jurisdiction act of 1890 that's to legislate in regards to foreign territories. The 1902 order in council was subjected to several matters of constitutional significance ranging from both provincial and administrative divisions, also including structures of government and thus the administration of justice and the magnificence of laws thus to statures of natural law, equity and morality.

The 1902 order in council also helped where it defined the province and administrative divisions of the protectorate under Article 1[181] thus the central divisions which constituted of districts including Elgon, Karamoja, Busoga, Bukedi and Labwor. The Rudolf province consisting of the districts of Torkwed, Turkana, and Dabusa. Then also districts of Bunyoro, Toro and Ankole and the islands appertaining there to Article 3 of Buganda government.

The Order in Council also defined the protectorate of Uganda and enumerated its administrative decisions and empowered the King of the United Kingdom, acting through the secretary of state, to declare from time to time, if he so desired that any areas under his protectorate may form part of his protectorate and conversely that parts of the protectorate cease to be so. In the same aspect, the commissioner was vested with powers of the government of Uganda and for the purpose he was to have the official seal by which his acts could be authentic. He was also vested with power of prerogative of mercy which he exercised in the name of the king with the approval of secretary of state.

Following the formation of the 1902 Order in Council, it was aimed to empower the commissioner in the making of laws as pertained under Articles 8-10.[182] In 1902, this function was placed under the legislative council and it's worth noting that by the virtue of 1902 order in council where the commissioner was able to make peace through laws, good governance[183] within the protectorate that was between 1902 and 1920, office of the commissioner was provided under Article 4 and 5[184] who was the overall controller and administrator of the protectorate who was the Chief Representor

[181] 1902 Order in Council.
[182] 1902 Order in Council.
[183] Article 12 of the order in council.
[184] Ibid.

of the High Majesty's in England and was assisted on the same duties by the Deputy Commissioner and other officers.

The order in council also aided and established a unified system of exercise of judicial power comprising of justice courts. In particular, full rights in civil and criminal jurisdiction were all invented in the high court concerning all persons and matters in. This was provided for under Article 15 Clause 1.[185] The Court was referred to as His Majesty's High Court of Uganda.

However, it's worth noting that the 1902 order in council centered a receptionist clause that under the powers of Article 15[186] (clause 2) and the receptionist clause defined law to be applied in the protectorate and in particular in the judicial determination of disputes and matters by courts of law. It's to the effect that the applicable law was to include in law, doctrine of equity and statutes of general application of force. This reception of statutes of general application was legislation in force in as august 1902 and this paved way for laws including the Evidence act[187], Sale of Goods Act, and the Penal Code Act[188] came to be the embedded laws.

Not forgetting the fact that the 1902 orders in council also contained the matter of the repugnance clause and this was articulated under Article 20 and this particularly dealt with the application of native laws and customs in any customs in any dispute arising or involving between natives and this was provided for as long as the issue was not repugnant to the rules of natural justice, equity and morality. In reference to Article 20, this elaborate more on cases of both civil and criminal matters to which natives were parties and aided that every court shall.

1. Be guided by native laws as long as the laws were applicable and not repugnant to factors of justice, good morals and equity.
2. However, court of justice in respect to disputes between natives were required to decide such disputes according to substantial justice without undue regard to matters of technicalities of procedure and without undue delay and explaining case is **R v Yowasi K Paulo**[189]

However, the repugnancy clause was introduced by section 20[190] which intended to remove those customs and laws that were considered being negative and repugnant thus lived inconsistent with the rules of natural justice, equity and morality and the major problem with the clause was that the negative and repugnant aspect of a custom were perceived in the eyes of the colonial judge in other words, it was a subjective test thus applied according to the moral standards of an English person.

[185] Ibid.
[186] Ibid.
[187] Cap 6
[188] Cap 120
[189] (1922) U.L.R 987
[190] 1902 order in council.

In reference to the case of **R v Amkeyo**[191]where the issue in point was whether the eventual relationship which existed between the accused and the woman with whom proved to have married basing on customary principles was in position to testify against the accused. In this case Amkeyo had been charged and convicted of possession of stolen property and the main witness in point was the wife with whom he claimed to have married under native customs. However, basing on the note to protect the marital confidence her evidence could not be admissible, but basing on the attributes of the case chief justice Hamilton rejected the notion and held that the relationship between the two in question could not fit the ideal of marriage as understood among civilized people and that the native custom was repugnant to good concise, equity and morality and thus that here the woman was being referred to as a mere chattel and thus the relationship was potentially polygamous.

Explaining case of **Mwenge v Migade**[192] where the question related to the existence and continuation of customary tenure (Butaka) in Buganda, and the inalienability of such Butaka in ancient customs of Buganda and in this aspect court considering the provisions of the 1900 Buganda agreement and the land registrations passed by the Buganda government in 1908, and not to held that the practice in Buganda showed that the Butaka tenure no longer existed and therefore by the provisions of the land law thus court declaring the existence of the Butaka repugnant to the customs and hence needed be repealed. And other explaining cases include the case of **Gwao Bin Kilimo v Kisunda Bin Ifuti**[193], and then case of **Mukwaba and other v Mukubira and others**[194].

THE LANCASTER MARLBOROUGH CONFERENCE (1961)

The Lancaster Marlborough Conference is believed with notice that it's the first Uganda Constitutional Conference on the constitution of an independent Uganda and it was scheduled on 9th October 1961 and it was opened on 18 September 1961 at the Lancaster House in London.

In respect to the outcomes of the Lancaster Marlborough conference was that parties to the negotiations came to agree that Uganda would attain its long awaited and full independence and that's on 9th October 1962. It is worth noting that the conference involved a number of delegations that aimed to represent the United Kingdom, the party also involving the Uganda People's Congress and the Buganda kingdom and also included the Secretary of State for the Colonies, the Right Honorable Ian MacLeod, MP, the minister of State for Colonies, the right honorable the Earl of Perth, and the colonies, and the parliamentary undersecretary of state for the colonies, the Honorable Huge Freser, MBD, MP.

[191] (1917) 7 EARL 14.
[192] (1933) ULR 97.
[193] 1938 1 TLR 403.
[194] Civil case no. 50 of 1954.

However, in the meeting sir Hilton Poynton, KCMG, was the named leader of the United States delegates and they included the following Sir John Martin KCMG, CB, CVO, Mr. WBL Manson, CGM and Mr. F D. Webber, CGM. Messers J.M, De Winton, CBE, MC, saved as advisers to the delegates.

Within the conference, Uganda also attained some representatives and these were named the Uganda government delegates and they were under the leadership of Sir Fredrick Crawford, GCMG, OBE (Governor) and with whom he worked with other personalities these included sir Walter Courts, CMG, MBE (Governor designate), the Honorable BKM, Kiwanuka (chief minister), Honorable R.I.K Dresfield, CMG, QC (attorney general), the Honorable CGFF. Mellmoth (minister of finance), the Honorable B.K Bataringaya (minister of local government) and the Honorable C.K Patel, CBE, QC (minister of commerce and industry) and lastly Messers CPS Allen ABD, AC Badenoch served as advisors to the attributed delegates.

In aiming articulate different aspects of parties, Hon.R. A Mbonye Byombi led the democratic party delegates an MP for Bufumbira county and these included as herein after, Honorable members of parliament; HA Vuciri, J.H Obonyo, P.A.U.K, A. Oriekot, N. K Rugyemwa, A. Akaduyu, R.B Bwambale, P.J Wilkinson, QC, M.K Patel and M.M Ngobi and to the party honorable I.D Hunter and the G.B.K Magezi serving as advisor to the delegates.

It's worth noting that Mr. M Kintu led the delegates of Buganda kingdom and the then Katikiro and also had other members who were working as delegates besides him these including Mr.A. K Sempa, Mr.L. N Basudde, Mr. A.D Lubowa, Dr. K Muwezi and Dr. E.B.S Lumu, Messers E.W Kiggundu, A.F Mpagi, E.F.N Gratiaen, C.M. G, G C, IGM Flegg. Dingle Foot, Q.C, MP and then their adviser was DS downs.

However following the great membership representation in the Lancaster Conference, the attributes of the 13 District councils were represented too at the conference and the District Council Delegates included the following as herein after**,** N.Androvile (West Nile), E.Athiyo (Karamoja), D.K Baguma (Toro), J.W.R Kazoora (Ankole), Y.K Mulondo (Busoga), Honorable C.J Obwagor (Teso), E. Kasoma (Toro), Y.H Wacha Olwol (Lango) and these delegates duties were advised by Messers R Imalingat (Teso), E.Kasoma (Toro), D.K Luboga (Busoga), K.M.S Kikira (Kigezi), and Honorable S. Mbabi Katana (Bunyoro), T.K Mudanye, M.B.E (Bukedi) And then S.K Mutenyo ..(Bugisu).

In respect to the representations of the urban centers thus Kampala and Jinja they were equally represented by a number of personalities these including Messers C. Lewis, C.B. E, and the one K. Evans, Mr.G. F Brooks who also served as the supervisor of the two and in respect to attributes of secretariat of the conference was under the leadership of the one Mr. A Leavett as Secretary-

General together with Mr. J. W Staopoole as the Deputy Secretary-General and Messers K.A.F Woolverton, I.N Jenkins, E.G Lomax.T.M Jenkins, K.D Law and D.H doble as the secretaries.

The first constitution of Uganda was the product of the Uganda constitution conference held at the Lancaster house in 1961. it was held to discuss the report of the Uganda relationships commission which had been tasked in projection of the future form of government for Uganda best for Uganda, the relationship between the central government, Buganda and other kingdoms, plus other authorities in the country.[195]

The main Issue of the conference was the status afforded to the different kingdoms especially in recognizing the existence of a new state of Uganda. The issue of the *"lost counties"* also resurfaced however postponed due to lack of Buganda's support. It therefore provided for the complex system of devolution of power within Uganda.

The kingdom of Buganda particularly gained strong powers of self-governance[196] . the kingdoms of Bunyoro, Acholi, Toro and Ankore and the territory of Busoga also gained the status of *"federal states"*, and were permitted to retain their legislatures. The remaining districts and the territory of Mbale were controlled directly by the central government.

It provided for the direct election of most members of parliament. However, the exception was that Buganda MP's were to be selected by an electoral college made up of members of the Lukiiko. The 1962 constitution was amended 3 times, most importantly to begin with, it was amended to replace queen Elizabeth II represented by governor-general of Uganda *Sir Walter Coutts* as the head of state with a ceremonial position of president. In 1964 was amended to include the date when the Toro legislative Assembly stand dissolved, and in 1965 it was amended the final time to give effect to the outcome of the lost county's referendum.

On the lost counties issue, violence in Buganda was tied to the considerations of constitutionality, the constitutional provision on the referendum was to the effect that it should be held two years after independence. However, Obote went on to hold the referendum at the earliest opportunity. Constitutional complications were compounded by the fact that Muteesa was Kabaka and at the same time president of Uganda, when then Obote decided that the central government was to take over the issue of the lost counties, Muteesa refused to sign the required documents. To win the referendum however Buganda arranged forex-servicemen to settle in the contested counties to swell the number of votes for Buganda to which later, it was decided that the ex-servicemen were not allowed to vote since they were not part of the 1962 voters registrar of the areas concerned.

The 1962 constitution saw growing contentions as in any way the Kabaka had to protect the

[195]Mukholi, David (1995). a complete guide to uganda's fourth constitution: politics and the law.
[196]Uzoigwe, G.N. (1983) Uganda and [parliamentary government. The journal of modern African studies. 253-271

interests of Buganda as well as Uganda which was a heavy task given the political climate then. This even resulted in the unintended resignation of Michael Kintu the Katikiro then for failing to protect 'Buganda's sovereignty'.

The concept of constitutionalism cannot be ignored because at this stage Uganda's politics was played in a setting where each side's apparent need was look for legal loopholes to turn it to its own advantage.[197] The Ugandan state was officially named the sovereign state of Uganda and the concept of multipartyism took its first constitutional chance to contribute to constitutionalism in Uganda. Each party functionary represented a local constituency and most of the constituencies were ethnically leaned and distinct. The organization of the UPC- KY coalition rule 1962-1964 with which the obstacles of UPC in forming a government were about to melt.

STRUCTURES AND ARRANGEMENTS UNDER THE 1962 CONSTITUTION

Promulgation of the 1962 independence constitution was a landmark in Uganda's constitutional history. For the first time, the framework of government was designed to be conducted within specific rules that sought to observe the broad principle of constitutionalism including separation of powers, supremacy of the constitution, independence of the judiciary, human rights etc. Nevertheless, the constitutional framework coupled with the political situation that prevailed in Uganda at the onset of independence meant that a number of problems remained.

There were crucial factors in the constitutional framework that resulted in the period of 1962-1966 being regarded as the stagnant years. And these included;

1. The question of the head of state which was not addressed by the independence constitution.
2. The question of the federal relations in particular between Buganda as a federal entity and Uganda as a unitary state.
3. The question of the relation between Buganda and Bunyoro over the lost counties.
4. Overall problems of governance particularly in the relations between the executive and the other organs of government.

Invariably there were other problems including the opportunistic tendencies on the part of personalities in whom government and political authority was vested.

1. The Question of the Head of state

The independence constitution had maintained Her Majesty the Queen of England as the head of state and so necessitated the determination of a proper head of state for an independent Uganda. There were different opinions particularly between the parties and the kingdoms as to the criteria as

[197] Violent constitutionalism in Uganda. G.F. Engholm and Ali. A. Mazrui. Jstor. org

to who should be head of state. The broad membership of UPC floated the idea that the party should provide the head of state. Meanwhile KY and Kingdom of Buganda questioned the propriety of a commoner ruling over royalty.

After several discussions, it was resolved to give the officer of the head of state to one of the traditional rulers. When the debate was later conducted in the National Assembly the majority vote was in favour of a traditional ruler being the only person eligible to be a constitutional head of state. Thus by the *Constitution of Uganda (1st Amendment) act No. 16 of 1963*, it was stipulated that the president and V.P of Uganda would be elected for a period of 5 years by the National Assembly and further that only traditional rulers would be eligible for election to these offices. On 4th October, 1963, Sir Fredrick Mutesa II, the Kabaka of Buganda, and Sir William Nadiope of the Kyabazinga of Busoga became the president and Vice President of Uganda respectively.

Rather than resolve the lacuna in a constitutional framework, the question of the head of state only took the new dimensions and bread new problems. Although the office of the head of state was largely formal and non-executive (in the sense of constitutional monarchy in a west minister type/style of government), tensions would begin to surface in the relations between the figurehead – head of state and the P.M. The issues would arise as to what the formality of the office of the head of state meant. Most significantly controversy arose as to who had precedence as between the head of state and the P.M, as to who was to represent Uganda at international conferences, as to whether Mutesa II should be allowed the police band at his birth day party etc.

But perhaps most significant as opposed to these rather petty issues was the question of the allegiance of Mutesa II to both offices of head of state and Kabaka of Buganda. The test would eventually come during the referendum on the lost counties when Mutesa II refused to sign the memorandum of transfer the counties to Bunyoro. The situation was made worse because the relations between the two personalities Mutesa and Obote gradually turned out into hatred for each other.

Invaluably the tension between the two personalities was nonetheless underlined by the broader question of Buganda's status in relation to the rest of Uganda. The Kabaka's federalism was seen to be at loggerheads with Obote's perceived unitarism.

2. **The question of Buganda's position in relation to Uganda**

This question is one that was traceable to the period in the run up to independence particularly the Munster report of 1961 and the constitutional conferences. The federal status of Buganda was as a major feature of the 1962 constitution created a situation in question the demarcations of authority and jurisdiction became all too confused. The potential for tensions to flare up was always manifest in particular as regards matters of jurisdiction by the legislative bodies and courts as well as on

matters of finances and revenues. Coming up in 1965 in the wake of the lost counties referendum a year early in 1964, question had had disastrous effect upon the Kabaka's status and relations with Obote, the case highlighted how fragile the constitutional framework of the 1962 constitution was particularly as regards the federal relations of Buganda in a unitary Uganda. The lost counties issue had largely marked the end of the UPC-KY alliance. This case spelt the doom of the 1962 constitutional arrangement (chaos turned out only a year later in 1966).

Facts: The case involved distribution of finances and revenues between the central government and Buganda government and the question of how much in grants Buganda was entitled from the central government. Buganda argued that on the basis of its status, it should obtain a grant of a basis different from the other parts of Uganda. The fact that the matter wound up in court and could not be amicably resolved between the two parties demonstrates how hostile their relation had become.

3. **The question of the lost counties**

The question of the lost counties had been a controversy at the constitutional conferences and the underlying tensions had remained throughout the early years of independence. By 1961, it was depicted that at least 3/4 of the people in Bugangaizi were Banyoro not withstanding 60 years of Buganda rule. In Buyaga the situation was even more striking with 15 Banyoro for every Muganda – Even Sir Tito Winyi the Omukama of Bunyoro argued that the case of the restoration of the two counties to his kingdom could not be logically denied. The tense relations between the two kingdoms and the aspirations of the peoples of the counties would be underpinned by two developments in 1963 and 1964. The first was the case of **Joseph Kazaraine v. the Lukiiko**[198] the applicant Mr. Kazaraine was convicted for inciting the people of Buyaga and Bugangaizi not to pay taxes to the Kabaka's government and for obstructing chiefs from carrying out their rightful duties of revenue collection. The issue before the High Court was to whom jurisdiction over the two counties was vested as between the central government and the Buganda government.

Reference was made to the 2nd constitutional conference question had directed that the two counties should vest in the central government. It would obviously follow that the central government was entitled to exercise jurisdiction over the province. However, because it was not clear when exactly the two counties were supposed to come under the jurisdiction of the central government. The court held that Buganda exercises jurisdiction over the counties. It would seem that the court's decision reflected move of a desire not to upset the political set up given the volatile character of the matter and in any event a referendum had been scheduled to resolve the matter.

Kazaraine's case is important for a number of reasons:

[198] [1963] E.A 472

1. It underpinned the tension in the relations between Buganda and the two counties.
2. It portrayed the confusion of the 1962 constitution had brought about with respect to an issue that was not resolved in the run up to independence.
3. It demonstrated the problem of the unitary-federal arrangements of the 1962 constitution were likely to cause.

The second development was the referendum on the lost counties in 1964 between 1962-64 the Kabaka government had laboured to justify why the two counties should remain in Buganda. They presented a number of reasons including;

i) The undesirability of upsetting the administrative arrangements that had existed for such a long period.
ii) The inch endowment of Buganda of Buganda than that of Bunyoro which meant that the two counties would benefit more under Buganda.
iii) The benevolence and non-sectarianism character of the Kabaka's rule.
iv) That the development of the counties had been secure under Buganda rule. Further, there were concerns that the change of administration would adversely affect Buganda land owners in the counties.

Nevertheless, the central government went ahead with the referendum which was held on 4th November, 1964. The two counties overwhelmingly voted to return to Bunyoro under the constitution. Kabaka Mutesa II, the then president was supposed to sign the instrument of transfer of the two counties but refused to do so.

Obote as the Prime Minister then put the matter before the National Assembly and subsequently the motion for transfer of the counties was confirmed through the constitution of Uganda. (3rd amendment Act No. 36 of 1964). The Buganda government petitioned to the High Court challenging the constitutionality of the referendum and lost its subsequent appeal to the Privy Council was also dismissed in the case of **The Kabaka's Government V. Attorney General of Uganda.**[199] The referendum would mark the final death of UPC – YK alliance following the referendum. There was widespread hostility in Buganda and worsening of relations between the central government and the Buganda government on the other hand.

For Obote and UPC, the referendum acted as a boost as it showed that he could no longer be held at ransom to Buganda's demands, the prevailing political situation was also in UPC's favour. Several KY members of parliament had been persuaded to cross to UPC thereby undermining the strength of KY. Similarly, several members of the opposition DP crossed over including its Secretary General Bail Batalingaya. UPC was therefore stronger than ever to enable central government to

[199] P.C A & P 56 – 1964.

control the National Assembly.

In the early years of independence autocratic as well as disrespect for the constitution for the constitution would become a future of governance this was particularly evident in the relation between the executive and other organs of government. Obote's government having the majority in parliament (National Assembly) demonstrated a tendency of the executive to dictate the laws enacted by the National Assembly more significantly though was the disrespect by the executive of the decisions of the independence of the judicially.

This attitude of the executive towards the judiciary was manifested as early as 1962 in respect of the case of **Jowett Lyagoba v Bakasonga & Others.** [200]

The case concerned w the election of the Basoga District Council and the legality in particular of the election of specifically elected members of the council. The issue was whether a resolution by the council and the endorsement by the governors of Uganda conformed to the provision of the 1962 constitution. The matter ultimately also touched on the legality of William Nadiope's election as Kyabazinga. The High Court upheld the challenge to the elections and declared the various persons were unlawfully elected and would have to vacate the offices.

Three month after the court's decisions, the National Assembly enacted the *Busoga Election Validation Act No. 9 1963* which validated the elections and in effect over turned the decisions of the court.

THE 1966 KABAKA CRISIS.

The 1966 Kabaka Crisis can be traced to the growing animosity between Buganda government and the central Government in the aftermath of the 1964 referendum on the lost counties and this was also reflected in the disputes before the courts in 1964 and 1965, further the growing suspicions and conspiracies during the period of 1965 and 1966 (including the Kabaka's relations with the P.M, the power struggles in UPC between Ibingira and Obote and the crossing of the floor by opposition MPs ensured that the country had by 1966 become a powder keg ready to explode. That the 1966 crisis occurred was the inevitable consequence of a series of events commencing in early 1960s.

In January 1966, during a session of the National Assembly, a KY member of Parliament Daudi Ocheng alleged that the PM, Obote and his ministers Adoko Nekyon and Felix Onama and Idi Amin were involved in illegal gold trading in the Congo (Zaire). This allegation was made while the PM was on tour in Northern Uganda and upon his return to Kampala he caused the appointment of a judicial commission of inquiry into the matter.

[200] [1963] E.A 57.

In February during a cabinet meeting in Entebbe, the P.M ordered the arrest of 5 ministers including Ibingira (resulting in the **Ibingira and others case)**.[201] In the same month of February 1966, the P.M suspended the 1962 independence constitution, citing that the country had lost stability and that certain individuals intended to overthrow the lawful government of Uganda. The suspension of the constitution resulted in a number of developments:

1. The abolition of the posts of president and V.P
2. Declaration of a state of emergency in Buganda
3. The dismissal of Shaban Opolot as army commander and his replacement by Idi Amin. (Resulting in the case of **Shaban Opolot v. Attorney General**[202])

The 1962 constitution was subsequently abrogated in April 1966 with significant implications:

i) The abolition of kingdoms in Uganda and in effect the federal and semi federal status of the kingdoms.
ii) Declaration of Uganda as a republic
iii) The promulgation of the 1966 interim constitution (whose legality was subsequently challenged before the courts) and ultimately the 1967 republican constitution. The reaction to these constitutional developments within Buganda was one of opposition with the Lukiiko passing a resolution in May 1966 for the central government to leave Buganda soil by the end of May 1966. The central government response was to send troops led by Idi Amin to attack the seat of Buganda at Mengo. This resulted in the capture of the major properties of Buganda and the fleeing to exile by the Kabaka where he died in 1969.

IMPLICATIONS OF THE KABAKA CRISIS FOR CONSTITUTIONALISM

The abolition of the kingdoms which followed the abrogation of the 1962 constitution in April 1966. This was later affirmed by Article 118 of the 1967 constitution (this Article remained in place until it was repeated in 1993 by the NRM government. This was illustrated in various court decisions which include;

Shah v. Uganda 1969 E.A 261

Shah had a contract with the defunct kingdom of Buganda from which he was to get a commission. With the abolition of the kingdom most of assets and liabilities of the defunct kingdom were inherited by the central government. When Shah made a claim for commissions on contracts entered into with the kingdom of Buganda before its abolition, the central government purported to amend the Local Government act to bar such claims.

[201] Grace Ibingira and Others v. Uganda [1966] E.A 445(No.2)
[202] [1969]1 EA 631

The declaration of Uganda as a republic with an executive President. This resulted in placing of excessive powers in the president without significant checks and balances which had major ramification for separation of powers in the subsequent years.

The 1967 constitution affected the separation of powers and constitutionalism in a number of instances including the making of the Attorney General a cabinet member as opposed to the 1962 constitution when he wasn't. Further the office of the Director of Public Prosecution (DPP) was brought under the A.G which had not been the case in 1962. This resulted in the politicization of the persecution of opposition leaders.

The declaration of a state of emergency initially in Buganda and subsequently throughout the country. This resulted in several instances of arrest and detentions without trial of individuals. This was particularly reflected in the promulgation of the *1966 Emergency Power (Detention) Regulations* which initially applied in Buganda and under which individuals such as Ibingira, Matovu, Lumu etc. were detained. This would in itself bear implications for human rights especially the right to personal liberty and in the attitude of the executive to the negation of judicial independence of the courts.

The Ibingira case followed the arrest during a cabinet meeting in Entebbe and their detention pending an order of deportation under Deportation Ordinance Cap 46. The case involved a challenge as to the constitutionality of orders under the deportation ordinance unconstitutional as was never expected to apply to citizens of Uganda and lawful orders under the 1962 constitution (Article 19) were never intended to be orders that resulted in the deprivation of personal liberty.

The court of Appeal directed that the matter be remitted to the high court for grant of orders of habeas corpus in order to conform with the decision of the court of Appeal, the government brought the Ibingira's from Karamoja up to Entebbe where they released them but upon stepping out of the airport they were rearrested and detained under the *Emergency Powers (Detention) Regulations* which were then applicable only in Buganda. This resulted in the 2nd Ibingira case in which they challenged their re-arrest and detention as having been undertaken in bad faith by the government and in violation *Art. 35 of the interim 1966*. In the meantime, prior to their re-arrest, the National Assembly had enacted the *Deportation Validation Act* which sought to provide government the immunity against any claim for compensation by Ibingira and others in respect of the habeas corpus proceedings in the first case.

The high court refused to hear on merit, the 2nd case brought by Ibingira and once again the matter went before the E. A court of Appeal that there was absence of bad faith in the government bringing the applicants to Buganda where they were rearrested and that it was the applicant's misfortune to be in an area where the detention regulations applied.

The stance taken by the court in the 2nd case demonstrated the demise of the judicial independence of the courts, with the growing tendencies of the executive to ignore or nullify decisions of the courts as well as interfere in the operation of the courts. The courts in themselves seemed content to make decisions in favour of the government.

It raised the question of the legality of extra-constitutional changes of government in light of the abrogation of the 1962 constitution and the promulgation of the 1966 and 1967 constitution. This question was central to the decision in the case of Exparte Matovu where a challenge was made as to the constitutionality and validity of the 1966 constitution. In the final analysis the question before the courts was whether the events leading to the 1966 constitutional change in the legal order. The court referred to the writings of a prominent scholar Prof. Hans Kelsen who had propounded theories on the extra constitutional changes of a legal order.

Basing on his idea of the constitution as a grand norm, Kelsen argued that norms derive their validity from the grand norm. He argued that an extra constitutional change in the legal order occurred in instances where the change is not contemplated or envisaged by the existing legal order. The change must in itself result in an efficacious government with authority over territory and its people.

In the finality, the validity of norms will derive from the new legal order given that the old one has been legal order continue to exist, this is because their existence and validity is permitted by the new legal order.

The phenomenon of extra constitutional changes in the legal order, has defined a larger part of Uganda's constitutional history particularly in the nature of the enactment of legal notice L/N 1 to usher in a new regime for instance.

THE PERIOD OF 1966 AND 1971

It is period of military rule most especially in the reigns of Obote and Idi Amin. Suspension of legal documents and enforcing decrees on the people. Gukiina views the development of authoritarian rule and abuse of power as not only a necessary but an inevitable stage in Uganda's political history largely because of lack of national consensus. However, Ibingira on the other hand rejects the theses of inevitability and attributes these developments on the particular personality of Obote and his motives. [203]

Comparative constitutionalism has been the subject for philosophical and academic inquiry tracing the idea back to Aristotle. Uganda not being any different, throughout the constitutional modifications printed through historical events, adhered to the practice. It has however in the

[203] Ibingira, G.S.K (1980), African upheavals since independence. (West views Press)

modern period adopted new tactics to constitutional reform.

THE AMIN REGIME OF MILITANT POLITICS AND THE DESTRUCTION OF FORMAL CONSTITUTIONALISM

The 1966 crisis had propelled Amin to the forefront of Uganda's political scene. It was not surprising that upon the departure of president Obote for a common wealth conference in Singapore, the army announced on 25th January, 1971 that it staged a coup in order to save a bad situation politics that was to characterize Amin's regime. The coup plotters listed 18 reasons of grievances against the Obote government significantly;

1. Violations of human rights including detentions and the lack of political freedoms.
2. The existence of a state of emergency throughout the country since 1969.
3. Corruption, nepotism and tribalism.

The legal instrument that ushered in Amin's regime was a proclamation known as *Legal Notice 1/71*. It's significance as with all the subsequent legal notices 1/79 UNLF era and No. 1/86 (NRM period) was the introduction of a new constitutional legal order in terms of Kelsen theory as well as to give legitimacy to the new regime. The constitution of Uganda was invariably the 1967 constitution read together with L/N 1/71. The legal Notice comprised the following features; it suspended several Articles of the 1967 constitution including.

i) Article 1 on the supremacy of the constitution. In effect Amin himself became the supreme law and was no longer subject to the constitution. He did rule by decrees.
ii) Article 3 on the amendment of the constitution by parliament which could now be done at will by Amin by way of decrees.
iii) Article 63 on the powers of parliament to make laws which would be vested in Amin through the promulgation of decrees.
iv) Chapter 4 on the executive and the qualifications on election of the president who came to be designated as head of state by virtue of the *Constitution (Modification) Decree No. 5 of 1971.*
v) Chapter 5 on the parliament, its composition and its legislative powers which would now vest in Amin and a council of ministers by virtue of *The Parliament (Vesting of Powers) Decree No. 8 of 1971.*

The immediate period of the inception of Amin's regime was characterized by jubilation in some parts of the country particularly Buganda with the return of Mutesa's body while the other parts particularly Lango and Acholi faced purges. Similarly, all political prisoners were released including Ibingira, Abu Mayanja, Benedicto Kiwanuka and the majority were elected into the

primary initial civilian government. Nonetheless within a short period of time, a clamp down on the opposition began to take on the character of a military junta with all the institutions of government, the executive legislature and judiciary manned by the military. Amin introduced a total dictatorship and within a space of two years he had completed into turning the country in an absolute military regime. During the 2 years, the regime began a clamp down on human rights through the passing of decrees thus although Amin had released political prisoners detained by Obote's government, the first act of his regime was to suspend political party activities which was secured by the ***Suspension of Political Party Activities Decree No. 14 of 1971***, which provided in part that "no person was allowed to manage, take part in collect subscription for, raise funds or otherwise encourage political party activities. Public meetings or processions designed with political motives are banned as are the signs, symbols, flags, songs, statements, slogans and names of political parties". Several other laws were passed during Amin's regime to deal with political descent resulting in further violation of human rights. These included;

1. The ***Detention (Prescription of Time Limit) Decree No. 7 of 1979*** which allowed for indefinite detention throughout trial for 30 days before reasons are given for detention. The decree also gave powers to arrest and detain individuals to members of the armed forces; the
2. The ***Newspapers and Publications (Amendment) Decree No. 35 of 1972*** which permitted the minister for information to prohibit the publication of any newspaper for an indefinite period if satisfied that it was in public interest. This resulted in the deprivation of the freedom of expression like the banning of the Ngabo newspaper and subsequent disappearance of its editor.
3. ***Military Police (Power of Arrest) Decree, 1971*** which gave the military powers of arrest to civilians and in effect removed its power from the mainstream police force. By this decree the armed forces and state intelligence forces such as the state research bureau, anti-smuggling unit could carry out arrests, summary trials as well as execute civilians which not only eroded the traditional policing powers but also judicial powers. The implications of this decree were remarked upon by Russell, C.J in the case of **Ephraim Bukenya v. Attorney General**[204]

In all these aspects of the creation of a totalitarian regime the most drastic was the assault upon the judicial arm of government. This was secured through the establishment of quasi-judicial organs not traditionally empowered to exercise judicial power over civilians. This was established by trial by *Military Tribunals Decree No. 12 of 1973.*

[204] [1972] H.C.B 87.

The implications of the military tribunals decree were to compromise judicial independence of traditional courts and often resulting in the denial of the right to fair trial as in most cases individuals were tried in absentia without legal representation or the right to cross examine witnesses. A similar quasi-judicial organ was the economic crimes tribunal for the offences of smuggling, hoarding, extortion etc.

The erosion of judicial power reached its culmination with the promulgation of *Proceedings Against the Government (Protection) Decree No. 8 of 1972*. It was promulgated following the release of a British citizen on an application of a writ of habeas corpus by Chief Justice Benedicto Kiwanuka. The decree gave government immunity by ousting the jurisdiction of courts to grant relief with regards to actions for injuries resulting from measures taken to protect the public and security and enforcement of law and order. With the jurisdiction of the courts ousted and the supremacy of the constitution non-existent, the military government was in effect beyond the check of the law.

UGANDA NATIONAL LIBERATION FRONT 1979 – 1980

The period from 1979 can be described as one of a search for constitutional reconstruction. The search was a result of a government formed in exile during the Moshi conference whose main participants were drawn from approximately 22 exile political groups. The main instrument which came to bind the participants consisted of the minutes to the resolution of the conference. The overall body that was ushered in after the fall of Amin's regime was the UNLF which was the umbrella organization of the various political groups associated with the Moshi conference.

The UNLF was made up of distinct organs including:

i) The National Executive Committee with its chairperson as Prof. Yusuf Lule and vice as Akena P. Ojok. The National Executive Committee subsequently became the executive organ of the UNLF government.

ii) The National Consultative Committee which was chaired by Prof. Edward Rugumayo and his vice Omwony Ojok. The NCC would constitute the legal organ or the UNLF government.

iii) The Military Commission which was chaired by Paul Muwanga and his vice Yoweri Museveni.

The UNLF had also established a cabinet while in exile and upon Amin's fall in April 1979 the chairman of the UNLF Prof. Yusuf Lule was sworn in as the 4th president of Uganda. The main constitutional element that ushered in the UNLF government was *Legal Notice 1/79* which effectively restored Art. 1 of the 1967 constitutional previously suspended under L.N. 1/71. On the

other hand, the legal notice modified chapter 5 of the 1967 constitution to constitute the National consultative council as the legislature body.

The government of Prof. Yusuf Lule was short lived surviving only 68 days. It was faced with internal wrangling and conflicts over ideology and policy and the last straw came about as a result of dispute over ministerial appointment. Some members of the UNLF insisted that all presidential appointments must be ratified by the NCC basing their argument on the premise that this was in accordance with the minutes and resolutions of the Moshi conference.

On the other hand, Prof. Lule argued that the spirit of the Moshi conference had only stipulated that he governs by the 1967 constitution and that the constitution mentioned nothing about ratification of presidential appointments. He therefore argued that as president under the 1967 constitution reinstated as the supreme law of the land, he was not subordinated to the NCC. He therefore organized a cabinet reshuffle in which he transferred Paul Muwanga from ministry of internal affairs to that of labour and replaced him with Andrew Lutakome Kayira. The NCC revolted and in a motion of no confidence, they voted for his removal and subsequent replacement as president with Godfrey Binaisa.

The events surrounding Prof. Lule's removal as president were to result in the 1st constitutional case since 1966. This was the case brought by **Andrew Lutakome Kayira and others v. Edward Rugumayo and Others**.[205]

The petitioners sought to challenge the removal of Prof. Lule as president with regard to its lawfulness under the constitution. The court held;

1. The existing constitutional framework at the time of Prof. Lule's removal was the 1967 constitution as modified by L.N 1/79. Since the L.N did not make reference to the resolution of the Moshi conference. They were not part of the constitution of Uganda
2. The 1967 constitution did not prescribe a procedure for the removal of a president. Therefore, the removal of Prof. Lule as president was done in a manner not contemplated under the constitution and thus amounted to a coup.
3. An inquiry into the lawfulness of the removal of Prof Lule as president would invariably raise the question of the legality of the then existing government of Godfrey Binaisa. And in that regard Acts and Laws undertaken and enacted by the government. This was a political question into which the courts could not inquire.

The significance of Kayira's case

It tested the extent to which Kelsen theory as postulated in Exparte Matovu's case[206] continued to

[205] Constitutional Case No. 1 of 1979
[206] Ex Parte Matovu: Uganda v. Commissioner of Prisons [1967] E.A.L.R. 514 (H.C.).

exercise influence in politics and governance in Uganda and the tendency of courts to refer to this theory in order to secure political continuity.

After Lule's removal, Binaisa fell into the same trap as he tried to reshuffle Paul Muwanga, Museveni and Oyite Ojok and they removed him and subsequently placed all executive powers in the hands of the military commission led by Muwanga and Museveni. The military commission created a presidential commission comprising of 3 members, 2 of them judges and the 3rd a long-serving civil servant. This body was however merely cosmetic as the real executive power lay with the military commission which would then put in place a process for the holding of general elections and which took place in December 1980.

THE PERIOD OF THE NATIONAL RESISTANCE MOVEMENT 1986 – 1995

The new Museveni and NRM regime projected a sui generis revolutionary orientation that seemed to constitute a watershed in the political architecture of Uganda. At his inauguration, Museveni stated that; "no one should think that what is happening today is a mere change of guard it is a fundamental change in the politics of our country

The NRM take-over was seen as a fundamental departure from misrule to political transformation, constitutionalism, rule of law and human rights. The contractual fundamentals enshrined in the ten-point program and promise of a fundamental change that was that already exhibited in the displace of the triumphant rag-tag NRA guerrilla fighters instilled an unprecedented sense of relief in confidence. Ugandans envisioned the end to state-orchestrated wanton murderers; the end of the culture of political violence, torture, arbitrary arrest the repressive modus operand a, above all, all the opportunity to freely elect and peacefully change their leadership. It was considered a dawn of the new era. The exceptions were the people of northern Uganda region, where the defeated armies re grouped and waged an extended war led by Alice Lakwena and Joseph Kony.

Internationally, Museveni's conversion to neo liberalism earned him western acclaim of a unique visionary, charismatic leader' and primus inter pares of the new 'new breed' of African leaders[207]

The period of the NRM period can be described as one involving the search for a new model of constitutionalism. The NRM came to power on the platform of promising a fundamental change in which it declared that it would discard itself from the previous modes of government. The guiding philosophy of the NRM government was to be found in the 10-point programme which outlined the basic elements of its agenda for political and social economic reconstruction of the country.

[207] Oloka-Onyango, Joe, 2004, 'New-Breed' Leadership, Conflict, and Reconstructionin the Great Lakes Region of Africa: A Sociopolitical Biography of Uganda'sYoweri Kaguta Museveni, Africa Today, 50 (3): 29-52;
Kjaer, Anne Mette, 'Old brooms can sweep too! An Overview of Rulers andPublic Sector Reforms in Uganda, Tanzania and Kenya', Journal of ModernAfrican Studies, 42 (3): 389-413.

Amongst this was the restoration of democracy, rule of law and respect for human rights. Elimination of corruption, creation of a self-sustaining and integrated economy.

The major constitutional instrument that ushered in the NRM government was *Legal Notice 1/86*. It retained Art. 1 of the 1967 constitution on supremacy of the constitution. Nonetheless it suspended Art. 3 on the amendment of the constitution. It also suspended Cap. 4 with exceptions of the office of the president. It also modified Cap. 5 and in particular Art 63 by constituting the National Resistance council (NRC) as the legislative organ of the NRM government. The L.N also contained in its schedule a Code of Conduct to regulate and govern the operations of the *NRA (army).* The code of conduct contained basic principles by which the army was to be guided. In effect, the army was for the first time in Uganda's history subjected directly to the constitutional frame work. In the case of **F.E Ssempebwa v. Attorney General**[208] issue – the passing of legislation was to be by the NRC and not the chairman of NRM.

In terms of constitutionalism, the NRM government has perhaps had the most profound influence on the constitutional framework of government since independence. It is to be said that at its inception in 1986 the NRM was largely a broad-based government embracing a wide spectrum of political ideologies and opinions and was intended to be a transitional system of government. However, by 1995, the NRM had narrowed down in terms of its composition as well as transformed in the manner in which it operated and described itself as a political system. The major changes introduced by the NRM have entailed constitutional structures as the conceptual frame work of government. At the level of institutional structures, the changes included the following.

(i) The inception of resistance councils and committees. The RC system had already been introduced in areas of S. Western Uganda which had come with the control of the NRA as a rebel group upon coming to power; the RC system was introduced throughout the country. Of significance, the RC system transformed the nature and character of local government by breaking the monopoly of the chief thus for the first time, power at the local level was divested from a single individual and placed in a committee or council. Furthermore, the RC system brought about a new system of participatory democracy at the grassroots whereby the local people were involved in the election of their elders from the village to the district levels. Furthermore, the system also sought to bring about semblance of separation of powers. With the establishment of not only the council and committees which largely exercised legislative and executive powers, but also the resistance council courts which exercised judicial powers.

Resistance Councils and Committees (Judicial Powers) Statute No. 1 of 1987.

It may be said that over the period of time as the NRM entrenched itself, the LC system

[208] Constitutional Case No. 1 of 1986

became more and more like an institutional mechanism for the ruling power as they were now being used to advance the causes of the government. Furthermore, the concept of participatory democracy was limited to L.C 1 and L.C 2 as the other levels of the system was then based on elections by way of electoral colleges. In addition, elections for the L. Cs was primarily based on quenching which did not effectively promote democratic choice as it gave way to instances of intimidation particularly the women.

The establishment of the office of the Inspector General of government referred to as the "Ombudsman" in other countries. This was a significant establishment since no other government had previously instituted such an office and it was intended to give effect to the intention of the NRM government to eradicate corruption as stated in its 10-point programme.

The office of the IGG was designed to check on executive excesses (abuse of office) and its mandate included prevention of abuse of office as well as investigation into allegation of corruption, maladministration and abuses of human rights. Nonetheless, an examination of the operation of the office from 1988 when it was established by the IGG statute up to 1995 when it was transformed into a constitutional body under the 1995 constitution reveals a number of shortcomings of the office. First, the IGG was responsible only to the president and this therefore did not ensure independence of the office in order to effectively carry out its mandate. Secondly findings and recommendations of the office were never made public. Thirdly, in the years of its existence, the IGG totally failed to carry out its mandate on the abuse of office.

(ii) Establishment of a Commission of Inquiry into violations of human rights. This was under the chairmanship of Justice Oder and it was mandated to inquire into the violation of human rights since independence up to 1986. In effect, the commission could not inquire into human right violation under the NRM government and its report issued in 1994 does not bear reference to human rights violations in 7 years of the NRM government. In any event, in spite of the commission's report, nobody has been prosecuted for committing human right violations.

(iii) The establishment of a Constitutional Commission. This was established under the ***Uganda Constitutional Commission Statute of 1988*** under the chairmanship of Justice Odoki. The commission was mandated to collect views country-wide on the future constitutional framework of the country. The result of the commission's work was a draft constitution which was debated before a constituent Assembly in 1994/5.

(iv) The Inception of the No-party (Movement) system of government. The NRM government

was founded on the principle of non-partisan politics which stressed the importance of individual merit as the basis of political governance. The NRM government was therefore broad-based and as a result at the very outset, political parties were suspended on the argument that they were largely sectarian and divisive and were responsible for the political turmoil experienced by Uganda since 1962. Initially, the suspension of political party activities was largely seen at the result of a gentleman's agreement to allow the new system of government to operate while incorporating individuals from the political parties. However subsequently with the extension of the NRM period in government 1989, the first steps towards outright suppression of political parties occurred. By the time of the elections for the constituent assembly in 1994, the non-partisan principles of the NRM government had side lined political party activity. *The Constituent Assembly Statute of 1993* specifically provided that election of delegates would be based on the on no-partisan principles of individual merit and therefore no person would canvass for election on the platform of political parties. There was an attempt to challenge this mode of election based on nonpartisan principles as a violation of rights of association and assembly.

In **Rwanyarare v Attorney General**[209] the court rejected his petition on grounds that:

1. Limitations on individual rights were permitted in public interest under the 1967 constitution and that public interest was manifested in the desire to ensure maximum participation in the constitution making process.
2. The C.A which was mandated to promulgate a new constitution was only transitional and in effect the limitation on the rights of association and assembly was for a limited duration.

It should be recognized that the NRM government introduced a significant transformation in the gender relations than any previous government. The question of women's rights and representation was accorded as much constitutional and attention. The government put in place significant changes in the law in particularly in respect of women representative in NRC but also affirmative action policies in respect of the appointment of women to public office and in significantly the addition of 1.5 points to women on admission to tertiary institutions.

[209] Constitutional case No. 1 of 1994

CHAPTER FOUR

POLITICAL QUESTION DOCTRINE, KELSEN THEORY, LEGALITY OF GOVERNMENT & CONSTITUTIONAL DEVELOPMENT

This chapter will argue that the shared assumptions of legal positivism have ossified into a "universalist" ideology of Uganda's judiciary aptly labelled "Matovu's Ghost". Judges thus perpetuate state law as an alien system of norms detached from most people's daily lives, ultimately backed by brute force. Only by re-examining the presumptions of positivism can the study of laws bridge the Hegelian gap. The Chapter will also scrutinize the principal elements of legal positivism derived from the High Court decision in **Uganda v. Commissioner of Prisons, Ex Parte Matovu**[210]. This book further challenges those positivist assumptions by offering an alternative "map" of laws in Uganda. This map denies the hegemony of state law, but departs from Chanock and Mamdani's focus on the bifurcated civil/customary laws. This book also analyses Uganda's court jurisprudence, or lack thereof, since the 1995 Constitution.

THE START OF CONSTITUTIONAL ABROGATION.

In 1966 February 22, Uganda's prime minister, Apollo Milton Obote, issued a statement to the nation in which he announced that they would assume all powers of government in the interest of national stability, public security & tranquillity. He later suspended the 1962 constitution. However, the courts, the civil services, armed forces and the national assembly were preserved for continuity for functioning of the states.

On April 15, 1966 Uganda National assembly abolished the 1962 constitution by resolution & replaced it with the 1966 constitution to be in force pending the establishment of a constituent assembly to draft & pass a new constitution which later came to be the 1967 constitution. Under this constitution, all executive authority was vested in the president to be exercised with the advice and consent of cabinet. Former president, sir Edward Mutesa has consequently evicted from the state house & eventually forced to flee into exile. The new constitution also abolished the federal states that had been created by its predecessor.

[210] [1967] E.A.L.R. 514 (H.C.).

THE PIGEON HOLE CRISIS: A VALIDATION OF A BLOODLESS COUP.

On the morning of April 15, 1966, the four jets of the Uganda Air Force traced lazy ovals in the sky above Kampala. The streets below were quiet except for the soldiers shifting in their gear at checkpoints throughout the capital city. Ninety odd men made their way through the deserted streets to the National Assembly. Each Member of Parliament found a freshly bound copy of a draft constitution in his pigeonhole. In the parliamentary session that followed, Milton Obote, the former Prime Minister, led a polite debate surrounded by soldiers on the "interim" Constitution of 1966.[211] The opposition parties stormed out in protest, but the remaining members passed it in the name of "we the people of Uganda hereby assembled in the name of Uganda" by 55 votes to 4. Later that day Obote was sworn in as Uganda's first Executive-President of the 1996 Constitution that effectively "emasculated" Parliament as an independent legislature.[212]

Two months earlier Obote had been on a month-long tour of the distant northern districts including his native Apac district. Meanwhile, in the capital to the south, Obote's opponents had hastily prepared and passed a near unanimous motion of censure in Parliament accusing Obote, three Cabinet Ministers and the second-in- command of the Uganda Army, Idi Amin, of corruption. Obote raced back to Kampala to issue his 22 February "Statement to the Nation by the Prime Minister" that announced he had taken over all powers of government and suspended Sir Edward Mutesa II, the President of Uganda and the Kabaka ("king") of Buganda. Part of Obote's statement read: "I call upon the judges and magistrates, civil servants -both Uganda (sic) and expatriate- members of the security forces and the general public to carry on with their normal duties."[213] In a radio address two days later he suspended the 1962 Constitution.

After Obote passed his interim 1966 Constitution and suspended the Kabaka, Ganda chiefs pushed for a confrontation with Obote’s regime. On 20 May, three chiefs, including Michael Matovu, proposed a motion 1n the Lukiiko (the Buganda Parliament) demanding the central government "remove itself' from Buganda soil within ten days. The ultimatum passed unanimously. Three days later Obote countered with Legal Notice No. 4 of 1966, which declared a state of emergency in the Buganda kingdom and had government soldiers arrest the three saza chiefs. Riots broke out across the kingdom demanding their release, and attacking police stations and other symbols of the central government.[214] The next day Colonel Idi Amin led government troops to surround the Kabaka’s palace. After a half-day of bitter fighting, the troops overwhelmed the palace defenders and the

[211] Constitution of Uganda, 1966, promulgated 15 April 1966 (1966 Constitution)
[212] Yash Ghai, Matovu s case: Another comment (1968) 1 Eastern African Law Review 68 at 71
[213] Cited in Uganda v. Commissioner of Prisons, Ex Parte Matovu, [1967] E.A.L.R. 514 (gan. H.C.) [Matovu] at 522.
[214] T.V. Sathyamurthy, *The Political Development of Uganda:1900-1986* (Brookfield, Vt.: Gower,1986) at 437

Kabaka fled to London.

The battle over, Amin's soldiers razed the palace and made sure to torch each of the mujaguzo. These revered royal drums, over 200, embodied the kingdom's continuity-spiritual complement of the earthly Kabaka. This deliberate sacrilege devastated the Baganda, the state's most populous group and long-favoured by the British:

Baganda from all ranks, from intellectual to commoner, including those who supported in most respects the central government against [the Kabaka], found the reports of the loss of the drums as a numbing personal trauma.[215]To bereaved Baganda, the smouldering mujaguzo embodied their kingdom's death at the hands of the triumphant modern state of Uganda.

It was Michael Matovu who struck the match that would set alight the mujaguzo and eventually all of Uganda in two decades of civil war. He and three fellow saza chiefs (and Lukiiko ministers) were detained on 22 May 1966, the day before Obote proclaimed a public emergency in Buganda under the purported power of the Deportation Act. The five detained chiefs were driven far north from the capital and Buganda territory to an old colonial prison. On 14 July the East African Court of Appeal heard their application for a writ of habeas corpus and granted it and ordered their release since they were detained against their rights under the 1962 Constitution.[216] Matovu and his fellows were quickly flown south to the infamous Luzira prison, a colonial project of the 1920s, on a hill outside Kampala in Buganda lands. Two days later, Matovu was escorted out to the prison's inner compound, told he was released and then rearrested immediately under the new emergency powers to quell the Buganda riots.[217] For over a month Matovu was held incommunicado in Luzira until he at last met with his lawyer, Abu Mayanja, a member of Parliament for the Kabaka Yekka royalist party, in the presence of police and prison officials.[218] Matovu filed his application for a writ of habeas corpus ad suijiciendum on 6 September 1966 and a mere two weeks later the High Court of Uganda declined another habeas corpus application since the government assured the court that it would allow the East African Court of Appeal to hear their case.[219]

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[215]M.CrawfordYoung,"Buganda"in Rene Lemarchand, ed., *African Kingships in Perspective: Political Change and Modernization in Monarchical Settings* (London: Frank Cass,1977) at 200

[216]*Ibingira v. Uganda* [1966] E.A.306(East Afr.C.A.) *[Ibingira]*

[217]*Emergency Powers(Detention)Regulations,* Statutory InstrumentNo.65of1966*[DetentionAct]*

[218] A year after the *Matovu* decision, Mayanja would be arrested on charges of sedition for an Article he penned against Obote. Binaisa, his opponent in Matovu, would try the case. It ended in an acquital, but Mayanja was immediately rearrested in the courtroom and served two years in prison before being released:Ssemujju Ibrahim Nganda,"A Biography Abu Mayanja Never Lived to Read"*The Weekly Observer*(10 November2005),online:Weekly Observer <http://www.ugandaobserver.com/ new/archives/2005arch/features/spec/nov/spec200511102.php>

[219]*Ibingira, supra*

THE MATOVU CASE

Matovu's case finally came before the High Court of Uganda by way of a reference to interpret the Constitution. Three judges sat together -Chief Justice Sir Udo Udoma and Justices Sheridan and Jones- to give their unanimous judgement on 2 February 1967, five months after Matovu's application and almost a year after Obote's coup. The Court's decision began with an extended admonition of the applicant for two procedural errors. First, Matovu did not state to whom the writ was addressed.[220] This was hardly surprising, though, given the chaos following the state of emergency in Buganda. Matovu did not know, nor was he told, who was detaining him. Second, Mayanja filed an affidavit, required for an originating motion, sworn by himself since the detainee, Matovu, was unable to make it himself. The High Court objected that Mayanja did not begin this motion in the name of the "Sovereign State of Uganda". This formality recalled the historical roots of a writ of habeas corpus in England, which began as a direct petition by a subject to the King for release from illegal detention by one of his officers.[221] Since Mayanja's key argument denied that a properly constituted sovereign power existed in Uganda after the coup, however, addressing his motion to the "Sovereign State" would prejudice his case by conceding the legitimacy of Obote's regime. The Court decided they would "jettison formalism to the winds" and overlook the procedural slip-ups since "the liberty of a citizen of Uganda" was at stake.[222] But their concerns and the depth in which they analysed them revealed a sympathetic attitude towards the executive in power.

The Court next addressed the Attorney General's challenge to their authority to decide on the validity of the Constitution. The very fact that the Court was hearing this case presupposed, the Attorney General argued, that the 1966 Constitution was legally valid because the people's representatives properly and legally promulgated it.[223] If not, by what authority did they derive their judicial powers?

The judges quashed any insinuation about their loyalty by noting there was never any "dispute or doubt" about their loyalty to the "Sovereign State of Uganda" and that they remained, "in their posts in response to the appeal by the Prime Minister . . . [which was] clear testimony of their loyalty."[224] This appeal, of course, was Obote's "Statement to the Nation by the Prime Minister", which specifically appealed to "Uganda and expatriate" judges. This was a veiled threat to foreign

[220] *Matovu, supra*
[221] Matovu, *supra* and see generally David J. Clark & GerardMcCoy.*The Most Fundamental Legal Right: Habeas Corpusin the Commonwealth* (Oxford: Clarendon Press,2000)
[222] *Ibid*
[223] *Ibid*
[224] *Id*

judges and resonated with the HC: Sir Udo Udoma, a Nigerian, and British-born Justices Sheridan and Jones. All three judges must have known that Obote had targeted them since they had little popular legitimacy in the eyes of most Ugandans.[225] Having established their loyalty, the judges of the Court addressed the argument that the 1966 Constitution was valid since it came about after a successful revolution.

A DISCUSSION ON THE EX PARTE MATOVU CASE

The case itself, going by its immediate place in the history of Uganda marked the end of a semi federal system of governance with its colonial ties and impositions and heralded the beginning of republicanism in Uganda; it was the starting point of the centralization of modern government in Uganda, the birth of the very political questions and conditions that confront our time as will be discussed later. We must, as an imperative for good study of this period look at the two differing perspectives that led up to this case. The first naturally is the then government perspective of events and the other is that its opposition held both of which I will try to explore in depth here:

Professor Oloka-Onyango gives, in lucid fashion, the different arguments fronted by each side. He says that, "*viewed from Obote's angle, the 1966 Constitution attempted to achieve a number of things. First, it sought to introduce political stability to a situation of interregnum and social tension generated…by the Kabaka's attempt to illegally acquire arms. Secondly, it was an attempt at autochthony, in other words the indigenization of the constitutional regime seeing that the 1962 instrument was basically an arrangement with Britain, the departing colonial regime. Lastly, it was cast as an effort to forge national unity within a context in which colonialism had produced and encouraged disparate sub-national identities in classic divide and rule fashion*."[226]

Clearly, Obote could not have been aware of the consequences that necessarily flowed from his view of the state of affairs and the subsequent steps taken in remedy of what he perceived as an existential threat to the nascent state of "independent" Uganda. He possibly could not have known that his act was essentially the first act of an illegitimate overthrow of an established constitutional order in favor of another. However noble and well-meaning the abrogation of the Constitution of Uganda, 1962 was done, it was the established order; the grounding that held the entire government in place and the legal instrument that granted legitimacy to Obote himself. In contrast to what is popularly held in history, I do not believe that republicanism was born in Uganda through the Constitution of Uganda, 1966 but rather it died its first death by it because it naturally requires more than merely abolishing monarchies and centralizing government to create a republic. We do

[225]Mamdani &Oloka-Onyango

[226]Prof. J. Oloka-Oyango, Ghosts and the Law: An Inaugural Lecture. (November 12, 2015) at pg. 17

not judge the historical significance of an event by its present expression but rather by its future ramifications as we shall see soon.

The transition that Obote envisaged, the transition to an independent Uganda with a structure of government purposed at demonstrating a departure from the colonial way was marred in the manner in which it was executed: "*the 1966 Constitution marked the departure into exile of Sir Edward Mutesa, first president of an independent Uganda… and it also commenced the transition from a parliamentary system of governance to a presidential regime, buttressed by a framework of military and autocratic central authority which eventually burst at the seams to give birth to Uganda's second Field Marshal, Idi Amin*."[227] I contend that it is precisely these seeds that were sown in 1966 that sprouted as weeds in the fresh constitutional gardens created subsequent to these events and choked the living blossoming flowers of democratic order.

The discussion made above is merely a demonstration of the contrasting political attitudes that led up to the suspension of the Constitution of 1962 and the hasty promulgation of the Constitution of 1966. However, that was not the immediate cause of the historical case of Uganda v Commissioner of Prisons, Ex Parte Matovu[228] (hereafter referred to as the Ex Parte Matovu case). The immediate cause of this case is much wider and considering the political and constitutional crisis then simmering in the country; the case was itself inevitable. If it had not been Michael Matovu, some other person perhaps one in a similar position would have brought it to court. Matovu had been a victim of the infamous Emergency Regulations passed in 1966 that applied particularly in Buganda following the declaration of a state of emergency in Buganda in the aftermath of the Kabaka Mutesa II's exile. He was not alone in this; Grace Ibingira and the other ministers that had been previously deported to Karamoja under the Deportation Ordinance[229] had been rearrested under these regulations upon arrival in Buganda. The frightful broadness of these Regulations demonstrated the vast proportions executive power can reach even in the presence of a constitutional order; such lessons were undoubtedly carried forward with a degree of sophistication into post 1986 politics.

By an application of habeas corpus, other critical questions in respect to the existent legal order emerged beginning with the constitutionality of the Emergency Regulations under which Matovu was detained which automatically called into question the validity of the standing Government and the Constitution of 1966 itself. We might have the court that decided the case to thank for its willingness to ignore the technicalities that plagued the initial petition of Matovu and decide the case on its merits considering what was at stake in the circumstances; the denial of one's

[227]Ibid at pg. 18
[228] [1967] 1 EA 514
[229]Later pronounced unconstitutional by the East African Court of Appeal in Grace Ibingira v Uganda [1966] EA 445

fundamental rights such as the right to liberty. It was the basis for now much vaunted Article 126(2)(e) of the Constitution of the Republic of Uganda, 1995 (as amended).

Chief Justice Udo Udoma was resolute in his pronouncement that the courts could not review the actions of a separate arm of Government; in as far as the actions of Government that called into question its own validity were concerned the courts had not power to determine such a matter. He consigned such concerns to the realm of "Political Questions" best determined by the political branches of Government. The Chief Justice remarked, "*any decision by the judiciary as to the legality of the government would be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and the legislature which were accountable to the Constitution, but a decision on the validity of the Constitution was distinguishable and within the court's competence*." Perhaps this determination was reached with a view of preserving the notion of separation of powers and maintaining the independence of the judiciary. Certainly these considerations were in the mind of the court as can be plausibly presumed if any attention is paid to the authorities cited by the court to wit **Marbury v Madison**[230]. Progressive activists against the excesses or the deficiencies of the executive may at times look at this determination with contempt especially those that wish to employ court process as a spring board to lawful change where legislative change is not forthcoming.[231]

I might be so bold as to say that the court in the Ex Parte Matovu case essentially gave a sitting government a decisive tool to put certain otherwise unconstitutional acts beyond judicial reach. It is true that the court ought not to engage in politics but as Prof. Joe Oloka-Onyango labors to demonstrate, in matters when the subject of a case extends beyond the immediate concerns of the aggrieved party into the public domain then public perceptions and common politics is bound to follow case into the courtroom. He explains that, "*in cases of public interest litigation politics is never far away from the judges' chambers. Consequently, it is not only the parties immediately concerned with the petition who watch keenly for the gains and losses that may result from a court ruling. Such matters will invariably become the concern of the broader public. Because the issues in public interest litigation have typically been the subject of intense social, cultural, or political contestation in other arenas before they reached court, it is simply unrealistic to expect them to have been shorn of these dynamics once they arrive at the Bench."*[232]

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[230] 5 U.S. (1 Cranch) 137 (1803)

[231] One of the most pronounced manifestations of the Political Question Doctrine in present times appeared in the matter between Centre for Health Human Rights & Development (CEHURD) & 3 others against the Attorney General Constitutional Petition No.16 of 2011 that concerned government responsibility to provide adequate maternal health care services in public health facilities. The Constitutional Court, while invoking the Political Question Doctrine, resolved that such determination could not be made in the circumstances as this was the preserve the executive

[232] J. Oloka-Oyango, When Courts Do Politics: Public Interest Law and Litigation in East Africa (Cambridge Scholars

All this considered, it would be an abdication of duty on the courts' part if a matter firmly within the public conscience possessing some degree of political denotations were dismissed for being too political to be dealt with by the courts especially so if such matters have a significant bearing on the fundamental rights of a citizen. Yet this is not the contemporary position of court; politics is sacred ground upon which no judicial foot must tread. The Political Question Doctrine is certainly the theoretical underpinning of this understanding and it only stands to reason to know that such a restrained posture of court leaves glaring vacuums certainly to be occupied by the innate authoritarianism of the executive.[233] In contemporary times I would say that, in as far as the enforcement of human rights and the preservation of the Rule of Law is concerned, it has become necessary for the courts to depart from their traditional role of interpretation into the domain of public policy so as to bring law to bear upon the excesses of the executive that manifest themselves as policy issues with the legal cover of the Political Question Doctrine.

Certainly, the Ex Parte Matovu case had its other side which side as negatively haunted Uganda's road of democratic rule and whose remedy has yet to be found either in reason or in law; the Hans Kelsen theory of change of government. We can certainly credit the Constitution of 1995 with its ingenuity in attempting to exorcise the specter of the Kelsenian theory of change of government and legal revolution; change in the basic norm.[234]

"Change of the Basic Norm: It is just the phenomenon of revolution which clearly shows the significance of the Basic Norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican

Publishing, 2017) See Introduction

[233]This would be later seen in the final years of the Obote I regime and all other regimes that followed subsequent to it until 1986 with the assumption of power of the National Resistance Movement. During this period, the line that had been drawn so far behind, the line of no jurisdiction of the courts was pushed even further behind such that by the end of the Idi Amin regime in 1979 the courts could hardly be said to be an equal branch of government. In Omwony Ojwok, Frederick Ssempebwa & 8 others Constitutional case no.1 of 1979 the court declined to rule that the action of the National Consultative Council (NCC) in removing the then President Yusuf Kironde Lule had in fact been unconstitutional. This state of affairs was aptly covered by Prof. Oloka-Oyango in his inaugural lecture entitled Ghosts and the Law (cited above) at pgs. 28-29 when he observed that, "*Via the ghost of ex parte Matovu, executive power reigned supreme as did the notion that a violent takeover of government would be considered legally valid. Such was the view of the courts well into the early years of the National Resistance Army/Movement government.*"

[234] Article 3 of the Constitution of the Republic of Uganda, 1995 (as amended) that outlaws any attempt to take government by force of arms thereby likening revolutionary action to treason against the people of Uganda

constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm"[235]A more influential and sacred paragraph was never written in respect to the notion of political change and legal transformation in Uganda.

The fact that the court in the Ex Parte Matovu case adopted this theory as one applicable to Uganda is very surprising indeed. The Kelsenian theory of legal change assumes two fundamental changes to the "grundnorm"; changes to the written basic norm or constitution and changes to the customs of the society to which it applies. The point of the former is that the efficacy of the revolutionary constitution is proven and concretized the moment that constitution begins to become the foundation of the new laws of the State: the point of the latter is made when the society itself changes its customs to accord with the new basic norm.[236] It is certainly true that a new order cannot logically be held to be bound by the old norms but if the idea that social conduct must comport with this new order is to be thoroughly adopted then further considerations must be made.

The first assumption that Kelsen makes is that this socio-political change termed a revolution ushers in a new set of norms: the precise general assertion of the character of law under the Pure Theory of Law is that law is necessarily coercive in nature; laws are "*coercive orders of human behaviour. They command a certain human behaviour by attaching a coercive act to the opposite behaviour*"[237]If we go by this notion of coercive orders fronted by Kelsen himself, certain human behaviour including resistance to this order would naturally be met by sanction from the revolutionary government. The theory then turns from being one of a democratic order i.e. a transition from a monarchical system to a republic to being one potentially despotic in character and considering the trend of African politics from the immediate post-colonial epoch to the modern day.

If we consider 1966-67 events in Uganda, then the so called "Obote revolution" provided evidence to this assertion. If we say that the election in 1962 founded the democratic order under the Constitution of 1962; if we say then that Kabaka Muteesa II, by virtue of his alliance with the Uganda People's Congress, received the popular mandate of the people then we might be justified in saying that the events of 1966 where the illegitimate contradiction of those of 1962 and the Constitution of 1966 was the subversion of that of 1962. I mention this because it is only sensible

[235] H. Kelsen, General Theory of Law and State (1st edn, Routledge 2005) 437
[236] See J.W. Harris, 'When and Why Does the Grundnorm Change?' (1971) Cambridge Law Journal, 29(1), 103 at pg. 117-118
[237] H. Kelsen, Pure Theory of Law (The Lawbook Exchange Ltd, 2005) 33

and just that a democratic order be ousted in a democratic process, the democratic process in this case being either a plebiscite or an election itself, then taking Muteesa II as democratic president whether he had executive power or not, it would have been pure treason to contest his position by force of arms and the resulting order would be nothing but a despotism. One constitutional order cannot overthrow another without bringing its own legitimacy into question if they both arose out of the same basic norm. It must be noted that even after Kabaka Muteesa II was exiled, the Constitution of 1962 was not entirely done away with; the Prime Minister turned executive President Apollo Milton Obote elected to preserve it with the amendments he had effected, that is, the merger of the offices of Prime Minister and President. By his own confession he said,

"*There was no constitutional way out, so on February 24, 1966 I called the press and suspended the constitution and hence the posts of president and vice president. On April 15, 1966, I introduced the 1966 constitution in parliament whose only difference from the 1962 constitution was to merge the office of the prime minister with that of the president*."[238]

If we go by the Hans Kelsen theory of legal change and change of government which the court in Ex Parte Matovu asserted applied in the circumstances then by implication, in failing to do away completely with the old legal order[239], the grundnorm, the Obote Government of 1966 remained subject to it and bound by its terms so in essence he committed treason against the Government. If we pursue the Kelsenian theory to its letter, then we can say in a certain fashion that customs of the people fashioned after the basic norm and their adherence to that basic norm that was the Constitution of 1962 had not altered in any fundamental respect so no legal revolution occurred in the circumstances.

If we turn to consider in further detail the essential nature of the Kelsenian theory of the change of government and of law, then we might find ourselves staring at despicable creature of contemporary despotism. The Ugandan experience of 1966-67 is one of many such examples but if we step further into the history of Uganda the year of 1966 loses its unique character and becomes something of a commonality. When we speak about the consent of the people we must mean the unequivocal consent of the people best expressed by the concept of universal suffrage not a mere acquiescence of the people. The general 'might makes right' underpinnings of the Kelsenian theory of change of law inhibits in the most drastic manner the free expression of the people. If a

[238] Uganda People's Congress, 'Milton Obote: Telling his own Lifetime Story,' (Victor Karamagi, Daily Monitor, October 24, 2005) as referenced in Prof. J. Oloka-Oyango, Ghosts and the Law: An Inaugural Lecture. (November 12, 2015) at pg. 18

[239] Prof. George Kanyeihamba remarked on this point mentioned, "*Analyzing the events of that period and the provisions of the 1966 Constitution, the Independence Constitution of 1962 was neither suspended nor abolished. What happened was that only those part which dealt with executive powers and Head of Government were altered in order to merge the post of President with that of Prime Minister and create an Executive President*." G.W. Kanyeihamba, Constitutional and Political History of Uganda: From 1894 to Present (2nd edn LawAfrica Publishing Ltd 2002) 90

revolutionary band of rebels happens to take power, naturally their principle aim must be, irrespective of their agenda, the consolidation of their power and in pursuit of this aim will stifle any emerging voices of dissent. If the consent of the people is coerced and their behaviour altered to meet the new constitutional norm, how then can claim that the new constitutional order was met with the blessing of the people? What would otherwise be a constitutional regime becomes one of unprecedented tyranny. The Bolshevik story is one such example: the strangulation of the political life of the masses that Rosa Luxemburg criticized in her pamphlet titled *The Russian Revolution*, 1918 came as a necessary result of the immediate tasks of consolidation of power by the nascent Bolshevik Government in spite of their most seemingly noble objectives.

THE DOSSO CASE

The Attorney General relied on the authority of Hans Kelsen, in particular his General Theory of Law and State, and a Pakistan case, **State v. Dosso**.[240]

In Dosso, the Pakistani Supreme Court faced a de facto coup by the President and the armed forces. It relied on Kelsen to characterize the President annulling the constitution and enforcing martial law as an "abrupt political change" not foreseen by that constitution. Since this fit Kelsen's criteria for a successful revolution, the new military regime's laws were legitimate.

Borrowing heavily from the Dosso judgement, the Attorney General proposed four "cardinal requirements" to establish the legitimacy of Obote's regime and the 1966 Constitution. There must be) an abrupt political change (i.e., coup d'état), (ii) not contemplated in the old legal order, that then (iii) destroys the old legal order. The new Constitution and its laws must also (iv) be effective. The Attorney General cited Obote's successful coup and new Constitution passed by members of the National Assembly as evidence fulfilling the four requirements. The judges found his evidence "irresistible and unassailable" and upheld the 1966 Constitution as legally valid.

KELSEN'S GENERAL THEORY OF LAW AND STATE

Only after this decision did the Court justify itself based on two passages in Kelsen's General Theory of Law and State.

First, his "principle of legitimacy" holds that legal norms remain valid so long as they are not invalidated in some way the legal order itself provides. Thus validity depends on conforming to the hierarchy of norms in a legal order.

The exception, however, is after a revolution, when "the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first order

[240]*State v. Dosso* (1958),2P.S.C.R.180(Pak.S.C.) *[Dosso]*

itself.[241] Kelsen defines revolution broadly to include anything from a coup d'état to a complete overthrow of state institutions so long as "the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated."[242] All norms of the old order are no longer valid since the new order is now the ultimate source of validity. While the content of the norms appears unchanged, from a juristic point of view they are now only valid if properly created by the new legal order. Obote's coup, the Court decided, was just such an illegitimate and unforeseen end to the 1962 Constitution.

Second, Kelsen's "principle of effectiveness" states that a legal order's validity depends on the social facts of whether, "individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order". If people are generally obedient, then the new order is a valid one. A system's validity is thus somehow dependent on its effectiveness. For Kelsen, people's actual behaviour is only legally normative once a new order exists. But the basic norm of this order can only be presumed once the order is shown to be effective. This tension between social fact and legal normativity lies at the heart of Kelsen's theory, For the High Court, however, effectiveness was a simple empirical inquiry.

The Court also considered a third passage discussing international law. Kelsen reiterates that "a national legal order begins to be valid as soon as it has become-on the whole-efficacious; and it ceases to be valid as soon as it loses this efficacy.[243]" Thus the Court, in a somewhat simplified way, stated: "The government brought into permanent power by a revolution or coup d'état is, according to international law, the legitimate government of the State, whose identity is not affected by these events." However, this thesis will leave it aside this international law aspect since the focus in on national and local legal orders: see Hans Kelsen, General Theory of Law and State, trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press, 1945) at 117-18,200 & 220. satisfied by evidence proving (presumably on a balance of probabilities though they never say) adherence to the 1966 Constitution and its laws. The only evidence the Attorney-General submitted were a "large number" of affidavits of which the Court mentions only eight, all of which were sworn by members of the executive-the very men would led Obote's coup. The judges accepted the affidavits and concluded in a single paragraph of analysis that the 1966 Constitution was "efficacious" since: the new Constitution has been accepted by the people of Uganda and that it has

[241] The Court also considered a third passage discussing international law. Kelsen reiterates that "anationallegalorder beginsto be valid as soon as it has become-on thewhole-efficacious; andit ceases Tobe valid as soon as it loses this efficacy."Thus the Court, in a some whats implified way, stated:"The government brought into permanent power by evolution or coup d'etatis, according to international law, the legitimate government of the State, whose identity is not affected by these events. "However, this thesis will leave it aside this international law aspect since the focus in on national and local legal orders: seeHans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Mass.: Harvard UniversityPress, 1945) at117-18,200&220

[242] Id.

[243] Id.

been firmly established throughout the country, the changes introduced therein having been implemented without opposition, as there is not before us any evidence to the contrary.[244]

Here the Court accepted the affidavits as truth, even when a civil war raged in Buganda and elsewhere. This deference is evident throughout their decision in Matovu. Responding to a challenge that many states did not recognize Obote's government, for example, the Court pointed to an affidavit to the contrary by Mr. Bigirwenkya, Permanent Secretary of the Ministry of Foreign Affairs. The Court's clearest statement of Kelsenian ideology came in its conclusion. On the issue of their powers of adjudication, the judges wrote:

Courts, legislatures and the law derive their origins from the constitution, and therefore the constitution cannot derive its origin from them, because these can be no law unless there is already a state whose law it is, and there can be no state without a constitution.[245]

All legal authority was derived from the Constitution. Moreover, the legal system predicated upon a state, and vice versa. For the Court, no law could exist without a state, and no state could exist without a constitution. Thus they concluded that the Detention Act was validly enacted under the 1966 Constitution. Matovu would not be released, but the government had to provide him with reasons for his detention.

LEGITIMIZATION OF THE KELSEN THEORY IN UGANDA

In 1966, the High Court of Uganda legitimised the new nation's first coup d'état. After two decades of civil war, Ugandans enacted their first popular constitution in 1995. However, the judiciary's dominant positivist ideology, still looms over the legal order.

With colonization came laws written, administered and adjudicated by Europeans. British administrators copied English laws whole and imported their common law. Along with innumerable provisions and principles of English justice, colonial officers and judges brought with them those laws' tradition of Benthamite and Austinian legal positivism. Nor did Ghana's independence in 1957-the first for a British colony in sub- Saharan Africa-launch a judicial "revolution" that condemned this legal philosophy to a phantom presence in old colonial law reports. Surprisingly, expatriate and newly appointed African judges became even more "positivist" that their European brethren. In Uganda, this thesis argues, the judiciary's uncritical application of legal positivism in the distinct context of this African state has ossified into an ideology that continues to burden substantive justice for most Ugandans.

[244] This journal's history chronicles the decline oflegal academia in east Africa. Its physical quality deteriorates over ten years from its first publication by the University of East Africa, Dar es Salaam, in 1968. The thick, type-set first edition, bound in bright green, gradually ends up as a thin, photocopied collection from a hastily type-written original. Volume 11 covered 1978-81 and then only three more volumes came out until it finally ended in 1990

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REVOLUTION DOCTRINE: MORE EXECUTIVE MINDED THAN THE EXECUTIVE

Despite an imperfect grasp of Kelsen's finer details, the three judges in Matovu's Case accepted Kelsen's structure of state law and the principles of legitimacy and effectiveness. Two critics of the Matovu decision in Uganda were sympathetic to its reasoning, if not its conclusion.

The eight affidavits were by the (i) Cabinet Secretary, (ii) Attorney-General (Binaisa), (iii) Inspector General of Police, (iv) Permanent Secretary (P-S) to the Ministry of Public Service, (v) Quartermaster- General of the Uganda Armed Forces, (vi) P-S, Ministry of Defence, (vii) P-S, Ministry of Foreign Affairs and (viii) P-S, Ministry of Regional Administrations:

Martin wrote in the Eastern Africa Law Review that the Chief Justice, "while accepting the political realities, was still attempting to express his loyalty to the general ethos of constitutionality."[246] He noted, however, that the outcome was never in doubt because Udoma C.J. had taken the Oath of Allegiance and the Judicial Oath, administered by the self-proclaimed President at Parliament on 15 April 1966, well before the Matovu decision.[247] Moreover, the common law has no principle of "constitutional fact", as in American jurisprudence, so it's unclear how the Court made the key factual finding based on a few affidavits that "the people" of Uganda obey the new constitution.[248]

The second critic, Yash Ghai, had little sympathy for what he saw as judicial subservience to the executive's reasons to detain individuals in emergency situations. He concluded that,

"What is most disturbing about the judgment is not necessarily the actual decision, but its general tenor, which is, to quote Lord Atkin, 'more executive minded than executive'."[249]

Matovu quickly diffused through African Jurisprudence. It is useful to consider how judges and commentators reacted to Kelsen in the High Court of Uganda. Matovu was first invoked to legitimize the Unilateral Declaration of Indepedence (U.D.I) In Rhodesia[250] the sheer volume of academic commentary on the U.D.I cases is staggering[251]

While similar to Obote's bloodless coup, the Smith regime had also cut its colonial ties to the Westminster Parliament in London. The first cases rejected the new

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[246]R.B. Martin,"In the Matter of an Application by Michael Matovu"(1968)1*Eastern Africa L. Rev.*61at 66-7
[247] Id. at 63
[248] Id. at 63
[249] Ghai 1968, supra at 75.
[250] Mad:;jmbamuto v. Lardner-Burkc N.O., [1966) R.L.R. 756 (Rhod. Gen. Div.)
[251] [Mad: jmbamuto 1966);

On appeal to the High Court, Chief Justice Beadle accepted Kelsen, but found Smith's regime had de facto, not de jure, authority because its effectiveness was in doubt- thus it hovered somewhere between the old and new basic norms.[252] Fieldsend A.J .A. rejected the legal-political question distinction to hold the new regime illegitimate on the public policy ground that "nothing can encourage instability more" than for coup plotters to know that they can rely on the judiciary's support.[253] But the High Court Appellate Division in R. v. Ndhlovu overturned this line of reasoning. The Court recalled the "political question" doctrine to limit itself to deciding legal, but not political, questions.[254] Relying on Kelsen again, the Court ruled that the Smith regime's constitution was valid and legitimate.

Most critics accepted the Kelsenian analysis as authoritative even if they disagreed with the judges' application.[255] This also assumed that the judiciary should limit itself to legal, and not political, questions. Some like De Smith, however, rejected this interpretation because judges were key political players in the Rhodesia coup.[256] Kelsen's principles of legitimacy and effectiveness, he argued, simply mask political calculations under jurisprudential authority.[257] In her realist critique, Palley said the cases were determined by the judges' positivist ideology.[258] Dias agreed, suggesting that "positivist judges can always take refuge behind the threadbare adage that courts are not concerned with morals."[259] These three dissenting critics all argued along different lines that Kelsen's so-called general theory had little application in Rhodesia judges and leaders lived, worked and played in a tight-knit community isolated from the rural, African population unmentioned in any court case.

Two other cases in Nigeria and Ghana illustrate that the dominant view of the Rhodesian cases was also common in other so-called revolution jurisprudence in Africa. An aborted putsch by young

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[252]The following Articles are only arepresentativesampleof the many commentaries on the Rhodesian cases in the five years after U.D.I. Interestingly, no academic Articles deal with *Matovu* at length other than the two by Martin and Ghai: see*e.g.*S.A. deSmith,"Southern RhodesiaAct1965"(1966)29Mod.
L.Rev.301; Claire Palley,"The Judicial Process: U.D.I. and the Southern RhodesianJudiciary"(1967) 30 Mod.L.Rev.263; R.W.M. Dias,"Legal Politics: Norms Behind the Grundnoml'(1968)26
CambridgeL.J.233; H.H. Marshall,"The Legal EffectsofU.D.I.(BasedonMadzimbamutov.Lardner-Burke"(1968)17I.C.L.Q.1022; F.M. Brookfield,"The Courts, Kelsen, and the Rhodesian Revolution" (1969) 19U.T.LJ.326; J.M. Eekelaar,"Rhodesia: The Abdication of Constitutionalism"(1969)32Mod.
L.Rev.19; J.M. Finnis,"Revolutions and ContinuityinLaw"inA.W.B. Simpson, ed., *Oxford Emrysin Jurisprudence: Second Series* (Oxford:

[253] M ad mbamuto 1966b, supra note 50 (The Mad mbamuto decision was given on 10 September 1966, while the Matovu began a month later. Martin believed it was likely that the Ugandan judges had read the Rhodesian case and consciously applied the reasoning of Justice Lewis: see Martin, mpra note 46 at 64).

[254] Madi Jmbamuto 1968, supra note 50 at para. 351-52.

[255] Id. at 430 (Frustrated at his fellow judges' support for the Smith regime, Fieldsend A.J.A. resigned in March 1968: Eekelaar, supra note at 20).

[256]*Ndhlovu, supra*.

[257] See e.g. Brookfield, supra note 51 at 330-39 & 351-52.

[258]DeSmith, *supra note*51at94.

[259] Id. at 102-03.

army officers against the Nigerian federal government in 1966 set off events culminating in the Nigerian Civil War. Most of the elected government was killed and the surviving members handed over power to the commander of the federal army. Six months later another coup, this one a success, replaced the leader of the military regime in control.[260] When this regime tried to oust judicial oversight over its special tribunals, the issue came before the Supreme Court in Lakanmi v. Attorney-General[261] The advocate for the federal military government advanced the Kelsenian arguments that the first coup was a revolution, and thus its Decrees were the ultimate sources of law. The Court approved Dosso and Matovu, but rejected the Nigerian case by noting it was not an "abrupt political change" since the civilian government had handed over power willingly. Thus the basic norm was still legitimate and the tribunals were prohibited by the 1963 Constitution.

In 1966, the same year as the Nigerian coups, the military overthrew Ghana's first civilian government. When civilian rule was restored three years later, the new constitution contained a transitional provision that let the government terminate all state offices established during military-rule.[262]

The new government had fired Mr. Sallah, a manager at a government-owned company, who was appointed in 1967 by powers conferred in a 1964 act. Sallah challenged his dismissal by arguing the original constitution was still valid in an appeal to the Supreme Court. Following Binaisa's argument in Matovu, the Attorney General argued that the 1966 coup was a Kelsenian revolution, in which case the transition provision allowed Sallah's fling. In the Supreme Court, a majority of judges rejected Kelsen as an authority since, as Justice Sowah said, they would "not derive much assistance from the foreign theories." In his concurring opinion, Justice Archer wrote:

What was the Basic Norm? Was it the proclamation [by the coup leaders]? It was not so because it was not a constitution. How then do we trace the Basic Norm? Is the Basic Norm the people of Ghana who supported the armed forces and police or is the Basic Norm to be detected from the armoured cars at Burma Camp?[263]

The majority did not accept that soldiers could capture the executive and thus wipe out the old constitution by decree. Justice Archer's derisory rhetoric aside, it is clear that he was sceptical of ever finding Kelsen’s elusive norm in putsch-ridden Ghana. Thus a majority dismissed the Attorney General's Kelsenian gambit and upheld Sallah's claim.[264]

Academic interest in coups d’état and other lesser revolutions waned as cynicism set in after the

[260] Palley, supra note at 284.
[261] Dias, supra note at 257.
[262] Id. at 253.
[263] Tayyab Mahmud, 'jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) Cornell Int'l LJ 49 at 69, fn 123.
[264] (1971] u. Ife L.R. 201 (Nig. s.q.

rise of dictators and one-party states at the expense of an independent judiciary.[265] Some critics supported the Kelsenian doctrine as a valid theory, but not how it was applied by particular courts.[266] Hassan limited it to popular revolutions since it seemed a coup removing the head of state had no impact on the vast majority of the state.[267] The realist critique has also returned in the "implicit bargain theory" that judges enter into a tacit bargain with (military) coup leaders to protect their posts and its privilege in exchange for legitimacy and legal continuity.[268]

Only Tayyab Mahmud challenged Kelsen's applicability to contexts outside Europe.[269] Kelsenian revolutions, he argued, assume the "historical experience of Western Europe and colonial settler states. These include a substantial measure of ethnic unity, linguistic uniformity, cultural homogeneity, political stability, and representative governance."[270]

This is critical to understand why Kelsen's refusal to distinguish between a mass social upheaval and a coup d'état, which he treated as the same from a judicial perspective, was especially troublesome in African states.

Mahmud outlined four socio-political facts that distinguish developed from developing contexts.[271] First, territorial boundaries, especially in Africa, were arbitrarily mapped over existing linguistic, ethnic, religious and other settlement patterns. Second, the defining characteristic of the non-western state is its underdeveloped capitalist economy, which includes (urban) "pockets of prosperity" in a sea of (rural) poverty. Third, state structures are overdeveloped relative to civil society, especially coercive instruments like the military or police. Fourth, a linguistic or ethnic minority often dominates the state despite nominal elections.

"Revolutions" in Africa were unique mainly because coup leaders merely sought to oust the current leader without any more changes.[272]

Most critics, however, accepted Kelsen as an authority on revolution. They accepted that the principles of legitimacy and effectiveness were a legal test that could be applied without judges engaging in a political question. A few commentators questioned this dominant positivist view, whether from realist or moral positions. How does a basic norm explain an obligation to conform to

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[265] Constitution o/the Republic o/Ghana, 1969, s. 9(1).
[266] *Sa/lab v Attornry-General,* [1970] C.C.55(GhanaS.C.)*;* see also S.K. Date Bah,'jurisprudence's Day in Court in Ghana"(1971)20I.C.L.Q.315.
[267] *Id.*[emphasisinoriginal].
[268] Hatchard, John & Tunde I. Ogowewo. Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth (London: Commonwealth Secretariat, 2003) at 14 & 17 (Ogowewo is wrong,
however, in believing he was the first to notice this implicit bargain. Farooq Hassan argued this very point in his seminal 1984 Article on coups d'etat in Commonwealth jurisdictions:).
[269] Mahmud, *supra*.
[270] *Ibid.*
[271] *Ibid*
[272] Ibid.

constitutional laws when most of the population is outside the reach of those laws? In the words of Dias, "What of the Africans?"[273] Before examining "that niggling moral question" that positivist judges ignored (Section 3), however, we must first outline those positivist presumptions that sustain Kelsen's general theory.

UNMASKING LEGAL POSITIVISIM AS AN EXECUTIVE POLITICAL THEORY

In his General Theory State and Law, Kelsen sets out "to enable the jurist concerned with a particular legal order to understand and to describe as exactly as possible his own positive law," consisting of a system of "positive legal norms."[274] He sees his project as descriptive and scientific since it is restricted to understanding the relation between legal norms related to social facts and distinct from the moral intentions of lawmakers, citizens and others. "Law" is a system of rules governing human behaviour synonymous with neither a fundamental moral order, nor a reductionist (scientific) perspective.[275] Given this general definition, Kelsen's theory is applicable in every society, regardless of its historical, social or political particularities. In his later work, Pure Theory Law, he makes this universal ambition explicit in describing the common features of all legal systems.[276]

A collection of legal norms form a legal order if two conditions hold.[277] First, if norm A directly or indirectly authorizes the creation of another norm, B, then A and B belong in the same legal order. Second, all norms in a legal order are authorized by one norm. Thus no norm can be part of two legal systems. If two norms exist neither of which authorizes the creation of the other, then they are not in the same system. These norms are positive in the sense that they are "created and annulled by acts of human beings".[278] From these two simple axioms and their corollaries, one can identify even very complex legal systems. Each system is thus necessarily hierarchical and linked, in Raz's words, by a chain of validity. The condition for a norm's existence is its validity. A norm is a valid legal norm if created by a definite rule found in another (valid) norm.[279] For Kelsen, norms are also "ought" statements that prescribe (or posit, hence positivism) a course of action. Norms are derived from human conduct, or rather are interpreted as such by people. By observing drivers consistently stopping at a red light, one might interpret this as a legal norm. People stop at red lights, therefore people ought to stop at red lights. But Kelsen rejects this move since he holds fast to Burne's

[273] Dias, supra.
[274] Kelsen,
[275] Id
[276]Hans Kelsen, *Pure Theory of Law*, trans. By Max Knight (Berkeley: University of California Press,1967).
[277] JosephRaz, *The Authoriry of Law: Essays on Law and Moraliry* (Oxford: Clarendon Press,1979) at 123.
[278] Kelsen, supra.
[279] Id.

scepticism over whether an "ought" can be derived from an "is".[280] This is not a simple matter of doubting whether one can derive a moral conclusion from a factual premise. Rather, Hume questioned how descriptive (empirical) claims could entail prescriptive (normative) claims. Kelsen's story so far is in trouble since all norms in a legal system are "ought" statements, and thus he cannot derive their normative force by a descriptive appeal to the "is" of social facts.

Kelsen escapes this dilemma by a transcendental move. Since all norms are a system are derived from a single norm, he presupposes this norm since it alone can account for the normative "oughtness" of all other norms in a legal system. This basic norm (Grundnorm) is at the pinnacle of the legal order and directly or indirectly validates all other norms. If a norm is created by an act of will, as Kelsen argues, then each norm is valid only if a higher legal norm authorizes its creation. We continue climbing this chain of validity until a norm(s) is reached that has no explicit norm authorizing its creation. It is here that Kelsen introduces a presupposed basic norm as the source of normativity "beyond which one cannot look for a more ultimate norm."[281] Kelsen's legal system thus derives its normative character by presupposing the basic norm. Moreover, the basic norm provides for the unity of the legal system.

The basic norm is of a different quality than all other norms in a legal system. It is transcendental in character since it is derived from what Kelsen takes as a given social fact, namely the normative legal system described above. The basic norm is the only non-positive law in a legal system because it is not posited by human action (i.e. a validly enacted norm). Since this system's normativity is only explicable by a single and ultimate norm, the basic norm is a logical necessity. Thus Kelsen's theory is distinct from other positivist accounts since it rejects grounding the normativity of posited laws in social facts alone. Kelsen's move, moreover, is open to attacks on the accuracy of his underlying description of a legal system.

In practical terms, Kelsen traces the basic norm back to the constitution and then all previous constitutions until we come to a "historically" first constitution. "The validity of this first constitution," Kelsen argues, "is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends."[282] This historical trek up the chain of validity to the basic norm of the legal system illustrates the temporal aspect of Kelsen's theory. A legal order occupies a certain normative space in a society, but it is also organic in the sense of growing or shrinking through time as lower order norms are created or extinguished. The identity of the legal order is constant through these changes since its basic norm remains unchanged.

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[280] Id see also Hume, David. A Treatise of Human Nature (Bristol: Thoemmes Press, 2001) at Book III, part I, section I.
[281] Id.
[282] Id

By associating the basic norm with a single constitution, Kelsen sees a State as inextricably bound up in a legal system.[283] Here the "State" has a specific meaning when seen from a "juristic point of view": it is "the community created by a national (as opposed to international) legal order."[284] Thus one must identify a State by first identifying its legal system. Conversely, a legal system logically entails a State-no legal system is Stateless. Thus a legal system's laws are valid over the entire territory of the

State since validity is a logical fact derived from a law's proper enactment by higher laws. Kelsen acknowledges, however, that some individual laws may be more or less effective in particular points within the State. Effectiveness, unlike validity, is a social fact and capable of degrees of satisfaction. In a sense, Kelsen's legal theory is also a political theory of the State.[285]

We are now better placed to reconsider the two short passages of Kelsen's General Theory cited by the High Court in Matovu. The fate of a legal system during a revolution is ultimately a question of what happens to the basic norm. Kelsen uses revolution' in a broad sense, anything from a radical social upheaval to coups d'état, because his concern is with the process by which a group seizes control of a State. "From a juristic point of view," Kelsen says, "the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated."[286] If the coup succeeds, the norms of the old legal order are no longer valid by the principle of legitimacy since it was violated by the coup. A coup that creates a new efficacious order entails a new basic norm. Otherwise the principle of legitimacy is violated because a new norm (the new regime's constitution or legal notice) not authorized by the old basic norm now claims to authorize all valid laws.

Kelsen explains a revolution's negation of the old basic norm by appealing to social facts in the principle of effectiveness. He argues, "[e]very single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order."[287] Given Kelsen's transcendental argument for the basic norm, it becomes clear why he thinks a new basic norm must be presupposed. Legal norms are valid only when -but not because they are effective. A legal system is valid since its norms were enacted in an authorized way.

Working up this chain of validity, as we have seen, leads to one or more positive laws that are not

[283] I will capitalize "State" throughout this book when referring to Kelsen's particular concept of the state in his Genera/Theory: id.
[284] Id
[285] See especially Lars Vinx, Hans Kelsen's Pure Theory of Law: Legality and Legitimag (Oxford: Oxford University Press, 2007) at 15-24. 120
[286] Kelsen,
[287] Id.

authorized by any higher norm. Here Kelsen made his transcendental leap to the basic norm. Thus the efficacy of a legal order is the social condition that permits one to posit legal norms whose normative validity presupposes a transcendental norm. As Kelsen puts it, "[t)he basic norm of any positive legal order confers legal authority only upon facts by which an order is created and applied which is on the whole effective."[288] ("On the whole effective" concedes that not everyone must obey the new laws.) A new legal order is only created after people behave as though it existed. Only then, when we can presume a new basic norm for this order, can we determine the criteria of validity for the norms in the new order. The principle of effectiveness thus restricts the principle of legitimacy.

This explanation of normative discontinuity is unsatisfactory for a few reasons, any account deriving normativity (however indirectly) from social facts must explain at what point a custom or habit becomes a social rule. Kelsen's answer is especially worrisome since he provides no test to measure the efficacy of legal norms. Deviation from the rule is not a problem, H.L.A. Hart notes, so long as most people's behaviour conforms to the rule and the deviants are criticized.[289] Raz also observes that no attempts to compute the number or ratio or percentage of disobeyers of a rule will ever "make much sense".[290] Some critics point to these concessions as proof that effectiveness, as a binary concept, is incoherent.[291] However this mischaracterizes the ideas of rules and rule-following employed. Inspired by his reading of Wittgenstein's Philosophical Investigations, Hart dismisses this critique as wrongheaded. For him, it "need not worry us more than the question as to the number of hairs a man may have and still be bald."[292] His seemingly casual dismissal sounds similar to the phrases Wittgenstein employed in his Philosophical Investigations when trying to focus the reader's attention on what really mattered: the use of language.[293]

If Hart's justification of efficiency can bolster Kelsen's theory, it is necessary to briefly digress to consider Wittgenstein's particular task in Philosophical Investigations. [294]Rule-following relates to a number of concepts Wittgenstein works with to disabuse us of apparent paradoxes created by our own misuse of language. The public language of social life, or "grammar", enables the very practice of rule-following. Grammar in turn presumes that " the speaking of language is part of an

[288] Id.
[289] H.L.A Hart, The Concept of Law, 2nd ed. (Oxford: Oxford University Press, 1961) at 55-6.
[290] Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System, 2d ed. (Oxford: Clarendon Press, 1980) at 203.
[291] See e.g. H. Patrick Glenn, "Doin' the Transsystemic: Legal Systems and Legal Traditions" (2005) SO
[292] Hart, supra note 91 at 56.
[293] Hart, supra note 91 at 56.
[294] See generally G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity, Volume 2 of an Analytical Commentary on the Philosophical Investigations (Oxford: Blackwell, 1985).

activity, or of a form of life".[295] Thus "a form of life" is the bedrock upon which language flows; it is presumed and self evident, but visible only in its effects on grammar-much like a rock lodged in a riverbed is only visible by the ripple on the surface it moulds from below.

The difficult question, which this book will pose and leave unanswered, is whether a form of life is unique to a community, language-group, nation, etc., or human beings as a species? Wittgenstein writes that a form of life is "the common behavior of mankind," which is "the system of reference by means of which we interpret an unknown language".[296] If laws are normative rules, as Kelsen and Hart suppose, we must be alive to the possibility that rule-following might depend on a form of life unique to a particular community, language-group, nation, etc. Moreover, two forms of life might lead to very different rule-following behaviour. Individuals from either form may find each other's behaviour unintelligible as rules in their understanding of the activity. This relativist reading of rules thus challenges the bond between a legal system and a state presumed by Kelsen and to a lesser extent Hart.

The continuity of a legal system through a revolutionary overthrow of governments brings out this tension. Kelsen claims that the "State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions."[297] As we have seen, Kelsen must admit discontinuity in the normative force of law to explain an illegal takeover by revolution or coup d'état. Finnis picks up on Kelsen's difficulty explaining how a legal system's normativity lapses in this brief interregnum. Do laws really loose their normative force during the legal discontinuity, however brief, of an unconsolidated coup? Finnis attributes "rules of succession" to any Kelsenian legal order, which determine who is authorized as a legal official. Ex rypothi, a coup d'état violates the rules of succession to office and so on up the chain of validity to the basic norm.[298] This leads to an inescapable discontinuity in the legal order since the principle of legitimacy no longer holds and a new basic norm is presupposed.

Finnis proposes an alternative "general principle" permitting revolutionary overthrow of rules of power-conferring laws:

A law once validly brought into being, in accordance with criteria of validity then in force, remains valid until either it expires according to its own terms or terms implied at its creation, or it is repealed in accordance with conditions of repeal in force at the time of its repeal.[299]

Thus a revolution can overthrow a basic norm, rule of recognition, etc., without interrupting the

[295] Ludwig Wittgenstein, Philosophical Investigations, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1968) at para. 23.
[296] *Id.*at para.206.
[297] Kelsen, *supra* note 38 at 368-69.
[298] Finnis 1973, *supra* note51at46 50.
[299] Id. [emphasis in original].

continuity of other laws enacted by those now repealed laws. In other words, a revolution repeals only higher legal norms governing the rules of succession, but leaves the validity of all other norms unaffected. "A revolution," Finnis argues, "unless it deliberately seeks the total subversion of the order of society, does not challenge, even temporarily, the general principle."[300] Thus for Finnis, a legal system must be more than a logical hierarchy of normative rules to explain its continual force during periods of interregnum.

But his solution to explaining continuity over time comes at a cost (one, we should note, that he is all too happy to pay).[301] Finnis suggests, "the continuity and identity of a legal system is a function of the continuity and identity of society in whose ordered existence in time the legal system participates."[302] He then places law in a moral community. When revolutionaries overthrow a legal system, reasonable people will accept the "general principle" as holding since they want to continue to have a stable order to guide their project of life. The continuity of law for Finnis is thus grounded in the common political project of a distinct (and distinguishable) society.

Despite his fulsome critique, Finnis shares Kelsen and Hart's presumption that a legal system correlates to some definable society. Indeed, Finnis makes an even stronger claim than either, arguing that, "[a]nalytical jurisprudence is intrinsically sub alternated either to history or to ethics or to both". In his view, the only sufficient reason in Hart's "internal view" for a person to obey law is "a specific moral reason for acting."[303]This conclusion obviously contradicts Kelsen and Hart's basic distinctions between what law "is" and what it "ought to be". But what the three of them share is more revealing.

For each, normative legal obligations arise from social facts. Kelsen, if not Hart, would surely disagree with Finnis that a shared moral order in society is necessary to ensure the continuity of the legal system according to his general principle. But they would share his implicit identification of a distinct society within the geographic borders of Rhodesia with the state and its legal system. As Wittgenstein's forms of life problematic reveals, community is an essential concept to understand even the simplest rules. For Kelsen, Hart and Finnis, all people must have a shared understanding of what it means to follow a rule. Thus a rule-based theory of law presupposes a society defined by its shared understanding and acceptance of what counts as proper rule-following behaviour. Although Kelsen rejects the idea that normativity is a social fact, his principle of efficiency is incoherent unless people in society can follow laws validly derived from the basic norm. At the

[300]*Id.* [emphasisadded

[301] By exposing this embarrassing normative gap in Kelsen's general theory, Finnis creates room for his solution of grounding positive laws in a society's moral practices: see Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press,1980).

[302]Finnis1973, *supra*.

[303] Matovu, *supra*.

heart of positivism lies a presupposed community of rule followers whose shared form of life can generate normative meaning.

GODFREY BINAISA'S IDIOSYNCRATIC JUSTIFICATION OF THE OBOTE COUP.

In Matovu, Godfrey Binaisa, the Attorney-General, based his defence of Obote's coup in Kelsen's idiosyncratic definition of revolution.[304] But this idea of revolution is hardly widespread in lay- or philosophical usage. In On Revolution, for example, Hannah Arendt saw revolution (at least the first American and French versions) as individuals coming together in a common purpose to create free public space.[305] A revolution, perhaps led by an elite vanguard, is necessarily a mass uprising with a conscious goal of replacing the old order and those who perpetuated it. Franz Fanon proposed a more radical definition similar to Finnis's idea of revolution as the "total subversion of the order of society". "Liberation" for him was, the total destruction of the colonial system, from the pre-eminence of the language of the oppressor and "departmentalization," to the customs union that in reality maintains the former colonized in the meshes of the culture, of the fashion and of the images of the colonialist.

Fanon recognized that the new African political and business elites, often one and the same, had a vested interest in perpetuating the structures of colonial rule. Thus a total revolution, for him, could only come from the rural peasants. Though quite different, both Arendt and Fanon would agree on restricting "revolution" to truly popular, mass movements.

Revolution, contrary to Kelsen, is something more than a palace coup. The judges in Matovu shared Kelsen's conception of revolution and his positivist presumptions. The legal system was identified with the (post)colonial state as a hierarchy of normative rules. Only laws created by a higher law were valid. And at the top was a basic norm, which the Court identified with the 1966 Constitution. All laws were written, although customary law oral sources were sanctioned by written laws

They also accepted Kelsen's distinction between effectiveness and validity. Effectiveness was an empirical fact, while validity was a logical imperative. Finally, the Court presumed the legal system and state were grounded in a homogenous society with a shared form of life. In some sense, all Ugandans were subject to state law, and all understood it and knew to follow it. These particular presumptions are the essential elements of the positivist ideology of Uganda's judiciary.

This is ideology, rather than prejudice, since the judges accept Kelsen and cases like Dosso as dogma. For the Court in Matovu, Kelsen is not a theorist to consider, but an authority to apply.

[304] Hannah Arendt, On Revolution (London: Penguin Books, 1963).

[305] Franz Fanon, Towards the African Revolution: Political Essqys, trans. Haakon Chevalier (New York: Grove Press, 1967) at 105; see also Franz Fanon, Pour Ia revolution africaine: Ecrits politiques (Paris: Fran<;ois

Nowhere in its judgment does the Court question the context or purpose of Kelsen's General Theory. But their positivist ideology did not begin with Matovu. This book will show, Kelsen's principles of legitimacy and effectiveness were merely effective authority to justify the Court's longstanding deference to the executive and readiness to presume a hierarchical legal order spread across a homogenous society of essentially indistinguishable Ugandans.

THE POLITICAL QUESTION DOCTRINE IN MILITARY AFFAIRS.

The matter of Tinyefuza began on November 29, 1996, when General Tinyefuza testified regarding the insurgency in North Uganda before the Parliamentary Sessional Committee (Sessional Committee) on Defence and Internal Affairs. Overall Tinyefuza issued a scathing attack on the Uganda Peoples' Defence Force in his testimony, criticizing its general behaviour and, in particular, its handling of the insurgency in North Uganda.[306] According to media reports, military authorities believed General Tinyefuza's testimony before the Sessional Committee "did not comply to the military line," and that he should retire from the army and go before the High Command. General Tinyefuza did not consider himself a member of the army when he spoke to the Committee, but he resigned in a letter to the President to clear the air. His resignation was rejected by the Minister of Defence on the grounds that it did not conform with the National Resistance Army (Conditions of Service) (Officers) Regulations 1993. General Tinyefuza saw these occurrences as exposing him to a fearful environment, and he believed his rights were about to be violated.

As a result, General Tinyefuza filed a petition with the Constitutional Court, requesting a declaration that the threats to punish him for his testimony before the Sessional Committee would be in violation of Article 87 of the Constitution; that the rejection of the resignation letter was unconstitutional; and that the army regulations were no longer applicable to him because – at the time of his testimony – he was still serving in the army. The Attorney General appealed to the Supreme Court after the Constitutional Court ruled in favor of General Tinyefuza. The Constitutional Court was reserved by the Supreme Court in a 5 to 2 vote.

Justice Kanyeihamba, writing for the majority, stated at the outset that in order to dispose of this appeal according to the principles of the Ugandan Constitution and laws, it was necessary for him to make some preliminary observations, which he said should guide a court in adjudicating constitutional matters of this nature and others. Justice Kanyeihamba started by looking at the political question concept as it is used in the United States and as it has been developed by Ugandan courts. He stated that the basic rule is that courts have no jurisdiction over topics that are within the legislative or executive's constitutional and legal authority. Kanyeihamba went on to say

[306] See Major General David Tinyefuza v Attorney Genera [1997] UGCC 3 (Justice Manyido opinion).

that even when courts feel compelled to intervene and evaluate legislative or executive activities when challenged on the grounds that an individual's rights have been violated, they do so rarely and reluctantly. In addition, he reaffirmed Matovu's support for the political question doctrine. The political question concept compels the court to assess as a threshold matter in all instances whether the question before it has been assigned by the Constitution to another co-ordinate organ of government, according to constitutional analysts.

Before getting to the merits, Justice Kanyeihamba outlined some of the areas in which he believes the political question theory should be applied in Uganda. Among them, he mentioned whether courts should seek proof of whether a bill approved by the legislature was done correctly or not, the handling of foreign relations, and the timing of declaring and ending wars and insurgencies. The majority of observers agree with Justice Kanyeihamba's description of the areas where the political question theory is most relevant. Justice Kanyeihamba was satisfied, based on common law sources, that courts should refrain from ruling on such issues until there are extremely evident incidents of violation or imminent violation of individual liberty. When it comes to the exercise and control of authorities relating to the armed forces' structure, organization, deployment, and operations, Justice Kanyeihamba stated that courts' reluctance to enter the arena reserved by the Constitution for the other arms of government reaches a nadir. In his opinion, the recognized norm is that courts will not substitute their own views of what is in the public interest in these cases, especially when the other co-ordinate organs of government are working within their constitutional competence.

Because military concerns are under the exclusive jurisdiction of both the administration and the legislature, Justice Kanyeihamba argues that it is not for the courts to assess whether the executive's discretion was exercised appropriately, if at all. Parliament, he believes, has the authority to hold the government accountable in these military matters. The United States Court of Appeal in Schneider v Kissinger makes a significant statement in support of Justice Kanyeihamba's position, stating that "the lack of judicial authority to oversee the conduct of the executive branch in political matters does not leave executive power unchecked because political branches exercise checks and balances on each other in the area of political questions." These judicial sentiments are shared by some commentators. For example, in a paper co-authored with others, Ibrahim Imam argues that “we should not be overly concerned that the political question doctrine deprives the courts of enforcement power over certain constitutional provisions because the Constitution and electoral process provide an appropriate substitute.” Thus, Justice Kanyeihamba cannot be criticized for pointing out that Parliament is the proper institution of government to check the executive on

military matters, and that this is a sufficient constitutional check on executive power in the context of the political question theory.

Justice Kanyeihamba then discussed the notion of separation of powers in the Ugandan Constitution, emphasizing that courts are not the only actors on the constitutional stage in Uganda, as they are in the United States. He correctly observed, in my opinion, that the constitutional platform is to be shared by the three arms of government, namely the executive, judicial, and legislative arms; that courts must consider the judgments of other repositories of constitutional power concerning the scope of their authority and the necessity for each to stay within its powers, including judicial review; and that courts must consider the judgments of other repositories of constitutional power concerning the scope of their authority and the necessity for each to stay within its powers, including judicial review.[307] Professor Tribe agrees that "as long as the manner in which the Constitution is to be interpreted remains open to question, the meaning of the Constitution is subject to legitimate dispute, and the judiciary is not alone in its responsibility to interpret," "the meaning of the Constitution is subject to legitimate dispute, and the judiciary is not alone in its responsibility to interpret."

Instead, Justice Kanyeihamba declared that the principle of separation of powers requires the courts to refrain from intervening in arenas not assigned to them by the Constitution or Ugandan laws unless there is a clear case requiring intervention for purposes of determining constitutionality of action or the protection of liberty that is currently threatened. Furthermore, he stated that in a democracy, courts must refrain from stepping into areas of disagreement that are best resolved by other government authorities. Cowper and Sossin have similarly observed and argued that “based on the principle of separation of powers, the political question doctrine limits judicial power in a number of circumstances where the other branches of government have a stronger claim to decide the issue raised” in their discussion of the political question doctrine in Canada. Kanyeihamba's statement, I believe, represents the concept that the president and legislature have a stronger claim to decide military issues that have arisen in this situation.

It is clear from Justice Kanyeihamba's analysis that the political question doctrine is acknowledged in Uganda, as it is in Ghana and the United States, as arising from the principle of separation of powers. Furthermore, it is obvious that the political question doctrine's application may be limited; that is, it may not apply in circumstances of evident constitutional infractions or abuses of power. In this sense, Justice Kanyeihamba's opinions are identical to those of Justice Kpegah of Ghana's Supreme Court. The two judges have similar views on the right balance of powers among the three branches of government, arguing that each has equal constitutional authority to interpret and

[307]L.H. Tribe, American Constitutional Law (Foundation Press, New York, NY, 1988) at 34–35.

implement the Constitution. Tinyefuza isn't the first time Uganda has used the political question philosophy. The Constitutional Court dismissed a case based on this approach as early as March 2012.

Fast forward to 2021, the supreme court suspended a decision by the constitutional court that proclaimed it unconstitutional for civilians to be tried in the military courts, especially if they haven't subjected themselves to the military system.

The constitutional court in the case of Kabaziguruka v Attorney General[308], The Constitutional Court found in a 3:2 judgment that civilians being tried in military courts is illegal, especially if they have not submitted to the military system.

Justice Kenneth Kakuru, one of the majority three justices, concluded that the General Court Martial's authority is confined to trying offenses defined by the Uganda People's Defence Force (UPDF) Act, and solely in respect of persons subject to military law.

The court's ruling, according to the justices, does not mean that civilians facing military trials are now free. Instead, they ordered that their case files be transferred to civilian courts for further treatment within 14 days of the verdict, on the advice of the Director of Public Prosecutions (DPP).

Uganda's Constitutional Court, which was established 26 years ago, has long been thought to be more flexible to the Executive, but following a recent ruling that prevented civilians from being tried in military courts, it might be claimed that the court is on the mend.

The current decision underlines the issues that have plagued this court for years. It was filed in 2016 by Michael Kabaziguruka, who had just been elected Nakawa MP, but the judgment was not delivered until five years later, after he had lost his seat, raising questions about whether justice was served, given that the former MP has spent the last five years with treason charges hanging over his head.

Kabaziguruka, who gave the military court a shot of defiance the previous time he appeared in 2016, made it obvious that as a civilian, the court had no jurisdiction over him. "I'm a civilian who should be tried in a civilian court," says the defendant. I have the financial means to employ a private attorney, but I am unable to do so since I am in the incorrect court. If you force me to stand trial here, I prefer to represent myself," Mr Kabaziguruka added, drawing a standing ovation from FDC members in the courtroom.

The length of time it took the court to deliver the judgment cannot be overlooked because lawyer Ladislaus Rwakafuuzi, who has long opposed civilians being tried in military courts, was healthy when Kabaziguruka gave him instructions to lead his legal team in filing the petition, but he was sick after suffering a stroke by the time the case came up for final submissions last year.

[308] Constitutional Petition 45 of 2016 [2021] UGCC 11 (01 July 2021)

The army supported charging civilians in their court by using Sections 119(1) g and h of the UPDF Act No7/2005, sub-sec (g), which states: ".... every person not otherwise subject to military law who aids or abets a person subject to military law in the commission of a service offence; and (h) anyone found in unlawful possession of I arms, ammunition, or equipment normally monopolized by the defence forces; or (ii) other classified stores as prescribed, is subject to military law and can be tried in military courts as apposed to civilian courts.

"The practical effect of all of this is that, under Sections 119 (1) g and h of the UPDF Act, the General Court Martial and any other military courts established under the said Act are purported to have jurisdiction to try anyone in Uganda, whether or not a member of the UPDF, for any crime under the Penal Code Act or any other enactment. All that is required for this to happen is to allege that a civilian aided and abetted a person subject to military law in committing that crime," stated Justice Kasule, who retired in 2018 but continues to serve on a contract basis.

"This is grossly unconstitutional since Article 210(b) [of the Constitution] restricts the General Court Martial and any other military court to exercise jurisdiction as to discipline over only members of the UPDF."

"By the General Court Martial extending its jurisdiction to try civilians who are not members of the UPDF in respect of all offences under the Penal Code Act and other enactments, it subjects ordinary civilians to criminal prosecutions that have no safeguards of a fair trial and proper administration of justice, the ensuring of which is a constitutional duty of the DPP. This is inconsistent and in contravention of the intent, purpose and overall spirit of articles 28(1), 126(1), and 210(b) of the constitution."

The key point made by activists and the opposition is that the court martial is not an independent tribunal because President Museveni controls it directly, which the majority of the justices agreed with.

"The General Court Martial, therefore, is a specialised court set up by Parliament and clearly is not part of the Judiciary. It is part of the Executive arm of government established under Chapter 12 of the Constitution which provides for the country's defence and national security," Justice Kasule wrote.

"Several attempts by the Executive to place the General Court Martial on the same footing as courts of judicature has in my view originated confusion and discord among jurists, legal practitioners and scholars. It's simply trying to fit a square peg in a round hole."

In as much as this decision seemed to be in the right direction of justice, the supreme court is not likely to uphold the same. This is because the Government appealed this decision to the supreme court. An interim order suspending the implementation of the Constitutional Court decision that

barred the Army Court from Prosecuting Civilians was granted by the Supreme Court. A panel of five Justices led by Chief Justice Alfonse Owiny Dollo said that the temporary order would run up to 29th July 2021 to allow the Justices to study Government's case for the intended appeal and make an appropriate decision.

THE POLITICAL QUESTION IN HEALTH ISSUES.

The Constitutional Court of Uganda recently used Tinyefuza to dismiss a constitutional petition in Centre of Health Human Rights v Attorney-General[309] (hereinafter Maternal Health Case), a case challenging government conduct or inaction based on Tinyefuza's political question doctrine. In the Maternity Health Case, the plaintiffs challenged the government's refusal to supply basic maternal commodities in government health facilities by petitioning the Constitutional Court under sections 137(3) and 45 of the Constitution. The plaintiffs sought a ruling that government activities or omissions that had resulted in excessive maternal fatalities in Uganda were in violation of the fundamental right to life and health.

The administration filed a preliminary objection to the Constitutional Court's jurisdiction to hear the case at the outset, claiming that the political question doctrine prevents the judiciary from hearing such matters. The government's preliminary objection in the Maternal Health Case is compatible, at least to some extent, with Justice Kanyeihamba's declaration in Tinyefuza that "courts have no jurisdiction over subjects that are within the constitutional and legal authorities of the political arms of government." Furthermore, the administration appears to agree with Professor Barkow's viewpoint that "in all constitutional matters, the primary inquiry must be whether the question before the court has been delegated to another body of government."

The administration contended that the way the petition was worded required the court to make a judicial judgement involving political matters, and that the court had to establish whether it had jurisdiction to determine those questions at the outset, citing Tinyefuza and other foreign authorities. It further maintained that by hearing such cases, the Constitutional Court would be infringing on political discretion, which is reserved by statute for the government and legislature. Furthermore, the government believed that the Constitutional Court should not deal directly with questions that the Constitution has designated as the sole responsibility of other branches of government; that for the Constitutional Court to determine the issues in the petition, it would be required to review all of the health sector's policies and make findings on them; and that the implementation of the policies would be the responsibility of other branches of government; and that the implementation of the policies would be the responsibility of other branches of

[309] Centre of Health Human Rights v Attorney-General, Constitutional Petition No 16 of 2011.

government. To back up its assertions, the government presented an affidavit from the Ministry of Health's Principal Secretary, outlining the government's efforts and strategies to improve maternal health services and maintain high standards in the health sector. It then cited sections 111(2) and 176(2)(e) of the Constitution, claiming that they protected the executive and legislative powers to design, review, and implement policies, as well as to allocate resources.

In dismissing the case, the Constitutional Court supported the Supreme Court's Tinyefuza ruling on the political question theory. While the Court was correct in saying that the Supreme Court had embraced the political question concept in Tinyefuza, it is crucial to note that the Constitutional Court first adopted it in Matovu and then applied it in Andrew Kayira v Edward Rugumayo.[310] Justice Kanyeihamba acknowledged in Tinyefuza that Matovu had adopted the political question doctrine as a sound premise to be applied in Uganda. One of the reasons for recognizing Tinyefuza's adoption of the political question doctrine is that it was the first case to apply the doctrine after the 1995 Constitution was enacted. Prior to Tinyefuza, it was unclear if Uganda's 1995 Constitution allowed for the application of the political question theory.

The Constitutional Court reasoned that the Constitution clearly defined the varied functions allocated to each of the three institutions of government in applying the political question theory in the Maternal Health Case. According to the Constitutional Court, this meant that each government organ's autonomy had to be protected from undue interference from the others. While it is true that the government did not provide sufficient resources to the health sector, the Court reasoned that the executive and no other branch of government had the authority to make such decisions. As a result, the Constitutional Court declared that it is obligated to defer to the president and legislature on certain constitutional problems of a political nature. The Constitutional Court defended its hesitation in deciding the petition's concerns by claiming that doing so would be substituting its discretion for the executive's. In other words, the Constitutional Court was concerned that by deciding the petition's problems, it would be intruding into the executive's realm, which would violate the principle of separation of powers.

As a result, the Constitutional Court upheld the government's preliminary objections, ruling that it lacked the authority to determine or enforce its jurisdiction over matters requiring analysis of government health-care policies because the alleged acts or omissions were committed by the political branches, and thus fell under the political question doctrine. This kind of application is known as the classical political question doctrine, according to Professor Wechsler and other observers. The classical version, according to Cutaiar, was recognized in the historic Supreme Court case Marbury. The classical version's primary premise is that "the political question doctrine

[310] Andrew Kayira v Edward Rugumayo, Constitutional Case No 1 (1979).

is a product of constitutional interpretation, not of judicial discretion." I agree with proponents of the traditional political question concept that the political question doctrine should only be used to jurisprudentially guide the court in establishing the circumstances in which the Constitution has delegated the determination of an issue to another body of government.

The political question theory has been frequently used to put the judiciary under the executive's shadow, as evidenced by the above discussion. The notion of separation of powers is still a mystery to the Ugandan government, which it must first decipher and then embrace in its daily operations.

A CALL FOR THE ABANDONMENT OF THE DOMINANT EXECUTIVE POLITICAL QUESTION DOCTRINE

The dominant positivist Executive ideology has not gone unchallenged. A group of judges led by Justice Kanyeihamba at the Supreme Court are questioned the role of the judiciary in the particular legal map of Uganda. In a Supreme Court case challenging the 2006 presidential elections, Kanyeihamba wrote that the Court must abandon the "political doctrine" constraints of Matovu and embark on an inquiry "radically different from an ordinary ... criminal, civil or administrative" trial. One way to do this is to look to the National Objectives and Directive Principles of the 1995 Constitution. If the constitution-making process did manage to distil some common national goals, judges could use those non-justiciable rights to creatively re-interpret their role. The first step would be to identify the positivist presumptions of the dominant judicial ideology and then scrutinize them against the distinct legal map of Uganda. As the recent cases surveyed indicate, a few judges have already begun this process.

A final observation is worth making on the place of human rights in countering despotic governments in Uganda. In their constitutional form, human rights are in essence an individual's justifiable checks against the state. Human rights thus have greater relevance where state law is hegemonic. But where other legal orders compete with or even preclude state law, focusing just on them is misguided. An exclusive human rights discourse is insufficient to address injustices that occur at the frontiers, or along different projections or scales, to state law This discourse is even dangerous since at a fundamental level it accepts the state, if not all its laws, as legitimate. In a nation interlaced with legal orders of which the state's is just one, any language that accepts a single order as superior may stifle inquiry into what justice means within the other orders or in their interactions. The old magistrate, defender of the rule of law, enemy in his own way of the State, assaulted and imprisoned, impregnably virtuous, is not without his own twinges of doubt.

The pervasive presumptions of positivism are deeply ingrained 1n the legal ideology of Uganda's judiciary. Only state law is seen as valid law-or law at all. When confronted with legal orders that

do not fit with this ideological form, judges have either re-invented them to fit, ignored them or sanctioned violence to subdue them. Kelsenian judges in Uganda thus identified a legal system with the state. For Kelsen, this had been essential to ward off the dangers of the arbitrary, autocratic state he had witnessed in Europe His theory of law thus relied upon, and contributed to, a political philosophy unique to his European experience. The Ugandan judiciary, however, accepted his theory as an ideology that dominated its work since the Uganda Order in Council 1902.

Any legal theory, even a self-consciously amoral one, presupposes a philosophical foundation. Judges in colonial Uganda applied statutes and case law imported from England and continued to do so after independence in 1962. But most importantly, they reproduced an ideology of interpretation-their particular positivism described in Chapter 2-based on philosophical premises that were as inconsistent with Speke's Buganda as they are with the Republic of Uganda today. Exorcising Matovu's ghost is a pressing precondition for scholars of Uganda and other African states with similar colonial experiences. This work has already begun in several disjointed discourses on law in Africa. For legal scholars generally, this project's findings will also illuminate the particularities of positivism in Anglo-American jurisprudence. The hegemonic claims of Kelsen and Hart have inspired very real ghosts in Uganda.

Yet legal scholarship on Africa is now gravitating towards two distinct poles, (i) legal anthropology, and (ii) international human rights and criminal law. Laws in Africa are thus either exoticized or marginalized, respectively. In practical terms, the former is evident in the rush of nongovernmental organizations to Karamoja to save the pastoralists from AK-47s and ultimately themselves. The renewed interest in the Karamojong reflects a broader trend towards classifying such orally-bound collectivities as "indigenous" and so inherently worthy of study. From the other perspective, the International Criminal Court's indictment of Kony and the LRA has largely ignored its potential impact on the complex political struggle for constitutionalism in Uganda. As vast intellectual resources capital is sunk in on developing an international criminal law, the niggling problems of plural legal orders slides towards the peripheries.

The twin ghosts of Hegel and Matovu hinder any attempts to study how Ugandans navigate and contest the various laws mapping their borders in the “unspoken assumption that Africa does not offer a good enough return to justify deploying resources to its study.” This book argues adamantly to the contrary: not only must Matovu's ghost be exorcized from Uganda's judicial ideology, but non-African legal scholars must do the same for Hegel's ghost. Extracting this spectre turns the burden of proof on its head and state laws must at last justify their once-presumed authority (and violence) against the indigenous norms they seek to map over.

CHAPTER FIVE

THE PRESIDENCY, ITS POWERS AND IMMUNITIES

INTRODUCTION

Society has over the years evolved from living in seclusion to high levels of organisation like democracies and monarchies. In the early ages, it was man against the wilderness and survival majorly based on man's ability to overcome the challenges of the jungle. The main activities were hunting and fruit picking.

As time advanced, so did man. The discovery of fire and iron smelting were one of the events that transformed time from the old stone age to the new stone age. Man was able to make tools and this helped with agriculture. The growing of crops and ability to keep animals encouraged settlement and therefore ended man's nomadic life. With time, there was need to separate labour to provide for the farmers and those who would keep the produce for the times the plants were not ready for harvest and this in the long run introduced classes in the settlements and the growth of cities. This was also the beginning of civilisation.

All these things happened around 10,000 and 5,000 BC. With the growth of settlement and communities, there was also a growth of leadership structures in order to maintain order and peace in these settlements. This in essence saw the rise of great empires around the world and their eventual fall.

All this still does not explain the origin of "president" as a supreme leader of a defined territory of land as we know it in the modern society. The title president is derived from the Latin prae-"before" plus sedere"to sit". As such, it originally designated the officer who presides over or "sits before" a gathering and ensures that debate is conducted according to the rules of order (see also chairman and speaker), but today it most commonly refers to an executive official in any social organization. Early examples are from the universities of Oxford and Cambridge (from 1464) and the founding president of the Royal Society William Brouncker in 1660.

This usage still holds relevance today in the title of such offices as "President of the Board of Trade" and "Lord President of the Council" in the United Kingdom, as well as "President of the Senate" in the United States (one of the roles constitutionally assigned to the vice president). The leader of the bench in the International Court of Justice is addressed as president. The officiating priest at certain Anglican religious services, too, is sometimes called the "president" in this sense.

However, the most common modern usage is as the title of a head of state in a republic.

In pre-revolutionary France, the president of a Parliament evolved into a powerful magistrate, a member of the so-called noblesse de robe ("nobility of the gown"), with considerable judicial as well as administrative authority. The name referred to his primary role of presiding over trials and other hearings. In the 17th and 18th centuries, seats in the Parliaments, including presidencies, became effectively hereditary, since the holder of the office could ensure that it would pass to an heir by paying the crown a special tax known as the paulette. The post of "first president" (premier président), however, could be held by only the King's nominees. The Parliaments were abolished by the French Revolution. In modern France the Chief Judge of a court is known as its president (président de la cour).

The word "presidents" is also used in the King James Bible at Daniel 6:2 to translate the Aramaic term **סָרְכִ֔ין (sā·rə·ḵîn)**, a word of likely Persian origin, meaning "officials", "commissioners", "overseers" or "chiefs".

The nomenclature of the supreme power that was used at the time all seems to have constantly revolved around the modern day understood meaning of president. A single person with the power to oversee the affairs of an organised group of people. It is important to note that these leaders at first had no regulation on how their powers could be used. But this position changed with the advancement of advocacy and the art of rhetoric that saw philosophers develop the art of convincing communities to think different about guidelines or norms set by authorities. No wonder most of these philosophers were killed by those in power because they opposed the supreme rule.

This paper therefore traces the origins of presidency as a position of leadership and its earliest codification. I also uncover the powers that were eventually bestowed on presidency with the modern development of different forms of governance like democracy and dictatorship. I also draw a difference between the powers vested in the president based on the system of governance and how they differ from a system without a president; for example, a monarchy. I then discuss whether the president is in and of oneself law in any given system of governance. If this is not absolutely true, then when can it be said that the president has abused the power vested in him or her. I also discuss the line between the president and the law and how obscure it is, or rather how some governments make it so. This paper ultimately drives to provide an analysis of presidential powers in Uganda.

TRACING THE ORIGINS OF PRESIDENCY

The first usage of the word president to denote the highest official in a government was during the Commonwealth of England. After the abolition of the monarchy the English Council of State, whose members were elected by the House of Commons, became the executive government of the Commonwealth. The Council of State was the successor of the Privy Council, which had previously been headed by the lord president; its successor the Council of State was also headed by a lord president, the first of which was John Bradshaw. However, the lord president alone was not head of state, because that office was vested in the council as a whole.

The modern usage of the term president to designate a single person who is the head of state of a republic can be traced directly to the United States Constitution of 1787, which created the office of President of the United States. Previous American governments had included "presidents" (such as the president of the Continental Congress or the president of the Massachusetts Provincial Congress), but these were presiding officers in the older sense, with no executive authority. It has been suggested that the executive use of the term was borrowed from early American colleges and universities, which were usually headed by a president.

British universities were headed by an official called the "Chancellor" (typically a ceremonial position) while the chief administrator held the title of "Vice-Chancellor". But America's first institutions of higher learning (such as Harvard University and Yale University) didn't resemble a full-sized university so much as one of its constituent colleges. A number of colleges at Cambridge University featured an official called the "president". The head, for instance, of Magdalene College, Cambridge was called the master and his second the president. The first president of Harvard, Henry Dunster, had been educated at Magdalene. Some have speculated that he borrowed the term out of a sense of humility, considering himself only a temporary place-holder. The presiding official of Yale College, originally a "rector" (after the usage of continental European universities), became "president" in 1745.

UNITED STATES OF AMERICA

Money, it is said, is the root of all evil: it has certainly been one of the most prolific stimuli to revolt, rebellion, and revolution--in western history, at any rate.[311] In England, Magna Carta and the Barons' War and the Civil War in 1642;in France--the nobillar revolts of the sixteenth century, the Fronde, and finally the great Revolution of 1789; in Spain--the revolts of the Netherlands, Catalans,and Portuguese: all serve as examples. The American Revolution started as a tax revolt

[311] Especially given that all colonialisms around the world were undertaken majorly to increase revenue for the colonial countries.

too.[312]

The colonial masters had just won a 7-year war against the French in North America at a hefty cost that almost cost them their own country. This doubled their national debt from £75 million to almost £147 million. Not only that: her ever-busy merchants evaded the various Trade and Navigation Acts and carried on a profitable contraband traffic in the West Indies; another loss to the imperial revenue. Yet the 'British Americans enjoyed a lighter tax burden than any people of the western world except the Poles'.[313]

What happened in the ensuing thirteen years was that the British repeatedly made efforts to tighten up the colonial economic laws and to impose taxes on the colonists to help pay to protect the western frontier from Indian attack. The colonists; tempers frayed by the losses now incurred among the contrabandists and by those who had speculated in the western lands which were now closed to settlement; resisted. The British tried one measure, met resistance, withdrew it and tried another, and so forth, each incident contributing to growing bitterness, radicalization--and a sense of solidarity among the colonists.[314]

The British ministers acted with extreme ham-handedness and insensitivity, while each of their blunders was seized on by the firebrands and revolutionaries among the colonists; such as the ineffable Patrick Henry, Sam Adams, and James Otis, who established a network of Corresponding Societies in Massachusetts, an example soon followed in the rest of the colonies. Exaggeration was compounded. One has only to look at the litany of complaints delivered 'to a candid world' in the latter part of Jefferson's Declaration of Independence to see that half were factitious and of the remainder half were grossly exaggerated. Take the Quebec Act, 1774, for instance. Although this left the province's government in the hands of a royal governor and his council, in all other respects this was a liberal, indeed noble, document. It restored French civil law to the Quebecois, and pledged toleration for their Roman Catholic religion. For their pains the British were accused of extending religious toleration to the Catholics so that they could be used to suppress the liberties of the colonists.[315]

To cut the long story short, in the 1770s, the increasingly defiant American colonies began to work toward political independence from the British Government.[316]Tensions continued to escalate until, in 1775, armed conflict erupted. The colonists, who were economically dependent on Europe, recognized that European nations were unlikely to conclude trade agreements with the Americans

[312]Samuel E. Finer, 1999. The History of Governments from the Earliest Times, Vol.3, Oxford University Press, p.1485-1491
[313] Ibid p. 1489
[314] Ibid p. 1490
[315]Ibid p. 1491
[316]https://history.state.gov/milestones/1776-1783/foreword

unless they declared their independence. The U.S. Continental Congress endorsed Thomas Jefferson's Declaration of Independence on July 4, 1776, and, with the endorsement of this document, the conflict with Great Britain became a full-fledged War of Independence.[317]

Unable to defeat the strong British military on their own, the American colonists required foreign assistance. John Adams approached the French with the "Model Treaty," which protected neutral trade and shipping rights in the event of a war. The French decision to sign this commercial treaty with the American colonists made France an implicit ally in the war against Great Britain.

In 1778, France formally established its position as an ally with a treaty of alliance that committed the French to the war on the condition that the Americans did not seek a separate peace with Great Britain. Following the British surrender at the Battle of Yorktown, the Americans negotiated independently with Great Britain despite their agreement with France. The war was not officially concluded, however, until the agreement to the Treaty of Paris in 1783, which was signed in concert with treaties between Great Britain, France, and Spain. The final treaty granted full independence and recognized the borders of the new United States of America.[318]

The 1787 Constitution of the United States did not specify the manner of address for the president. When George Washington was sworn in as the first president of the United States on April 30, 1789, the administering of the oath of office ended with the proclamation: "Long live George Washington, President of the United States."[319] No title other than the name of the office of the executive was officially used at the inauguration.

The question of a presidential title was being debated in Congress at the time, however, having become official legislative business with Richard Henry Lee's motion of April 23, 1789. Lee's motion asked congress to consider "what titles it will be proper to annex to the offices of President and Vice President of the United States – if any other than those given in the Constitution".[320] Vice President John Adams, in his role as President of the United States Senate, organized a congressional committee. There Adams agitated for the adoption of the style of Highness (as well as the title of Protector of Their [the United States'] Liberties) for the President.[321]Adams and Lee were among the most outspoken proponents of an exalted presidential title.[322]

Others favoured the variant of Electoral Highness or the lesser Excellency, the latter of which was vociferously opposed by Adams, who contended that it was far beneath the presidential dignity, as the executives of the states, some of which were also titled "President" (e.g. the President of

[317] Ibid
[318] Ibid
[319]Bartoloni-Tuazon, Kathleen, 2014. For Fear of an Elective King. Ithaca: Cornell University Press. p. 89.
[320] Ibid p. 86
[321] Ibid p.57
[322] Supra note 10

Pennsylvania), at that time often enjoyed the style of Excellency; Adams said the president "would be levelled with colonial governors or with functionaries from German princedoms" if he were to use the style of Excellency. Adams and Richard Henry Lee both feared that cabals of powerful senators would unduly influence a weak executive, and saw an exalted title as a way of strengthening the presidency.[323] On further consideration, Adams deemed even Highness insufficient and instead proposed that the executive, both the president and the vice president (i.e., himself), be styled Majesty to prevent the "great danger" of an executive with insufficient dignity.[324] Adams' efforts were met with widespread derision and perplexion; Thomas Jefferson called them "the most superlatively ridiculous thing I ever heard of", while Benjamin Franklin considered it "absolutely mad".[325]

Washington consented to the demands of James Madison and the United States House of Representatives that the title be altered to "Mr. President".[326]Nonetheless, later "The Honourable" became the standard title of the President in formal address, and "His/Her Excellency" became the title of the President when addressed formally internationally.

Historically, the title was reserved for the incumbent president only, and was not to be used for former presidents, holding that it was not proper to use the title as a courtesy title when addressing a former president.[327] Despite that, some sources maintain that living former U.S. presidents continue to be addressed as "Mr. President", both formally and informally, and some contemporary experts on etiquette maintain that it is entirely appropriate.[328]

REPUBLIC OF CHINA

The fate of government throughout the entire world was galvanized, between 1500 and 1776, by two technological advances--firearms, especially artillery, and the ocean-going sailing-ship--and the union of these two in what were effectively 'floating castles enveloped by all-round batteries of quick-firing guns'. These ships enabled the Europeans to take and settle America and to establish fortified trading posts throughout South and South-East Asia.[329]But they could not penetrate the latter beyond the protection afforded by their gunships. Their significance, then, was that for the first time post-Roman Europe had a significant role to play, alongside the three other great state systems--the Islamic, the Indian, and the Chinese. The significance of the siege-gun was more

[323] Supra note 11
[324]Hutson, James H. March 1968. "John Adams' Title Campaign". The New England Quarterly. 41 (1): 30–39
[325] Ibid
[326]Caroli, Betty Boyd 2003. First Ladies. Oxford University Press US. p. 4. ISBN 978-0-19-516676-7.
[327]Wood, Gordon S. (2006). Revolutionary Characters. Penguin Press. p. 54. ISBN 978-1-59420-093-9.
[328]"Forms of Address: How to Address the President". HuffPost. 1 January 2013
[329]Bull and A. Watson, 1984. Expansion of International Society, Clarendon Press,Oxford,p. 34.

indiscriminate than that of the new type of ship; it strengthened central governments throughout the globe. That artillery could batter down the curtain walls of baronial castles and centralize power in the hands of the monarch is part of the conventional wisdom of European history.[330]

The History of the Republic of China begins after the Qing dynasty in 1912, when the formation of the Republic of China as a constitutional republic put an end to 2,000 years of imperial rule. The Manchu-led Qing dynasty ruled China proper from 1644 to 1912. The Republic experienced many trials and tribulations after its founding which included being dominated by elements as disparate as warlord generals and foreign powers.

Qing dynasty in the late 19th and early 20th centuries was challenged by civil unrest and foreign invasions. Internal rebellions and their repression brought millions of deaths, conflicts with foreign Western European powers brought humiliating unequal treaties, exacted reparations that burdened the fiscal system, and compromised the country's territorial integrity. Popular sentiment among Han Chinese grew that political power should return to the majority Han Chinese from the minority Manchus. Following the Boxer Rebellion and the invasion of the imperialist powers to put it down, the Qing Imperial Court launched fundamental institutional and political reforms, such as abolishing the Imperial examination system in 1905, drafting a constitution in 1906, the establishment of provincial legislatures in 1909, and the preparations for electing a national parliament in 1910. However, Manchu conservatives in the Qing Court thought these reforms went too far and distrustful critics felt they did not go far enough. Reformers were either imprisoned or executed outright. The failures of the Imperial Court to enact such political liberalization and modernization caused the reformists to take the road of revolution.

In 1928, the Republic was nominally unified under the Kuomintang (KMT; also called "Chinese Nationalist Party") after the Northern Expedition, and was in the early stages of industrialization and modernization when it was caught in the conflicts involving the Kuomintang government, the Communist Party of China (founded in 1921), local warlords, and the Empire of Japan. Most nation-building efforts were stopped during the full-scale Second Sino-Japanese War against Japan from 1937 to 1945, and later the widening gap between the Kuomintang and the Communist Party made a coalition government impossible, causing the resumption of the Chinese Civil War, in 1946, shortly after the Japanese surrender to the Allied Powers in September 1945.

A series of political, economic and military missteps led to the KMT's defeat and its retreat to Taiwan (formerly "Formosa") in 1949, where it established an authoritarian one-party state continuing under Generalissimo/President Chiang Kai-shek. This state considered itself to be the continuing sole legitimate ruler of all of China, referring to the communist government or "regime"

[330] Ibid, p. 1064

as illegitimate, a so-called "People's Republic of China" (PRC) declared in Beijing (Peking) by Mao Zedong in 1949, as "mainland China", "Communist China, or "Red China". The Republic of China was supported for many years — even decades — by many nations, especially the United States who established a 1954 Mutual Defense treaty. After political liberalization began in the late 1960s, the PRC was able — after a constant yearly campaign in the United Nations — to finally get approval in 1971 to take the seat for "China" in the General Assembly, and more importantly, be seated as one of the five permanent members of the Security Council. After recovering from this shock of rejection by its former allies and liberalization in the late 1970s from the Nationalist authoritarian government and following the death of Chiang Kai-shek, the Republic of China has transformed itself into a multiparty, representative democracy on Taiwan and given more representation to those native Taiwanese, whose ancestors predate the 1949 mainland evacuation.

I N D I A

Some historians choose to take Indian civilization as commencing with the riverine cultures of Mohenjo-Daro and Harappa (2500 BC); others with the Aryan invasions (c. 1500 BC). Either way the fact remains that it is thousands of years old. Furthermore, Hindu religion, its unifying and unique characteristic, is the oldest continuous religious tradition in the world, such that Hindus are still using some of the hymns of the Rig Veda, of c. 1500 BC.

Yet during these three millennia before the Mughal period (1526-1739) there was no single Indian polity congruent with Indian civilization. The so-called empires that commence with the Marians in 321 BC were loosely articulated, short-lived, and few; and in any case their detail is largely unknown recorded history. Instead, there was a multitude of minor kingdoms whose existence was fluid and short-lived.

However, one of the eras worth noting was the era of the Mughal Empire, and this for two most powerful reasons. Unlike any of these other states, it created a stable administrative structure that held together three-quarters of the subcontinent for over 150 years. Secondly, the ruins of this structure served as the basis for the first successful and durable unification in history of all India as we now conventionally think of it. This was British India, the Raj. The Mughals founded an imperial ideal and the Raj took it up and bettered it.

The fact is that until Mughal times India was a geographical expression. It was not like the monocultural and for the most part politically united China. Studying it is more like studying Europe, with its diverse languages, religions, and peoples, and its many states which, like those of India, were continually at war. The India of today is half the area of the USA. It is 2,000 miles from Kashmir to Cape Cormoran, 2,200 from Baluchistan to the eastern frontier of Assam. Eighty-three

per cent of its population are Hindu: only 11 per cent are Muslim (though before partition they accounted for 25 per cent). But in addition, there are substantial minorities of Jains, Buddhists, and Christians. No fewer than fifteen languages are officially recognized as such, but if the dialects are considered, they number (according to Sir George Grierson's researches, 1903-28) no fewer than 225. It is perfectly true that linguistic and/or ethnic uniformity are not sufficient or even necessary conditions for statehood: but they do help it along mightily.

Fast forward, India, like many other countries around the world, was colonised. In 1498, a Portuguese fleet under Vasco da Gama successfully discovered a new sea route from Europe to India, which paved the way for direct Indo-European commerce. The Portuguese soon set up trading posts in Goa, Daman, Diu and Bombay. After their conquest in Goa, the Portuguese instituted the Goa Inquisition, where new Indian converts and non-Christians were punished for suspected heresy against Christianity and were condemned to be burnt.[331] Goa became the main Portuguese base until it was annexed by India in 1961.[332]

The next to arrive were the Dutch, with their main base in Ceylon. They established ports in Malabar. However, their expansion into India was halted after their defeat in the Battle of Colachel by the Kingdom of Travancore during the Travancore-Dutch War. The Dutch never recovered from the defeat and no longer posed a large colonial threat to India.[333]

The internal conflicts among Indian kingdoms gave opportunities to the European traders to gradually establish political influence and appropriate lands. Following the Dutch, the British—who set up in the west coast port of Surat in 1619—and the French both established trading outposts in India. Although these continental European powers controlled various coastal regions of southern and eastern India during the ensuing century, they eventually lost all their territories in India to the British, with the exception of the French outposts of Pondichéry and Chandernagore,[334] and the Portuguese colonies of Goa, Daman and Diu.[335]

Again, like many other countries, there was an uprising to remove the colonial rule in India. The Indian rebellion of 1857 was a large-scale rebellion by soldiers employed by the British East India Company in northern and central India against the company's rule. The spark that led to the mutiny was the issue of new gunpowder cartridges for the Enfield rifle, which was insensitive to local religious prohibition. The key mutineer was Mangal Pandey.[336] In addition, the underlying

[331]Glenn Ames (2012). Ivana Elbl (ed.). Portugal and its Empire, 1250–1800 (Collected Essays in Memory of Glenn J. Ames).: Portuguese Studies Review, Vol. 17, No. 1. Trent University Press. pp. 12–15
[332]Sanjay Subrahmanyam, 2012. The Portuguese empire in Asia, 1500–1700: a political and economic history
[333]Koshy, M.O. (1989). The Dutch Power in Kerala, 1729–1758. Mittal Publications. p. 61. ISBN 978-81-7099-136-6.
[334]Holden Furber, Rival Empires of Trade in the Orient, 1600–1800, University of Minnesota Press, 1976, p. 201.
[335]Philippe Haudrère, Les Compagnies des IndesOrientales, Paris, 2006, p. 70.
[336]Saul David, 2003. The Indian Mutiny, Penguin Books, p. 70

grievances over British taxation, the ethnic gulf between the British officers and their Indian troops and land annexations played a significant role in the rebellion. Within weeks after Pandey's mutiny, dozens of units of the Indian army joined peasant armies in widespread rebellion. The rebel soldiers were later joined by Indian nobility, many of whom had lost titles and domains under the Doctrine of Lapse and felt that the company had interfered with a traditional system of inheritance. Rebel leaders such as Nana Sahib and the Rani of Jhansi belonged to this group.

After the outbreak of the mutiny in Meerut, the rebels very quickly reached Delhi. The rebels had also captured large tracts of the North-Western Provinces and Awadh (Oudh). Most notably, in Awadh, the rebellion took on the attributes of a patriotic revolt against British presence. However, the British East India Company mobilised rapidly with the assistance of friendly Princely states, but it took the British the remainder of 1857 and the better part of 1858 to suppress the rebellion. Due to the rebels being poorly equipped and having no outside support or funding, they were brutally subdued by the British.[337]

In the aftermath, all power was transferred from the British East India Company to the British Crown, which began to administer most of India as a number of provinces. The Crown controlled the company's lands directly and had considerable indirect influence over the rest of India, which consisted of the Princely states ruled by local royal families. There were officially 565 princely states in 1947, but only 21 had actual state governments, and only three were large (My sore, Hyderabad, and Kashmir). They were absorbed into the independent nation in 1947–48.[338]

One of the most important events of the 19th century was the rise of Indian nationalism,[339] leading Indians to seek first "self-rule" and later "complete independence". However, historians are divided over the causes of its rise. Probable reasons include a "clash of interests of the Indian people with British interests",[340] "racial discriminations",[341] and "the revelation of India's past".[342]

In August 1947, the British Indian Empire was partitioned into the Union of India and Dominion of Pakistan. In particular, the partition of Punjab and Bengal led to rioting between Hindus, Muslims, and Sikhs in these provinces and spread to other nearby regions, leaving some 500,000 dead. The police and army units were largely ineffective. The British officers were gone, and the units were beginning to tolerate if not actually indulge in violence against their religious enemies.[343] Also, this

[337]Christopher Hibbert, The Great Mutiny: India 1857 (1980)
[338]Pochhammer, Wilhelm von (1981), India's road to nationhood: a political history of the subcontinent, Allied Publishers, ISBN 978-81-7764-715-0
[339]Modern India, Bipin Chandra, p. 76
[340] Ibid
[341]India Awakening and Bengal, N.S. Bose, 1976, p. 237
[342]British Paramountcy and Indian Renaissance, Part–II, Dr. R.C. Majumdar, p. 466
[343]Abid, Abdul Majeed (29 December 2014). "The forgotten massacre". The Nation. On the same dates [4 and 5 March

period saw one of the largest mass migrations anywhere in modern history, with a total of 12 million Hindus, Sikhs and Muslims moving between the newly created nations of India and Pakistan (which gained independence on 15 and 14 August 1947 respectively).[344] In 1971, Bangladesh, formerly East Pakistan and East Bengal, seceded from Pakistan.[345]

PRESIDENTIAL SYSTEMS

In almost all states with a presidential system of government, the president exercises the functions of head of state and head of government, that is to say, the president directs the executive branch of government. When a president is not only head of state, but also head of government, this is known in Europe as a President of Counsel (from the French Présidente du Conseil), used 1871–1940 and 1944–1958 in the Third and Fourth French Republics. In the United States the president has always been both Head of State and Head of Government and has always had the title of President.Presidents in this system are either directly elected by popular vote or indirectly elected by an electoral college or some other democratically elected body.

In the United States, the president is indirectly elected by the Electoral College made up of electors chosen by voters in the presidential election. In most states of the United States, each elector is committed to voting for a specified candidate determined by the popular vote in each state, so that the people, in voting for each elector, are in effect voting for the candidate. However, for various reasons the numbers of electors in favour of each candidate are unlikely to be proportional to the popular vote. Thus, in five close United States elections (1824, 1876, 1888, 2000, and 2016), the candidate with the most popular votes still lost the election.

In Mexico, the president is directly elected for a six-year term by popular vote. The candidate who wins the most votes is elected president even without an absolute majority. The president may never get another term. The 2006 Mexican elections had a fierce competition, the electoral results showed a minimal difference between the two most voted candidates and such difference was just about the 0.58% of the total vote. The Federal Electoral Tribunal declared an elected president after a controversial post-electoral process.

In Brazil, the president is directly elected for a four-year term by popular vote. A candidate has to have more than 50% of the valid votes. If no candidates achieve a majority of the votes, there is a runoff election between the two candidates with most votes. Again, a candidate needs a majority of

1947], Muslim League-led mobs fell with determination and full preparations on the helpless Hindus and Sikhs scattered in the villages of Multan, Rawalpindi, Campbellpur, Jhelum and Sargodha. The murderous mobs were well supplied with arms, such as daggers, swords, spears and fire-arms. (A former civil servant mentioned in his autobiography that weapon supplies had been sent from NWFP and money was supplied by Delhi-based politicians.)

[344]Symonds, Richard (1950). The Making of Pakistan. London: Faber and Faber. p. 74. OCLC 1462689. At the lowest estimate, half a million people perished and twelve millions became homeless.

[345]Srinath Raghavan (12 November 2013). 1971. Harvard University Press. ISBN 978-0-674-73129-5.

the vote to be elected. In Brazil, a president cannot be elected to more than two consecutive terms, but there is no limit on the number of terms a president can serve.

In most African countries, the president is elected by the masses and uniquely to some African countries, the position is usually finally vied for by a number of people. Therefore, the person with the majority vote is declared president.

It is not so different in Uganda. A president is elected every five years according to the Constitution. the requirements needed today are different from the requirements needed for every last ten years since the promulgation of the Constitution of Uganda in 1995. This goes to show that there must be something either sweet or enslaving about the position of presidency as shall be later discussed.

Some other countries have a semi-president system, also known as the French model. In this system, as in the parliamentary system, there are both a president and a prime minister; but unlike the parliamentary system, the president may have significant day-to-day power. For example, in France, when their party controls the majority of seats in the National Assembly, the president can operate closely with the parliament and prime minister, and work towards a common agenda. When the National Assembly is controlled by their opponents, however, the president can find themselves marginalized with the opposition party prime minister exercising most of the power. Though the prime minister remains an appointee of the president, the president must obey the rules of parliament, and select a leader from the house's majority holding party. Thus, sometimes the president and prime minister can be allies, sometimes rivals; the latter situation is known in France as cohabitation. Variants of the French semi-presidential system, developed at the beginning of the Fifth Republic by Charles de Gaulle, are used in France, Portugal, Romania, Sri Lanka and several post-colonial countries which have emulated the French model. In Finland, although the 2000 constitution moved towards a ceremonial presidency, the system is still formally semi-presidential, with the president of Finland retaining e.g. foreign policy and appointment powers.

The parliamentary republic, is a parliamentary system in which the presidency is largely ceremonial with either de facto or no significant executive authority (such as the president of Austria) or de jure no significant executive power (such as the president of Ireland), and the executive powers rests with the prime minister who automatically assumes the post as head of a majority party or coalition, but takes oath of office administered by the president. However, the president is head of the civil service, commander in chief of the armed forces and in some cases can dissolve parliament. Countries using this system include Austria, Armenia, Albania, Bangladesh, Czech Republic, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Malta, Pakistan, and Singapore.

A variation of the parliamentary republic is a system with an executive president in which the president is the head of state and the government but unlike a presidential system, is elected by and accountable to a parliament, and referred to as president. Countries using this system include Botswana, Nauru and South Africa.

In dictatorships, the title of president is frequently taken by self-appointed or military-backed leaders. Such is the case in many states: our very own Idi Amin in Uganda, Mobutu Sese Seko in Zaire, Ferdinand Marcos in the Philippines, Suharto in Indonesia, and Saddam Hussein in Iraq are some examples. Other presidents in authoritarian states have wielded only symbolic or no power such as Craveiro Lopes in Portugal and Joaquín Balaguer under the "Trujillo Era" of the Dominican Republic.

President for Life is a title assumed by some dictators to try to ensure their authority or legitimacy is never questioned. Ironically, most leaders who proclaim themselves president for life do not in fact successfully serve a life term. On the other hand, presidents like Alexandre Pétion, Rafael Carrera, Josip Broz Tito and François Duvalier died in office. Kim Il-sung was named Eternal President of the Republic after his death. I understand this description has many thinking of applying it to many presidents in Africa.

The aspect of presidency therefore takes various meanings which are shaped by the kind of governance a country subscribes to. Uganda is a democracy and as such, there are universally known dos and don’ts, powers and restraints that a president under this system of government must heed, exercise or never attempt.

Whether this notion has been acknowledged and respected is a whole other debate that I now interest you with. Most countries with a system similar to Uganda’s have either tremendously thrived and achieved big, or suffer in its shadow and reap its harsh outcomes. Uganda unfortunately sides with the latter.

PRESIDENCY IN UGANDA

Uganda is a democracy with its law enshrined in a constitution which is taken as the supreme law of the land. The powers and authority vested in the president are ably listed in this grundnorm. This means that there is no power other than the one listed in the constitution, no mandate other than the one predetermined by the same.

Remember the history of presidency? Each country was built upon the backs of torture and cruel colonialism and as such, the dream was forged out of the extremes of pain and tyranny in hope of an era of peace, equality, and inclusion. For countries with important documents like the constitution, this dream is well recorded to constantly remind the people of their purpose to act upon the dream. The Ugandan Constitution is not any different. Its preamble provides;

W E T H E P E O P L E O F U G A N D A :

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this22nd day of September, in the year 1995.

F O R G O D A N D M Y C O U N T R Y

This declaration by the people of Uganda is the spirit that breathes life into every law that governs the country; it is the dream they long to achieve. The president, as leader of this dream is expected to share significantly in this cause; to drive the country towards an era of peace and development.

For this reason, the constitution under Article 98 provides that;

"There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour."

This statement confers power upon the president to do certain duties in his capacity. Head of state and Head of Government, in a Parliamentary form of government, are two different people performing two very different duties. The Head of State has more ceremonial duties, while the Head of Government is responsible for running the government of a country with the approval of his or her cabinet.[346]

In a monarchy, federation, republic, commonwealth or any other form of state, the Head of State serves as an individual who is the chief public representative. The Head of the State is considered the first citizen, or the leader of the nation. His or her role is ceremonial; for example, In the U.K

[346]Read more: Difference Between Head of State and Head of Government | Difference Between http://www.differencebetween.net/miscellaneous/politics/difference-between-head-of-state-and-head-of-government/#ixzz6zIZYYufx

and Japan, the head of the state is a Monarch. In Uganda, the President is elected as the Head of the state.

The main role or duty of the Head of the State, involves attending political functions, exercising political powers, and legitimizing the state. These functions include greeting foreign dignitaries, and calling sessions of parliament. The Head of State also has the power to call for early elections. In some countries the Head of State can call for a President's rule in emergency situations. He or she is responsible for signing off on all laws passed, in parliamentary form of government. The Head of the State is the Chief of the Armed Forces.

In Presidential form of government like in the USA and in South Korea, the President is the Head of the State and serves the country as the chief executive. He is the commander-in-chief of the armed forces. The Head of State supervises various facets of bureaucracy, but does not have the responsibility of the chief legislator. This is quite similar to Uganda which has a separate arm of government doing legislation.

In a parliamentary form of government, the Prime Minister or Premier is the Head of the Government. He is the leader of the ruling party and is the chief of the executive branch. He presides over a cabinet. In the Presidential form of government and absolute monarchies, the Head of the Government and the Head of the State are the same individual. Uganda has both a parliament and a prime minister, but the Constitution puts all this leadership in the hands of the president.

The duties and responsibilities of the Head of the State include implementing laws, supervising bureaucracy, and making all-important decisions with the approval of the cabinet. He/she is also the head of the legislature. In the presidential form of government, the President is not a member of the legislature, thus he is not the head and this is the case in the Ugandan Constitution.

Article 99 of the Constitution further provides that;

The executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda.

This provision makes the president responsible for the administration of different executive affairs like implementing the law, and putting into action the policies relevant for a country's development.

This can seem to be so much power since on the onset; it looks boundless and open on how the president can fulfil this responsibility. However, the second part of the provision limits the scope of such powers to strictly "in accordance to [the] Constitution and the laws of Uganda". This would ultimately settle the debate of whether the president is above the law because clearly, he is bound by the law to do what is expected of him as the executive head.

This however does not rule out the possibility of stretching his powers beyond the confines of the

Constitution. (Presidential Overreaches shall be covered in Chapter 8 of this book) This is partly because, even the Constitution cannot hold him accountable! Article 98 quite clearly does not envisage an opportunity to take the president to court so as to atone for his/her wrongdoings. It is only possible to do the same once the person is no longer clothed with this power.

This indeed has happened many times in the history of the world. Since 1945, many regime leaders and key figures have been brought before domestic and international courts to answer to charges including genocide and crimes against humanity, amid a larger struggle to promote and enforce the rule of law worldwide.

The famously known include; Nuremberg Trials on the Holocaust; the 1945 Post-war Trial of Japanese General; the 1946-48 Tokyo War Crimes Trials; the 1985 Argentina's Trial of the Juntas; the 1993-2017 International Tribunal for the Former Yugoslavia set up by the UN Security Council to try those responsible for mass killings of Bosnian Muslims, Croats, and Kosovo Albanians, as well as for abuses against ethnic Serbs, in the Balkans beginning in 1991; the 1994-2015 Tribunal for Rwandan Genocide; the 1998-2006 Legal Battles of Augusto Pinochet; the 2011-12 Trial of Egypt's Mubarak; to mention but a few.

A few of these however, have been charged for the atrocities committed during their time served as presidents and yet, many continue to disrespect their mandate and abuse their powers. Most of these have since retired, or even passed on without ever being questioned about their times as heads of state.

Notably, the former president of South Africa; Jacob Zuma has been sentenced to 15 months in jail by the country's highest court. The sentence comes after the Constitutional Court found him guilty of contempt for defying its order to appear at an inquiry into corruption while he was president.[347]

In 1970, Sir William Wilberforce Kadhumbula Nadiope, the former vice president of Uganda and Kyabazinga of Busoga, was sent to Kirinya Government Prison to serve an 18-month jail term.[348]

In as much as this would serve as a representation of the power of the Constitution over every citizen in Uganda, for many a Ugandan, this was the highest form of betrayal on the part of then president Milton Obote and his ruling Uganda Peoples' Congress (UPC) party where Nadiope was the vice president and had helped the party win the April 25, 1962, general election.[349]

[347]BBC News, 30th June, 2021. Ex-President Jacob Zuma sentenced by South Africa's top court, [online] available at; https://www.bbc.com/news/world-africa-57650517 (accessed on 1st July 2021)
[348] Daily Monitor, 23rd June, 2018. KyabazingaNadiope jailed for fraud, [online] available at; https://www.monitor.co.ug/uganda/magazines/people-power/kyabazinga-nadiope-jailed-for-fraud-1763982 (accessed on 1st July, 2021)
[349] Ibid

THE FOUNTAIN OF HONOR: AN ANALYSIS OF THE POWERS OF THE PRESIDENT AND THEIR EXTENT IN UGANDA

I come to the most significant feature of our time—the increasing powers of the executive. I need hardly remind you of the extent of these powers. They touch the life of every one of us at innumerable points: and they are an inseparable part of modern society. No one will deny that we could not have reached our standards and way of life without them. The constitutional executive powers held by the President are broadly defined and vary in application.

EXPRESSED POWERS

The expressed powers of the President are those expressed in the Constitution of the Republic of Uganda,1995 (as amended)

Article 98 of the Constitution of the Republic of Uganda 1995 (as amended) creates the executive branch of the government consisting of the President the vice President. Clause 2 states that the executive power shall be vested in a President. (Article 105 (1) states that the President shall hold his office for a term of five years. Article 99(1) is a vesting clause similar to Article 98(2) but it vests the powers to execute the instructions of Parliament which has the exclusive power to make laws.

Article 103 states the method for election of the president where the person submits to the electoral commission on or before the day appointed as nomination day in relation to the election a document which is signed by that person nominating him or her a candidate. The nomination should be supported by one hundred votes in each of at least two thirds of all districts in Uganda.

COMMANDER IN CHIEF (CIC)

The direction of war implies the direction of the common strength and the power of directing and employing the common strength forms a usual and essential part in the definition of the Executive power"

Alexander Hamilton.

Perhaps the most important of all presidential powers is commander in chief of the Uganda Peoples Defence forces. while the power to declare war is constitutionally vested in parliament the president commands and directs the military and is responsible for planning military strategy. The parliament provides a check on Presidential military power through its control over military spending and regulation. While historically presidents initiated the process for going to war, critics have charged that there have been several conflicts in which presidents did not get official declarations including

It is obvious that parliamentary control rights can be conceived as a continuum, deliminated by two extreme points. At one extreme parliaments have no say whatsoever in any deployment decision at the other end of the spectrum, parliamentary consent is required for all operations. In between these two extremes is a dazzling range of options giving parliaments a more or less tightly institutionalized consultative role or say in an increasingly large set of military operations.

Along with the armed forces, the president also directs Ugandan's foreign policy. Through the Department of defence, the president is responsible for the protection of Ugandans abroad and of foreign nationals in Uganda. The president decides whether to recognize new nations and new governments and negotiate treaties with other nations which become binding on Uganda when approved by a two thirds vote of parliament.

The President is the head of the executive branch of the federal government and is constitutionally obligated to take care that the laws be faithfully executed. Generally, a president may remove purely executive officials at his discretion. However, the parliament can curtail and constrain a Presidents authority to fire commissioners of independent regulatory agencies and certain inferior executive officers by statute. To manage the growing federal bureaucracy, presidents have gradually surrounded themselves with many layers of staff who were eventually organized into the executive office of the president of the Republic of Uganda.

The debate over the extent of presidential authority has been argued since the very formation of Uganda. On 8th October 1995, the constitution was promulgated by the constituent Assembly replacing the 1967 constitution. At that time the founding fathers intended to create an effective central government with a wide range of enforceable powers. The president of Uganda was intended to be chief Protector and the representative of the populace.

The Constitutional Executive powers vested in the president provide him with the ability to speedily act in the nations interest. "Decision activity, secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number. The President is vested with these powers to maintain the common good on behalf of societal interest.

The founders of the constitution intended to create a government that was clothed with all powers requisite to complete execution of its trust. The parliament is granted wide latitude in its authority over the military and the execution of the laws Article 79[350] provides that the parliament is entrusted with the ability to organize arm and discipline the military and make all laws which shall be necessary and proper to execute these powers. These military powers provide parliament with control over undeclared as well as declared actions of war.

[350] The Constitution of the Republic of Uganda, 1995 (As amended)

Conversely Article 98(1)[351] entails the commander in Chief powers of the president. This provides him with supreme command over land and Naval of the country and he may order the armed forces to perform any necessary military duties as appropriate for the defense of Uganda and to effectuate the defense of Uganda. These specific powers accorded to the president exist both in times of peace as well as in times of war.

The president is also tasked to recommend to parliament consideration such measures as he shall judge necessary and expedient. In any emergency scenarios, the president may take unilateral action before seeking parliamentary approval and when verification from the Parliament. According to John Locke this unrestrained power can be a concern and a potential threat to the liberty of the people.

"The Reigns of good princes have been always most dangerous to the liberties of their people. For when their successors managing the Government with different thoughts would draw the actions of those good rulers into precedent and make them the standard of their prerogative as if what had been done only for the good of the people. If they so pleased it has before the people could receive their original right and get that to be declared not to be prerogative which truly was never so"

Locke's reference to the prerogative of the people rings true even today as the specific enumerated powers of the president of Uganda have long been subject to the dispute. According to Locke, the executive branch must be able to deal with unforeseen issued that arise especially those which cannot be anticipated by the legislative branch where the law does not provide for all scenarios, the president must have the discretion and the latitude to act in a manner not closely prescribed by law so long as it is exercised for the public good.

The commander in chief powers are based on the checks and balances system subject to set by the legislature and subject to consideration by the judicially while it is true that Congress alone has the power to declare war on other nations, centralising authority within the executive permits the unitary executive evaluate threats consider policy choices and mobilize military and diplomatic resources with a speed and energy that is far superior to any other branch. However, a forward thinking president can reasonably operate within the confines of the constitution to protect the security of the nation. A strong executive would be far more effective and competent for the nation than a weak one.

In Youngstown sheet & Tube co v Sawyer[352] justice Jackson laid out a three pronged test that determine the validity of an exercise of executive power. First when the president acts pursuant to an express or implied authorization of congress his authority is at his maximum. In this scenario,

[351] Constitution of the Republic of Uganda, 1995 (As amended)
[352] 3430.5 579(1952),

parliament has granted explicit congressional authorization for the president to act when the president and parliament act together to address an emergency situation the president's concurrent powers are at their zenith.

Secondly the president acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers but there is a zone of twilight in which he and congress may have concurrent authority or in which its distribution is uncertain when the president acts within a zone of twilight, he acts without congress and authorization for his actions and may face the ramifications for doing so at a later date. While acting under the zone of twilight the president's independent powers are at their fullest. In this case the president can act with all embracing swiftly moving authority.

The powers of the president within this zone of twilight must be considered within certain factors. First whether necessity exists to authorize the presidents exercise of powers. This increases the likelihood that a court will later favor the presidents exercise of discretion. The President may act without implied or express congressional approval but he cannot act without necessity. The greater the immediate necessity for presidential action, the greater likelihood that the courts will sustain the presidents continuing independent authority.

Finally, the third standard for presidential authority arises when the President takes measures incompatible with the expressed or implied will of congress his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of parliament over the matter. When the President acts in violation of an act of parliament his power isn't its lowest ebb because he acts against parliamentary authority.

The President's war making powers are historically subject to the whim of parliament while a president requires congressional approval to declare war on a sovereign nation, congress may later choose to vote the presidents declaration of war or deny the president the necessary funds to continue the war. However, in the case of an emergency action, such as disaster occurring within a state whereas the president has to send in the National Guard to maintain order the president's power must be absolute and not subject to congressional or judicial scrutiny.

The president also has the power to nominate judges including members of the supreme court of the Republic of Uganda. However, these nominations require parliament confirmation. Securing parliament approval can provide a major obstacle for presidents who wish to orient the federal judiciary toward a particular ideological stance. When nominating judges to district or magistrate courts, presidents often respect the long standing tradition of parliamentary courtesy.

The constitutions ineligibility clause prevents the presidents from simultaneously being a member of congress. Therefore, the president cannot directly introduce legislative proposals for

consideration in parliament. However, the president can take an indirect role in shaping legislation especially if the president political party has a majority parliament. For example, the president or other officials of the executive branch may draft legislation and then ask representatives to introduce these drafts into parliament. The president can further influence the legislative branch through constitutionally mandated periodic reports to parliament. These reports may be either written or oral which often outline the president's legislative proposals for the coming year.

THE PREROGATIVE OF THE PRESIDENT

The powers of the President in colonial times were absolute. These powers derived from the absolutism of the Queen. Accordingly, it was in the power of the Crown to dismiss and disappoint as it pleased without qualification. It appears that on the grant of independence, this position was retained and the President had similar powers. The Prerogative of the President and its absolute nature was tested in the case of **Opoloto V Ag**[353]. The appellant had been dismissed from the Uganda Army in which he had been serving as Brigadier and Chief of the Defence Staff. He was as well detained under the Emergency Regulations. He sought a declaration that his discharge was invalid and that he was still a member of the Armed Forces.

Held (Sir Charles Newbold P)

The prerogative powers vested in the British crown before independence including the power to dismiss at will officers in its service are now vested in the President and to take away this established prerogative right by statute required clear words.

For a long time therefore, it remained the position that it was in the President's power to appoint and disappoint as he deemed fit. This position however did not survive the 1995 Constitution and it was soon to be tested in courts of law. Judicial pronouncements cast great doubt as to the validity.

It was castigated and jettisoned in **Major General David Tinyefuza V Attorney General**[354] where in Kanyeihamba JSC noted that, 'In England, where the notion of crown prerogative has from time to time immemorial been accepted, English courts have from time to time held that the royal prerogative cannot be used to deprive a citizen of his or her vested interest without compensation…The case of Opoloto V Uganda which concerned the exercise of a Presidential prerogative to remove an officer from his commission was also cited. In this age of modernity, democracy and entitlement to human rights and freedoms, Opoloto's case can no longer be treated as good law… The Constitution and laws of Uganda have provided clear and emphatic provisions for the removal from office of public officers. Removal must be for cause and the person affected

[353] (1969) EA 631
[354] CONST. APP. NO.1 OF 199

must be given notice and opportunity to be heard. Therefore, the Opoloto's case must be confined to its four corners by this court…If the President who is commander in chief of the Uganda Defence Forces had wanted to remove the petitioner from those rights and responsibilities, he should have done so expressly and for one of the causes spelt out in the relevant statute and regulations. Further more, the President has no constitutional or legal power to deprive the petitioner of his vested rights such as his entitlement to pension and other rights which he earned as a member of the Uganda People's Defence Forces...it should be the law to affect the rights of the petitioner and not the prerogative of the President'.

Mukasa-Kikonyogo JSC on her part stated that , 'I would be declined to accept the submission of Mr. Lule basing himself on the case of Opoloto V Attorney General[355] that the President had a prerogative right to remove the respondent. To hold so in my view…would be inconsistent with the rights of the individual member of the Army. It would give the president powers to dismiss arbitrarily as apparently it happened in Opoloto's case (supra). As it was submitted by the appellant, in exercise of his powers, the President should comply with the law but not contrary to it'.

(Wambuzi CJ)

'It is my considered view that in the case before us, the President was bound to act in accordance with the law whether or not he was exercising prerogative powers'.

It would appear that absolutism of the President was done away with by the 1995 Constitution. Under Article 20 (2)[356] of the Constitution, it is stipulated that the rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons (i.e. including the President). Even in the prerogative of mercy established under Article 121[357] to be exercised by the President, he can only exercise it with the advice of an Advisory Committee on the Prerogative of Mercy which consists the Attorney General and 6 prominent citizens of Uganda appointed by the President. (Does the fact of being appointed by the President affect their independence of mind?)

Article 98[358] of the 1995 constitution of Uganda provides for the president of Uganda that; there shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defense Forces and the Fountain of Honor. The President shall take precedence over all persons in Uganda, and in descending order, the Vice President, the Speaker and the Chief Justice shall take precedence over all other persons in Uganda.

[355] (1969) EA 631
[356] Constitution of the Republic of Uganda, 1995 (As amended)
[357] Ibid
[358] Ibid

Before assuming the duties of the office of President, a person elected President shall take and subscribe the oath of allegiance and the presidential oath specified in the Fourth Schedule to this Constitution. While holding office, the President shall not be liable to proceedings in any court. Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.[359]

The president shall be elected as provided under Article 103[360] of this constitution, that; The election of the President shall be by universal adult suffrage through a secret ballot. A person shall not be a candidate in a presidential election unless— (a) that person submits to the Electoral Commission on or before the day appointed as nomination day in relation to the election, a document which is signed by that person nominating him or her as a candidate; and (b) the nomination is supported by one hundred voters in each of at least two-thirds of all the districts in Uganda. The election of the President shall be held during the first thirty days of the last ninety days before the expiration of the term of the President, except in the case of— (a) the first election under this Constitution; (b) an election held under Article 104(6)[361] of this Constitution; (c) an election held under Article 109(2) of this Constitution; and (d) an election necessitated by the fact that a normal presidential election could not be held as a result of the existence of a state of war or a state of emergency, in which case, the election shall be held within such period as Parliament may, by law, prescribe. A candidate shall not be declared elected as President unless the number of votes cast in favour of that candidate at the presidential election is more than 50 percent of valid votes cast at the election. Where at a presidential election no candidate obtains the percentage of votes specified in clause (4) of this Article, a second election shall be held within thirty days after the declaration of the results in which election the two candidates who obtained the highest number of votes shall be the only candidates. The candidate who obtains the highest number of votes in an election under clause (5) of this Article shall be declared elected President. The Electoral Commission shall ascertain, publish and declare in writing under its seal, the results of the presidential election within forty-eight hours from the close of polling. A person elected President during the term of a President shall assume office within twenty-four hours after the expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President. Subject to the provisions of this Constitution, Parliament shall by law, prescribe the procedure for the election and assumption of office by a President.

[359] Article 98 of the 1995 Uganda constitution.
[360] Constitution of the Republic of Uganda, 1995 (As amended)
[361] Constitution of the Republic of Uganda, 1995 (As amended)

Under the same constitution, Article 99[362] provides Executive authority of Uganda; the executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda. The President shall execute and maintain this Constitution and all laws made under or continued in force by this Constitution. It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda. Subject to the provisions of this Constitution, the functions conferred on the President by clause (1) of this Article may be exercised by the President either directly or through officer's subordinate to the President. A statutory instrument or other instrument issued by the President or any person authorized by the President may be authenticated by the signature of a Minister; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President.[363]

The term tenure refers to the term of holding something. Article 105 of the Constitution of the Republic of Uganda, 1995 provides for the tenure of the President. A person who is elected President may hold office for one or more terms, and each term is five years. This implies that there is no limit to the number of terms a president can hold office for as long as he/she is democratically elected. The Constitution originally provided for a limit of two terms for a given president; however, the Constitution (Amendment) Act, 2005 removed the limits to the tenure of the office of President. Clause 3 of Article 105[364] provides for two scenarios when the seat of the President can be declared vacant, i.e. on the expiration of the time stipulated, which is five years or if the incumbent dies or resigns or ceases to hold office in accordance with Article 107. Article 107[365] expounds on the grounds that would warrant a president to be removed from office hence declaring the office vacant. The grounds are; abuse of office or willful violation of the oath of allegiance and presidential oath or any provision of the Constitution. This points to the rule of law since the President is subject to the law as well. The other grounds are misconduct or misbehavior, physical or mental incapacity. A president can resign by addressing a signed letter to the Chief Justice indicating his intentions to resign from the office of the President. Such resignation takes effect when the Chief Justice receives it. Upon receiving the President's resignation, the Chief Justice shall immediately notify the Vice president, the Speaker, and the electoral commission about the resignation.

[362] Ibid
[363] Article 99 Constitution of the Republic of Uganda, 1995 (As amended)
[364] Constitution of the Republic of Uganda, 1995 (As amended)
[365] Constitution of the Republic of Uganda, 1995 (As amended)

Article 106[366] of the constitution provides for the terms and conditions of the president; the constitution of the Republic of Uganda explicitly states the terms and conditions of service of the president. This is to provide the scope under which money shall be allocated to the president and clarify issues concerning taxation and allowances. The law provides that the president shall be paid a salary and allowances and afforded such other benefits as Parliament shall by law provide. The Parliament, following its mandate, went ahead to pass the law on Emoluments and Benefits of the President, Vice President and Prime Minister Act. The law provides for the allowances and salaries of the president, vice president and Prime Minister.

However, the provision under this Act does not cover the benefits for a president who ceases to hold office. It only provides for how they can be removed as provided for under the constitution. The law goes ahead to provide that the presidents' salaries and allowances and any other benefits shall be charged on the consolidated fund. In addition to this, the president is exempted from direct personal taxation of his allowances and other benefits except on the official salary. The law also prohibits the president from holding any other public office other than what is conferred by the constitution. Similarly, the president is prohibited from holding any office of profit or emoluments that are likely to compromise his official capacity. It is also a requirement under the law that the salary, allowances, and other benefits granted to the president shall not be varied to the disadvantage of the president while he or she holds office; the same applies to the president's retirement benefits.

Article 107[367] of the Constitution of the Republic of Uganda provides for the grounds and procedure under which the President may be removed from office. The President may be removed from office on grounds of abuse of office or willful violation of the oath of allegiance and presidential oath or violation of any provision of the constitution. The President may also be removed for misconduct or misbehaviour where he/she has conducted him/herself in a manner which is likely to bring the office of the President into hatred, ridicule, contempt or disrepute, and; where the President dishonestly does any act or omission which is prejudicial or inimical to the economy or security of Uganda. The removal of the President on the grounds of abuse of office, misconduct or misbehaviour is commenced by a notice in writing submitted to the Speaker. The notice should be signed by not less than one-third of all the Members of Parliament (MPs). The notice should state that the MPs intend to move a motion for a resolution in Parliament for the removal of the President on any of these grounds i.e. willful abuse of office or willful violation of the oath of allegiance and Presidential oath or any other provision of the constitution, misconduct

[366] Constitution of the Republic of Uganda, 1995 (As amended)
[367] Ibid

or misbehaviour. The notice is considered complete when it discloses the particulars of each charge and is supported by necessary documents on which the claim for the President to be investigated for the purpose of removal from office is based.

The Speaker is required to cause a copy of the notice to be transmitted to the President and the Chief Justice within twenty-four hours after the notice has been lodged with/her office. Upon receipt of the notice from the Speaker, the Chief Justice is required to constitute a tribunal comprising three Justices of the Supreme Court within seven days. The tribunal is tasked with the responsibility to investigate the allegations in the notice and to report its findings to Parliament stating whether there is a prima facie case for the removal of the President.

The President has a right to appear at the proceedings of the tribunal and to be represented there by a lawyer or other expert or person of his or her choice. Where the tribunal finds that there is a prima facie case for the removal of the President on any of the grounds alleged in the notice, Parliament is required to vote on a resolution for the President's removal from office. The President is removed from office where the resolution is supported by two-thirds of all the members of parliament. Parliament has fourteen days to move the motion for a resolution for the removal of the President after receipt of the report from the Tribunal by the Speaker.

Under Article 124[368] has the power to declare a state of war it states; the President may, with the approval of Parliament, given by resolution supported by not less than two-thirds of all the members of Parliament, declare that a state of war exists between Uganda and any other country. Where it is impracticable to seek the approval of Parliament before declaration of a state of war, the President may declare a state of war without the approval but shall seek the approval immediately after the declaration and in any case not later than seventy-two hours after the declaration. Where the President makes the declaration of a state of war under clause (2) when Parliament is in recess, the Speaker shall immediately summon Parliament to an emergency session to sit within seventy-two hours after the declaration of a state of war. The President may, with the approval of Parliament, given by resolution, revoke a declaration of a state of war made under clause (1) or (2) of this Article.

Under the Article 110[369] it is further provided that; The President may, in consultation with the Cabinet, by proclamation, declare that a state of emergency exists in Uganda, or any part of Uganda if the President is satisfied that circumstances exist in Uganda or in that part of Uganda— (a) in which Uganda or that part of it is threatened by war or external aggression; (b) in which the security or the economic life of the country or that part is threatened by internal insurgency or

[368] Constitution of the Republic of Uganda, 1995 (As amended)
[369] Constitution of the Republic of Uganda, 1995 (As amended)

natural disaster; or (c) which render necessary the taking of measures which are required for securing the public safety, the defense of Uganda and the maintenance of public order and supplies and services essential to the life of the community.

Subject to the provisions of this Article, a state of emergency declared under clause (1) of this Article shall remain in existence for not more than ninety days and shall then expire. The President shall cause the proclamation declaring the state of emergency to be laid before Parliament for approval as soon as practicable as and in any case not later than fourteen days after it was issued. A state of emergency may be extended by Parliament for a period not exceeding ninety days at a time. The President or Parliament shall, if satisfied that the circumstances for the declaration of the state of emergency have ceased to exist, revoke the proclamation by which the state of emergency was declared. During any period when a state of emergency declared under this Article exists, the President shall submit to Parliament at such intervals as Parliament may prescribe, regular reports on actions taken by or on behalf of the President for the purposes of the emergency. Subject to the provisions of this Constitution, Parliament shall enact such laws as may be necessary for enabling effective measures to be taken for dealing with any state of emergency that may be declared under this Article. Any resolution passed by Parliament for the purposes of clause (4) or (5) of this Article shall be supported by the votes of more than one-half of all the members of Parliament.

Article 121[370] of the constitution provide for the prerogative of mercy; There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of— (a) the Attorney General who shall be the chairperson; and (b) six prominent citizens of Uganda appointed by the President. A person shall not be qualified for appointment as a member of the committee if he or she is a Member of Parliament, the Uganda Law Society or a district council. A member appointed under clause (1)(b) of this Article shall serve for a period of four years and shall cease to be a member of the committee— (a) if circumstances arise that would disqualify him or her from appointment; or (b) if removed by the President for inability to perform the functions of his or her office arising from infirmity of body or mind or for misbehavior, misconduct or incompetence. The President may, on the advice of the committee— (a) grant to any person convicted of an offence a pardon either free or subject to lawful conditions; (b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him or her for an offence; (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or (d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence. Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the

[370] Ibid

court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy. A reference in this Article to conviction or imposition of a punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal except a field court martial.

DELEGATED POWERS OF THE PRESIDENT

The Delegated powers are a list of items found in the Constitution of the republic of Uganda that set forth the authoritative capacity of parliament.

Almost all presidential powers rely on what the parliament does or does not do. Presidential executive orders implement the law but parliament can overrule such orders by changing the law. And many presidential powers are delegated powers that parliament has accorded presidents to exercise on its behalf and it can cut back or rescind.

Delegated powers also called enumerated powers are a set of items found in Article that set forth the authoritative capacity of parliament. The lists of enumerated powers include the following. The parliament shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of Uganda. But all duties, imposts and exercise shall be uniform throughout Uganda. To borrow money on the credit of Uganda, declare war, grant letters of Marque and Reprisal and make rules concerning captures on land and water and to make all laws which shall be necessary and proper for carrying into execution of the foregoing powers and all other powers by the vested by the constitution in the government of the republic of Uganda.

INHERENT POWERS OF THE PRESIDENT

These are assumed powers of the president not specifically listed in the constitution. They are those powers that a sovereign state holds. In Uganda the president derives these powers from the loosely worded statements in the constitution that the executive power shall be vested in the president. Inherent powers are assumed powers of the president not specifically listed in the constitution. They come from the president's role as Chief Executive. The question of presidential power is complicated by a key omission in certain constitutional sentences language. As opposed to Article 79 which states that the parliament is vested with the legislative powers herein granted, Article 99 does not use that language. It says all executive power is vested in the president. Supporters of the unitary executive theory argue that this means that the president's power particularly the inherent power that come with being commander in chief are open ended and cannot be checked by the other two branches.

EMERGENCY POWERS OF THE PRESIDENT

The president of Uganda as head of the executive branch has the authority to declare a federal state of emergency. A state of emergency is a governmental declaration that may suspend some normal functions of the executive legislative and judicial powers, alerts citizens to change their normal behaviors or order government agencies to implement emergency preparedness plans It can also be used as a rationale for suspending rights and freedoms even if guaranteed under the constitution. Such declaration usually come during a time of natural or man made disaster periods of civil unrest on following a declaration of war or situation of international or internal armed conflict.

To make a declaration of the state of emergency the president as a perquisite must be satisfied of three parameters that; Uganda or a part of it is threatened by war or external aggression.

The security or the economic life of the country or as part of it is threatened by internal insurgency or natural disaster. There are circumstances which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community.

PRESIDENTIAL DECLARATIONS

Uganda is a democratic republic and has three arms of government. Each has its roles laid out by the Constitution and therefore one arm must not at any point try to exercise the roles of another arm of government.

Article 79(1)[371] of the Constitution provides that subject to the Constitution's provisions; Parliament shall have the power to make laws on any matter for the peace, order, development and good governance of Uganda. Therefore, this provision gives the parliament the power to make any law that governs the daily workings in the jurisdiction of Uganda.

Article 79(2)[372] further provides that except as provided in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament. This provision bars any other body or person from making any other law for governing the country except as provided by the law.

The two provisions vest all the law-making power into the parliament, and the parliament has over time devised a procedure of making the laws, which is peculiar to their work and has over time brought forth the laws that manage the country.

It is important to note that the Constitution envisages other times when laws can be made without following the provisions of Chapter six strictly. Indeed, Article 99(5) of the Constitution provides

[371] Constitution of the Republic of Uganda, 1995 (As amended)
[372] Constitution of the Republic of Uganda, 1995 (As amended)

that the signature of a Minister may authenticate a statutory instrument or other instrument issued by the President or any person authorised by the President; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President.

This provision of the law seems to give the president the power to make statutory instruments that the minister can pass as law upon signature by the minister. Recently, the president of Uganda made declarations which were later codified by the Minister of Health and signed for operation as guidelines during the subsistence of the law. However, these laws were made according to the powers given to the minister for secondary legislation.

The failure by the government to follow the ordinary law-making process has, in turn, affected the observation of other substantial laws. Central to this is the Human rights violation. Most of the directives issued by the president were to do with movement, assembly, health, to mention but a few. To a certain extent, these rights were limited for purposes of curtailing the spread of the virus. As much as the move was for good intention, the mode of doing the same was not backed up by law and amounted to a violation.

Article 43 [373]of the Constitution of the Republic of Uganda provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. The provision further describes public interest that public interest under this Article shall not permit, among other things, any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society what is provided in this Constitution. Dr Busingye breaks down the meaning of this provision that the formulation of Article 43(2)[374] was deliberate, and each word as employed in that provision has particular significance. The effect of this provision was to set a high bar for the limitation of human rights.[375]

What is interesting is that Human rights were one aspect that all countries around the world were fighting for in their struggle for independence. They expected these rights to be guarded when it is a familiar face in the position of power. Indeed, the Constitution was deliberate in spelling them out clearly so that they would not be violated any longer. However, the person expected to protect the same has willingly disregarded the same by passing the declarations; an action that would warrant invoking Article 107[376] of the Constitution.

This is solely because of an alternative provided by the same Constitution that was ignored. Article

[373] Constitution of the Republic of Uganda, 1995 (As amended)
[374] Constitution of the Republic of Uganda, 1995 (As amended)
[375] Constitution of the Republic of Uganda, 1995 (As amended)
[376] Ibid

110[377] of the Constitution provides that the President may, in consultation with the Cabinet, by proclamation, declare that a state of emergency exists in Uganda or any part of Uganda.

If the President is satisfied that circumstances exist in Uganda or in that part of Uganda in which Uganda or that part of it is threatened by war or external aggression; in which the security or the economic life of the country or that part is threatened by internal insurgency or natural disaster; or which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community.

This state of emergency only subsists for ninety days and then expires, except where Parliament extends the days for a period not exceeding ninety days at a time. Such a declaration by the president must be laid before Parliament for approval as soon as practicable and in any case not later than fourteen days after it was issued.[378]

It is important to note that subject to the Constitution's provisions; Parliament must enact such laws as may be necessary for enabling effective measures to be taken for dealing with any state of emergency that may be declared under this Article.[379] This means that after the declaration, any orders made by the president must be codified by parliament.

During this time, the president would make these declarations and lay the same before the parliament for approval and maintain, uphold the Constitution. This is a fundamental responsibility he is expected to carryout. Article 99[380] of the Constitution provides;

2. The President shall execute and maintain this Constitution and all laws made under or continued in force by this Constitution.

3. It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.

There is no justification so far for the declarations given without the due regard to the provisions of the constitution. what is even more interesting, why hasn't the legislature triggered their Constitutionally granted power to sanction such abuse of power?

LAW MAKING PROCESS IN TIMES OF EMERGENCY

Article 110 of the Constitution provides that the President may, in consultation with the Cabinet, by proclamation, declare that a state of emergency exists in Uganda or any part of Uganda. It further

[377] Ibid
[378] Article 110 (1) (2) (3) (4) of the Constitution of the Republic of Uganda, 1995, as amended
[379] Article 110 (7), Constitution of the Republic of Uganda, 1995 (As amended)
[380] Constitution of the Republic of Uganda, 1995 (As amended)

provides thus;

"If the President is satisfied that situations exist in Uganda or in a specific part of Uganda in which Uganda or that part of it is threatened by war or external aggression; in which the security or the economic life of the country or that part is threatened by internal insurgency or natural disaster; or which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community."

This state of emergency only subsists for ninety days and then expires, except where Parliament extends the days for a period not exceeding ninety days at a time. Such a declaration by the president must be tabled before Parliament for approval as soon as practicable and in any case not later than 14 days after it was issued.[381]

It is important to note that subject to the Constitution's provisions; Parliament must enact such laws as may be critical for enabling measures to be taken for tackling any state of emergency that may be declared under this Article.[382] This means that after the declaration, any orders made by the president must be codified by parliament.

The laws governing the law-making process in Uganda are elaborate and envisage many circumstances that may usually affect the law-making process, including times of emergency like global pandemics. To this extent, it remains to establish how Uganda has operated in times of emergency like global pandemics and how its law-making process has been upheld and respected in the face of the same.

TENABILITY OF EXECUTIVE POWERS

It is noted that Uganda's rule as a protectorate was a one-man show, the commission. He was the head of the Protectorate, executive officer and the law-maker making the other officers puppets of the government until 1920.[383]

Today Uganda is considered to a democratic country though with a number of challenges at least in each of her governance and institutional framework there are quite a number of loopholes that one would base on to disqualify her as a democratic state. The major argument would be based on two aspects one being manipulation of a system and institutions by the executive. Though for the past 56 years Uganda has made evident strides towards rule of law and democracy.[384]

[381] Article 110 (1) (2) (3) (4) of the Constitution of the Republic of Uganda, 1995, as amended
[382] Article 110 (7), Ibid
[383] Kanyeihamba , *Constitutional Law And Government in Uganda(1975)*
[384] Justice Byaruhanga ; Democracy in Uganda after 50 years of independence; Acknowledgement of the problems and possible solutions pp. 10.

Under rule of law, the authority of law does not depend so much on the law as its instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion.

In ***Pharmaceutical Manufacturers Association of South Africa: Re Ex parte Application President of the Republic of South Africa 2000 (2) SDA 674 (CC) at 67 paragraph 85***, the court reasoned that the rule of law requires "that the exercise of public power by the executive and other functionaries' should not be arbitrary. Decisions must be rationally related to the purpose for which the power is given."

Contrary to **Article 99 (1)** the executive authority of the president does not go beyond the provisions of the laws that is the president must abide by, uphold and safe guard the constitution and people's interests.

Factors that favor the rule of law for proper governance include a legal framework that separates and delineate the responsibilities and powers of the legislative, executive and judicial branches streamlining with the local and state levels plus ensuring functioning accountability.[385]

The adherence to the rule of law requires the executive and all institutions at all levels to implement political decisions in an efficient, transparent, accountable, democratic and coordinated fashion. This requires the existence and application of appropriate mechanisms to ensure accountability and transparency of all relevant bodies in the state. The rule of law entails public and private accountability in the exercise of power, and consistent and fair regulation and dispute resolution, in both national and local contexts.[386]

Democratization takes proper constitutional reforms characterized by introduction of multiparty democracy. These lead to political reforms as to rule of law through reintroduction and sustenance of presidential term limits, institution of fair elections and liberation of legislature as well as judiciary from the executive shackles. The fact is Uganda's constitution recognizes the aspiration of the people in relation to a government based on rule of law.[387]The Constitution also establishes the rule of law as one of the national objectives and directive principles of governance.

That though the constitution confers several powers to the president, these are still limited by the parliament with some powers carried exclusively by the president. Thus where the president exercises extreme powers towards dictatorship the fault lies with him and the parliament.[388]

[385] G. W Kanyeihamba, *The rule of law, Judicialism , and Development* volume 3
[386] O'Donnell, Guillermo A. 2004. *"Why the Rule of Law Matters,"* Journal of Democracy 15(4); Weingast B. 1997 ;The political foundations of democracy and the rule of law'. Am. Polit. Sci. Rev. 91(2):245–63; UNDP (2011), Strengthening the Rule of Law in Crisis-affected and Fragile Situations. New York: UNDP, at 8, 11.
[387]*Article 1* of the Constitution of The Republic of Uganda, 1995 as amended.
[388]Kittredge,j.(2003) Presidents, Congress, and the Use of Force: A Critique of Presidential Powers. The History Teacher, 37(1), 89-98. Doi:10.2307/ 1555603

When acting as administrative authority, the president is required to adhere to the constitutional provisions by following the necessary procedures such as acquiring parliamentary approval.[389]

Article 172 (a)[390] provides the president power to appoint certain categories of public officers such inspector general of police, members of the human rights commission, director of public prosecution among others. Under this execution the president is expected to comply with the requirements of qualification to particular appointment. Follow procedures established in the particular legislations.

Emergencies and a state of war where **Article 110**[391] of the constitution provides the president in consultation with cabinet power to declare a state of emergency in situations where there is external aggression of war, threat to national security and interest of public safety. Though the having executive authority, the president must act within certain confines not overstep certain bonds of liberty.[392]

Article 124[393] of the constitution further provides the president to declare a state of war with approval of Parliament or seek the same within 72 hours of the declaration were reasonable.[394]

It is worth to note these are extraordinary powers which have rested on the president with the assumption that he will act in the best interest of the country of which this puts the rule of law at risk of presidential power grab.[395]

In terms of international relations, the president has powers under **Article 122**[396] to make appointments of ambassadors and heads of diplomatic missions.

According to **Article 123**[397], the president may make treaties, connections, agreements and other arrangements between Uganda and other countries that is, international relations.

Article 124 (a)[398] provides the president with powers to pardon, respite, remission of sentence to persons convicted of crime through exercise of prerogative of mercy done with support of prerogative committee of mercy.

With ministers, their functions will depend on presidential directives as they are not particularly stipulated in the constitution. The constitution provides functions of ministers under **Article 113 (3)**

[389] Articles 98, 99,111-114 of Constitution of the Republic of Uganda, 1995 (As amended)
[390] Constitution of the Republic of Uganda, 1995 (As amended)
[391] Ibid
[392] Joshua LFriedman "Emergency powers of the executive: The President's Authority when all Hell Breaks Loose volume 25 J.L & Health (2012)
[393] Constitution of the Republic of Uganda, 1995 (As amended)
[394] The moment the president declares a national emergency, a decision entirely within his discretion. He is able to set aside many of the legal limits on his authority.
[395] https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/
[396] Constitution of the Republic of Uganda, 1995 (As amended)
[397] Ibid
[398] Constitution of the Republic of Uganda, 1995 (As amended)

and 114 (4).[399]

Article 99(5)[400] provides ministers with power to sign statutory instruments on behalf of the president.

Section 12 of the Community Service Act provides ministers with powers make rules, regulations, order or guidelines such as prescribing composition ad duties of officers to include supervising officers and district community service officers.

Section 175[401] provides the minister with powers to amend make regulations as well as amend the schedules to the Act.

Under these functions, the minister is expected to act within the scope of powers with the necessary procedures like approval otherwise, the actions may be challenged on the basis of ultra vires.

PRESIDENTIAL IMMUNITY

NATURE AND SCOPE OF PRESIDENTIAL IMMUNITY

Most of the African countries have adopted and endured to have presidential immunity in their constitutions and it is this that has secured incumbents in African protection from prosecution in domestic courts not only for breach of country's laws but also for breaching international laws.[402]These provisions limit presidential prosecution before the domestic courts but do not necessarily mean that the president cannot appear before a court of law. Indeed, if the president desires, it is in his discretion to decide to appear before a court where he so wishes. For Uganda's case, the journey for presidential immunity is indeed deep. It is traced from the 1968 constitution. Article 34 (2)[403] provided that the president shall take precedents over all persons in Uganda and shall not be liable to any proceedings whatsoever any court.[404] This was as well amplified in the 1967 constitution under Article 24(3). Further this was adopted under Article 98 (4) and (s) of the 1995 Constitution of the Republic of Uganda they are clear to the extent that the president is immune from criminal prosecution but that, **Uganda V Commissioner of Prisons Ex parte Matovu**[405] expires when he ceases to be president.

Though this is the case, the practice of the international Criminal Court and the special court for Sierra Leone make it clear that presidential immunity is not a defence for the alleged crimes that are

[399] Ibid
[400] Ibid
[401] local Government Act Cap.243
[402] C.B. Mulungu, Immunity of State Officials and Prosecution of International Crimes in Africa. Unpublished PhD Thesis. University of Prestoria (2011) pp 194-278.
[403] 1967 Uganda Constituition.
[404] The Constitution of Uganda, 15th April 1966.
[405] [1967] E.A.L.R. 514 (H.C.).

committed internationally by the incumbents.[406] So long as an allegation is posed against a president on committing of international crimes like crimes against humanity, privacy, genocide and others as stated by the Rome Statute. Indeed, presidential immunity is a refugee camp for incumbents. The provisions seem to be small but carry a heavy load of importance that cannot be undermined. The rational for these provisions provides a well laid justification for their adoption by most of the countries worldwide in their constitutions in that despite the fact that no person regardless of their social, economic or political rights is or should be above the law, the presidents are given a benefit and a right above others that is due to the functions and powers vested in them.[407]

In Mississippi vs Johnson[408] in 1867, the court placed the president beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise. An application for an injunction to forbid the president from enforcing the reconstruction act on the grounds of their unconstitutionality, was answered by the attorney general Stanberg, who urged, inert alia, the absolute immunity of the president from judicial process. the court refused permit the filing using language construable meaning the president was not reachable by judicial process but which more fully paraded the horrible consequences were the court to act. first noting the limited meaning of the term ministerial, the court observed that very different is the duty of the president in the exercise of the power to see that the laws are faithfully executed, and among these e laws the acts named in the bill… the duty thus sense ministerial. it is purely executive and political.

Any attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized, in the language of chief justice Marshall, *"as an absurd and excessive extravagance."* it is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. but we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of the executive discretion." …

"the congress Is the legislative department of the government; though the acts of both, when performed, are, in proper cause subject to its cognizance. The impropriety of the such interference will be clearly seen upon consideration of its possible consequences."

[406] A warranty of arrest was issued against the former president of Sudan while still in office. Recently the president of Kenya was also on trice before the ICC.

[407] Charles Manga Fombad and Enyimba Nwauche (African Journal of Legal Studies 5 (2012) 9-118 Martinus NIJHOFF Publishers)

[408] 71 U.S. 475

Suppose the bill filed and the injunction prayed for allowed. if the president refuses obedience, it is needless to observe that the without power to enforce that process. if, on the other hand the president complies with the order of the court and refuses to execute the acts of congress, is it not clear that a collision may occur between the executive and the legislative department of the government. ? may not the house of representative impeach the president for such refusal.? and in that case could this court interfere, in behalf of the president, thus endangered by compliance with its mandate, and restrain by injunction the senate of the united states from siting as a court of impeachment? would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in in that court? one must be aware that the case was decided in the context of congressional predominance following the civil war. the courts restraint was pronounced when it denied an effort to file a bill of injunction to enjoin enforcement of the same acts directed to cabinet officers. Georgia V. Stanton,[409] before and since however, the device to obtain review of the presidents' actions has been to bring suit against the subordinate's officer charged with carrying out the presidents wishes. Kendall. V. United States ex rel. stokes[410],. panama refining Co. Ryan,[411]. In Youngstown sheet &Tube Co. Sawyer[412] Congress has not provided process against the president. In Franklin V Massachusetts[413], resolving a long running dispute, the court held that the president is not subject to the administrative procedure Act and his actions, therefore, are not reviewable in suits under the Act.

In as much as some agency action, the acts of the secretary of commerce in this case, is preliminary to presidential action, the agency action is not final for purpose of APA review. Constitutional claims would still be brought, however see also following Franklin, Dalton V. Spector. [414]

From these court opinions, rarely has the court been had an opportunity to elucidate its opinion. Although presently the court has definitely resolved one of the intertwined issues of presidential accountability. The president is absolutely immune in actions for civil damages for all acts within the outer perimeter of his official duties.[415] The courts close decision was premised on the president's unique position in the constitutional scheme. That was derived from courts inquiry of a kind of public policy analysis of the policies and principles that may be considered implicit in the nature of the president's office in a system structured to achieve effective government under a constitutionally mandated separation of powers. However, in an instance where the president is

[409] 73 U.S (6 Wall). 50 (1867)
[410] 37. U.S (12 Pet) 524 (1838)
[411] 293.U.S 388. (1935)
[412] 343.U.S 579 (1952)
[413] 505 U.S 788 (1992)
[414] 511 U.S 462 (1994).
[415] Nixon v Fitzgerald U.S. 731(1982)

caught in unofficial conduct, the following has and should happen.

In Clinton v jones,[416] the court, in a case of first impression, held that the president did not have qualified immunity from civil suit for conduct alleged to have taken place prior to his election, and therefore denied the president's request to delay both the trial and discovery. the court held that its precedents affording the president immunities from suit for his official conduct primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability were in applicable in in this kind of case. more over a separation of powers doctrine did not require a stay of all private actions against the president. separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the government at the expense another.

In the Ugandan modern constitution of 1995, the immunity of the president is stated under Article 98(4 and 5) exempting the president of any liabilities be of criminal or civil nature whatsoever, during the time he is in office only. It is important to note that this immunity is absolute, that if the president is still holding office, he is completely shielded from court proceedings against him.

However, the ICJ make it clear that presidential immunity isn't a defense for those alleged to have committed international crimes, such war crimes and crimes against humanity. A warrant of arrest was issued for the arrest of the president of Sudan issued by the ICJ although he was an incumbent president. Similarly, the president of Liberia, Charles Taylor was also prosecuted and the president of Kenya was also on trial. Therefore, presidential immunity is absolute only within the boundaries of Uganda.

The parliament of Uganda had tried to pass the international criminal court bill into law to strengthen the justice system in Uganda. Q seminar was held and hosted by Uganda coalition on the ICJ, a project under HURINET Uganda. In the seminar issues of war crimes were discussed wildly including of which was the immunity of the president. Nwoya county MP Simon Oyet supported the view that for justice to prevail, both the LRA and the UPDF commanders who committed war crimes must face courts of law. Oyet added that the year 2002 left a lot of gap for the war crimes were committed before that year. Most of the crimes committed before that time were by the government forces. He asserted that before 2002, many people died at the hands of the national Resistance army, while women were raped and girls were defiled. So, the seminar sought to bring to book all perpetrators including army heads.

One can draw a drastic conclusion that the periods of 1960 were that escaping light through the crevice that natured the form of politics Uganda was to adopt in the years to come. Indeed, it is the various events in this period that groomed the nature of leadership Uganda experiences apparently.

[416] 520 U. S. 681 (1997)

Prof. George Kanyeihamba asserts that the accelerating point for this was the granting of independence to Uganda in 1962 which saw Uganda having Dr. Apollo Milton Obote as the prime minister and Sir Edward Mutesa II as the president.[417] The President was the Supreme Head and Commander in Chief of the armed forces of Uganda. He was to be a constitutional head in the sense that he would act on the advice of the government which was still led by the Prime Minister. Despite all this, Uganda was not a republic.

He was supposed to act constitutionally in accordance with the due advice from the national cabinet.[418] This provision really posed a test to Mutesa who was a president and at the same time the king of Buganda. He had to make decisions that were to be beneficial to Uganda as a whole and yet he was a Kabaka who did not want to betray his people. Many scholars say that the challenge was planted by the 1962 independence constitution that the challenge was planted by the 1962 independence constitution that failed to draw a valley between the powers of the president and the prime minister. This kept the two in a pool of conflicts on who had more powers than the other which eventually led to the collapse of the UPC- KY alliance.[419] It slowly but surely worsened the relationship between the central government and the Buganda kingdom and the bursting moment of the tumor was the 1966 Kabaka Crisis when the Prime Minister ordered an attack of the Mengo Palace to have the president arrested. It is this that led to the unconstitutional overthrow of the president and instituted a new government of Dr. Milton Obote. The final nail to this was the 1967 constitution that was promulgated that saw Uganda becoming a Republic of Obote become the executive president of Uganda.[420] His office was governed by chapter 4. Article 24 (1) provided that there shall be a president of Uganda who shall be the Head of State, Head of Government and Commander in Chief of the Armed Forces of Uganda.[421] Just like all constitutions in other African countries, this constitution governed the presidency. It was laid on the presidential appointment powers, immunity impeachment and resignation of the president which shall be handled later. The provisions on this office were to be reflected in the 1995 Constitution of the Republic of Uganda. These provisions are crucial. They check on the conduct of the president while in office for the achievement of better administration.

[417] George W. Kanyeihamba. Evolution of Constitutional Law and Government.
[418] Section 67 of the 1962 constitution.
[419] The President declined to sign a statutory instrument for the transfer of the lost counties to Bunyoro after the referendum.
[420]
[421] The Constitution of the Republic of Uganda 1962

ABSOLUTE IMMUNITY

This finds its way out in circumstances where the president or king is granted absolute immunity from both civil and criminal proceedings. Absolute immunity is traced in many constitutions in Africa as a measure to secure concentration of the president to national matters, protecting this dignity of the presidential office and the image of the country. Article 50 (1) of the Lesotho Constitution provides that whilst any person holds the office of king, he shall be entitled immunity from suit and legal process in his private capacity and to immunity from criminal proceedings in respect of all things done or omitted to be done by him either in his official capacity or in his private capacity.[422] In Uganda Article 98 (4)[423] provides that while holding office, the president shall not be liable to proceedings in any court. Article 98 (5)[424] provides that civil or criminal proceedings may be instituted against a person after ceasing to be president, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any proceedings shall not be taken to run during the period while that person was president.[425]

This immunity in democratic countries is only available to the president and in monarchies to only the kings. This is sufficient reason as to why in Democratic countries with kingdoms. Kings are subjected to court sessions or are suit for any civil or criminal matter committed by them. In Uganda guidance can be traced from the recently concluded case where male Hasssan Kiwanuka Mabirizi sued the king of Buganda over land matters.[426] Recently as well the Rwenzururu king Charles Mumbere was charged with terrorism. It is so clear that immunity is only available to the president. Other scenarios are located under Article 11 of the Swaziland Constitution which states that the king and Ingwenyama shall be immune from (a) suit or legal process in any cause in respect of all things done or omitted to be done by him. In most Anglophone countries, there is qualified immunity and covers criminal liability. Article 41 (a) of the Botswana Constitution states that whilst any person holds or performs the functions of the office of the president him in respect of anything done or omitted to be done by him either in his official capacity or in private capacity. But really this is so broad that the president shall go away with many crimes without anyone issuing charges even after which may defeat the exception of immunity. This immunity is available in many jurisdictions.

[422] The Constitution of Lesotho 1993, as amended.
[423] Constitution of the republic of Uganda, 1995 (As amended)
[424] Ibid
[425] The 1995 Constitution of the Republic of Uganda as amended
[426] Kabaka of Buganda V Male H. Mabirizi Kiwanuka CACA No. 184 of 2017.

QUALIFIED IMMUNITY

This is another immunity. It balances two important interests; the need to hold public officials accountable when they exceed or exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably. Being more specific, qualified immunity protects a government official from law suits alleging that the official violated plaintiff's rights, only allowing suits where official violated a clearly established statutory or constitutional right.[427]

On further emphasis, qualified immunity protects government officials from liability for civil damage sin so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[428] Majority of these countries on the black continent have this immunity in their constitutions.

Countries like Angola under Article 127(1) and Article 43(1) b of Equatorial Guinea Constitution exclude from such immunity, impeachable offences. Malawi constitution under Article 91(2) also harbours qualified immunity. Qualified immunity is very important especially in those countries whose constitutions have no provisions providing for impeachment of president in case of certain serious crimes like Kenya under Article 143 (4) qualifies the immunity further by stating that it will not extend to a crime for which the president may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity.[429]

In other jurisdictions, immunity exists for life and this may be only lifted by Parliament where it considers it to be a matter of public interest. Article 45 of the Sudanese constitution gives mandate to the National Assembly to stop the president of his immunity from criminal section. Further analysis to this is traced in Zambia where Article 43 (3) of the Constitution was invoked by Parliament when it lifted the immunity of former president Chiluba before criminal proceedings were brought against him for corruption.[430]

In other jurisdiction or countries, this immunity is only available when one is in power and when they cease office, it loses effect to them. Article 133 of the Angolan Constitution states that a former president loses his immunity if he is removed from office and others this may be different but it is very critical and tactical and other countries have a past tenure immunity. Ghana Article 57 (6) of the Constitution allows civil and criminal proceedings to be instituted against a former president for acts or omissions during his tenure if such proceedings are brought within three years

[427] Pearson V Callahan, 555 US 223
[428] Lewis Franklin Powell in Harlow V Fitzgerald, 457 US 800 (1982).
[429] President Kenyata recently appeared before International Criminal Court while still in office.
[430] Scott, T. Beyond Neopatrimonial Leadership: The prosecution of past presidents in African paper presented at the annual meeting of the international studies Association. Hilton Hawallan Village, Honolulu. H.S, March 2005.

after he ceases to be president and beyond this immunity is available. In Burundi, the constitution prohibits any prosecutions of a former president if no proceedings were commenced against him when he was in office. Various countries have immunity in their constitutions basing on the aspirations of the people but generally all countries in Africa and the world at large do have immunity.

The effect with immunities is that they tend and have prolonged leaders in power especially in Africa. Most of the leaders look for a way of prolonging their stay in power upon realization that they are to face changes due to their conduct while in power. It is this that has been a breeding ground for dictators in Africa. This has seen such leaders enforce the removal of term and age limits in the constitutions through regular amendments.

In countries like Equatorial Guinea, in 2010, a constitution was adopted after a transitional government was established. This constitution provided for a two term limit but recently a new constitution was enforced by president conde to bypass that provision so that he runs for the third term. In Uganda, the term limit provision was amended in 2005 following the referendum living the 1995 constitution with only the age limit. This was also amended in 2017 constitutional amendment to enable President Yoweri Museveni contest for another term. One can say that the effect of presidential immunity has natured dictators in Africa.[431]

In the bid to remedy this by the international community, laws have been enacted following the creation of international organizations to oversee, enforce and promotes democracy, human rights and check on dictatorial regimes. These organizations have been joined by many countries in the world. Organizations like African Union, International Court and the International Court of Justice have been established.

RATIONALE FOR PRESIDENTIAL IMMUNITIES

The sole roles, responsibilities and duties of executive powers vested in the presidents are enormous and because of this, most of the countries through their constitutions have granted them immunity. In some it is absolute and in others qualified but the sole purpose for this is to enable them to be able to discharge and dispense their duties with as much freedom as possible. The rationale is that the court proceedings may distract the president's concentration on national matters due to the regular court sessions and cross examination which may hamper with his confidence yet he handles matters of national interest. The executive powers are vested in only the president and exercised by him alone. He may fear liability if his decisions go wrong. It is necessary to protect

[431] The Constitution retains the two term limit but is silent on time already served before it came into force enabling conde to seek two more terms. Available at: https://www.theconevrsation.com

the dignity of the office and not him personally.[432] As Esther Kisakye JSC noted cross examination in courts of law and court sessions may ashame the president, the office of the presidency and the image of the country therefore immunity should stand as a refugee camp for the Head of State.[433] Indeed because of the singular importance of the President's duties, diversion of his energies by concern with private law suits would raise unique risks to the effective functioning of government.

But that noted, there is nothing that would preclude the president from waiving the privilege. Thus, if so minded the president may shed the protection afforded by the privilege and submit to the court's jurisdiction. The choice of whether to exercise the privilege or to waive it is solely the president's prerogative. Therefore, it is a decision that cannot be assumed and imposed by any other person.

Presidential immunity is rooted in history. Presidents were granted absolute immunity for example the existence of the common law maxim that "the king can do no wrong" which was adopted in many countries especially the Anglophone countries. The reasoning behind this was that the king could not be made to submit to the jurisdiction of the kings courts.[434] This precluded the king from court sessions since he was viewed to be above others with absolute powers. I dearly, they found no reason of the king featuring in courts that he himself had established and get in some instances, he was viewed as law for at some point he could resolve some matters for which the courts had no answer about. The king indeed had residual powers. But the question as to whether or not absolute immunity achieves the purpose for its available depends on the nature and scope of that immunity.

[432] Nixon V Fitzgerald, 457 US 731 (1982)
[433] Sssekikubo and 4 Others V A.G. and 4 Others SCCA No. 1 of 2015
[434] A.V Dicey. Introduction to the study of the law of the Constitution. Macmillan, London (1945) and Blackstone W. and Brown. Commentaries on the Laws of England. West Publishing. St. Paul, MN, 1897.

CHAPTER SIX

EMERGENCY POWERS OF THE PRESIDENCY.

Article 1(1)[435] of the Constitution of the Republic of Uganda provides that all power belongs to people who shall exercise their sovereignty under the Constitution. State authority emanates from the people of Uganda, and the people shall be governed through their will and consent.

Article 2(1)[436] of the Constitution further provides that the Constitution is the supreme law of the land and shall have binding force on all authorities and persons throughout Uganda. Article 46(1) provides that an Act of Parliament shall not be taken to contravene the rights and freedoms guaranteed in chapter four regarding if an Act authorises the taking of measures that are reasonably justifiable for dealing with a state of emergency.

At the start of the novel coronavirus pandemic, many pertinent decisions were made by the government of Uganda to contain the spread of the virus. However, in doing this, a state of emergency was not declared to indemnify the State's actions or excuse the illegality of the directives and measures adopted for similar reasons. Most of the usual routines were affected, halted or even terminated to live within the new normal. It suffices to say that most of these new measures had a significant impact on the jurisprudence of Uganda as it is known to be.

Therefore, this chapter seeks to layout and criticise such impacts and how they have been detrimental or beneficial to the country's rule of law and its citizens at large. This chapter will also try to determine if the new measures should be admitted into the legal system or whether they must be phased out and a better, prepared and accommodative system built in their place.

STATE OF EMERGENCIES

This is a condition of natural danger whereby any government suspends normal constitutional procedures to regain control. It is usually declared during natural disasters, wars, civil unrests, a pandemic or epidemic and other risks. In the 1995 constitution, State of emergencies are provided for under Article 110(1)[437] which is to the effect that "the president any in consultation with the cabinet, by proclamation declare a state of emergency exists in Uganda or any part of Uganda if the president is satisfied that circumstances exist in Uganda or in that part of Uganda". Article 110(3)

[435] Constitution of the Republic of Uganda, 1995 (As amended)
[436] Ibid
[437] Ibid

provides that parliament shall have to approve in any a case not later than fourteen days after the proclamation declaring the state of emergency. Further its only Parliament that has mandate to extend the state of emergency but the extension should not be beyond ninety days. In Uganda, the declaration of state of emergencies has not been so common. Recently in 2007, the Ugandan government declared a state of emergency in flood hit northern and Eastern region. The then prime minister Apollo Nsibambi informed Parliament that the president was to deliver a proclamation for their approval. This ironically proves legislative sovereignty over the executive[438].

DEFINITION AND MEANING OF THE STATE OF EMERGENCY.

A state of emergency or emergency powers is a situation in which government is empowered to be able to put through policies that it would normally not be permitted to do, for the safety and protection of their citizens.

The governor declares a state of emergency when he or she believes a disaster has occurred or maybe imminent that is severe enough to require state aid to supplement local resources in preventing or alleviating damages, loss, hardship or suffering. This declaration authorizes the governor to speed state agency assistance to communities in need. It enables him to make resources immediately available to rescue, evacuate, shelter, provide essential commodities (i.e., heating fuel, food, etc.) and quell disturbances in affected localities. It may also position the state to seek federal assistance when the scope of the event exceeds the state's resources.

A government can declare such a state during a natural disaster, civil unrest, armed conflict, medical pandemic, or epidemic or other biosecurity risk.

Justitium is its equivalent in roman law; a concept in which the roman senate could put forward a final decree (senatus consultum ultimum) that was not subject to dispute yet helped save lives in times of strife.

States of emergency can also be used as a rationale or pretext for suspending rights and freedoms guaranteed under a country's constitution or basic law, sometimes through marital law or revoking habeas corpus. The procedure for and legality of doing so vary by country.

ORIGIN OF STATE OF EMERGENCY

The notion of state of emergency as used in situations of national threats is one that derives its roots in ancient times.

The genesis of the idea of special emergency powers can be traced as far as back the aesymneteia, "the elected tyrant" in whom the people of ancient Greece vested absolute powers as a temporary

[438]Relief Web.Reliefweb.int.Uganda:Floods Emergency Appeal No MDRUGOO6 Final Report.

exigency when their cities were under threat.[439]Aesymneteia or aesymnetes meaning a state of emergency was a practice in ancient Greece which was first analysed by Aristotle.[440]

The concept of state of emergency also has historical roots that stretch as far back as roman times in the practice of nominating a "dictator" in exceptional circumstances of external attack or internal rebellion.[441]Analogy is also drawn to the institution of roman 'dictatorship" that spanned three centuries of the Republic as well as the Roman law doctrine of iustium.[442]

The legal regime of state of emergency is a relatively modern development with origins in the French revolution that gained a place in most national legal systems by the mid-20th Century.[443]In France, a state of siege was declared in 1971 as a consequence of the 1789 French revolution.[444]The civil law notion of state of siege (l'etat de siege) that was spawned during the French revolution, first codified by a constituent assembly decree of 8 July 1791, and remains embedded in the French Constitution.[445]

During the 1789 French revolution, the concept of state of emergency began with a 1789 decree of the French constituent assembly which distinguished a state of peace from a state of siege the latter being described as a situation where all the functions are entrusted to the civilian authorityfor monitoring order and internal policing pass to the military commander who exercises them under his exclusive authority and responsibility.[446]

Another French revolution occurred in 1848 of which after its occurrence, the Constitution of the second French Republic included a new Article which prescribed that the occasion forms and the effects of a state of siege were to be elaborated in law.[447]

Around the same time, the concept also became relevant in North America particularly in US Constitutional Law and Practice where During the American Civil war the president Lincoln suspended the writ of Habeas Corpus guaranteed by Article 1 where it was deemed necessary.[448]

The modern origins of state of emergency as a legal concept came from the 19th Century in Western

[439]Reynolds, John," The long shadow of colonialism: The origins of the doctrine of emergency in international human rights law"(2010) Comparative Research in law and political economy.Reseach paper No.19/2010. Page 5 http://digitalcomons.osgoode.yorku.ca/clpe/86

[440] Claire Macken. Counter Terrorism and the detention of suspected terrorists: Preventive detention and international human rights Law. Routledge, 2013 page 37

[441] Scott P. Sheeran, Reconceptualizing states of emergence under international Human rights Law: Theory, Legal doctrine and politics, 34 MICH.J.INT'L L. 491(2013) page 496

[442] Ibid, page 5

[443] Ibid page 496

[444] Supra note 391

[445] See Article 36 of the Constitution of 1958

[446]Giorgio Agamben, the state of exception (Kevin Atell trans, Univ of chi press 2005) (2003) page 5 (Quoting Theodor Reinach, De L'Etat De Siege Etude Historique et Juridique 109(1885)

[447] Ibid page 12

[448] Ibid page 20

Europe and from liberal democratic tradition.[449]

The origins of the concept / notion of state of emergency is also evident in Britain with common law traditions of martial Law and emergency legislative systems. The concept of martial law has its roots in Medieval England where it operated as military law as a system of regulations for maintenance of order and discipline within armed forces,[450] and from the 14th Century it applied to civilians.

Many English legal scholars saw martial law as deriving from a common law right of a crown and its servants to repel force by forcein the case of invasion,insurrection, and riot or generally of any violent resistance to the law.[451]

The 19th Century saw the wide spread use of martial Law throughout the empire and evolution to emergency legislative codes.[452]

During the period as British was acquiring the colonies, state of emergencies were proclaimed by Britian in Malaya in June 1948, in Kenya in October 1952, in the Gold Coast in March 1948 and January 1950 and British Guina October 1953.

Emergency Regulations were imposed pursuant to Emergency Powers (Colonial Defence) Order-in-Council of 1939, entailing whole sale powers of censorship, curfew, arrest, detention and deportation.[453]

Such extensive emergency regulations were also introduced for the duration of the Second world war were substantial number of people were detained by government without charge or trial or term set and was justified on the basis of national security.

These intolerances lead to a post war movement for international protection of Human rights emerged with institutions such as the United Nations, Council of Europe.However over time some of the major international Conventions formulated over the course of years like the International Covention on Civil and Political rights (ICCPR), European Convention on Human Rights (ECHR) granted pass to state to derogate rights in the event of self-diagnosing emergencies.[454]

Under international law, rights and freedoms maybe suspended during a state of emergency, depending on the severity of the emergency and government's policies.

Though fairly uncommon in democracies, dictatorial regimes often declare a state of emergency that is prolonged indefinitely for the life of the regime, or for extended periods of time so that derogations can be used to override human rights of the citizens usually protected by the

[449]ISupra note 3 page 492
[450] Supra note 1 page 6
[451] A.V Dicey, Introduction to the study of the Law of the Constitution 284, (8th edition.1915)
[452] Supra note 1 page 11
[453]Ibid page 20
[454] ibid

international covenant on civil and political rights.

In some situations, marital law is also declared allowing the military greater authority to act. In other situations, emergency is not declared and de facto measures taken or decree – law adopted by the government. Ms. Nicole Questiaux (France) and Mr. Leandro Despouy (Argentina), two consecutive United Nations Special Rappoteurs, have recommended to the international community to adopt the following "principles" to be observed during a state or de facto situation of emergency: principles of legality, exceptional threat, proportionality, non-discrimination, compatibility, concordance and complementarity of the various norms of international law [455] Article 4 to International Covenant on Civil and Political Rights (ICCPR), permits states to derogate from certain rights guaranteed by the ICCPR in "time of public emergency." Any measures derogating from obligations under the covenant, however, must be to only the extent required by the situation, and must be announced by the state party to the Secretary- General of the United Nations.

The European Convention of Human Rights and American Convention on Human Rights have similar derogatory provisions. No derogation is permitted to the International Labour Conventions. Some political theorists, such as Carl Schmitt, have argued that the power to decide the initiation of the state of emergency defines sovereignty itself.

In state of Exception (2005), Giorgio Agamben criticed this idea, arguing that the mechanism of the state of emergency deprives certain people of their civil and political rights, producing his interpretation of homo sacer.

In many democratic states there are a selection of legal definitions for specific states of emergency, when the constitution of the state is partially in abeyance depending on the nature of the perceived threat to the general public. In order of severity these may include;

- Marital law when civil rights are severely restricted by the imposition of military force within a sovereign state, for example during a period of extreme threat of invasion or actual hostilities by foreign forces.
- State of siege when the civil rights of specified persons or groups such as political activists are likely to be curtailed, for example to prevent an insurrection or organized acts of treason by suspected agents provocateurs.
- Civil emergency dealing with disaster areas and requiring the deployment of extra ordinary resources to contain dangerous situations such as natural disasters or extensive malicious property damage such as may occur during rioting or by arson. As well as regular

[455] (cf. "Question of Human Rights and state of Emergency", E|CN.4|sub. 2|1997|19, at chapter 11; see also Etat d'exception.)

emergency services, sometimes military forces may be assigned to deliver aid under especially dangerous conditions or to prevent looting.

In Uganda, the notion of state of emergency has its roots in the post-independence era which involved change of leadership. Uganda attained its independence October 9th 1962 with the leadership of Kabaka Muteesa I under the 1962 constitution which was later abrogated by the Prime Minister Milton Obote in 1966 who declared himself an interim president under the 1966 interim constitution accompanied by various changes like abolition of Kingdoms. Later the 1967 Constitution was promulgated and later a state of emergency was declared which led to the one party rule of the nation under the Uganda People's Congress.[456] Later, Idi Amin Dada took over leadership and ruled by decrees and was later succeeded by the Current president H.E. YK Museveni whose regime led to the enactment of the 1995 Constitution which provides for the procedure of declaring a state of emergency under Article 110 and Article 43.[457]

SCHOOLS OF THOUGHT UNDER THE CONCEPT OF STATE OF EMERGENCY

Many schools of thought have come up to explain the concept of state of emergency. The main two broad schools of thought on the legality during a state of emergency also known as a state of exception include the Sovereignty approach and the rule of law approach.

The *Sovereignty approach* supporters believe that it is neither possible nor desirable to control executive action in times of emergency using standard juridical mechanisms.[458]The sovereignty approach believers basically believe that during times of emergency, the actions of the executive should not be subjected to the law.

Carl Schmitt is the most celebrated profounder of the school of thought and he propounds that:

"The precise details of an emergency cannot be anticipated nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is eliminated. The most guidance the Constitution can provide is to indicate who can act in such a case."[459]

The idea behind this thought is that the rule of law constraints may prevent a party from defending it's self in a serious crisis, and that the capacity of a ruler to maintain the existence of the liberal

[456] See http:// WWW.titutionnet.org Accessed on 29 July 29, 2020 at 6:04 pm
[457] Constitution of the Republic of Uganda, 1995 (As amended)
[458]Tom R. Hickman, Between Human rights and the Rule of Law: indefinite Detention and derogation Model of constitutionalism, 68 MOD.L.REV 655 (2005) page 658
[459] Carl Schmitt, Political Theology: Four Chapters on the Concept of sovereignty (George Schwab trans, Univ. Chi Press 2005) (1922)

state may depend on not being bound by the law.[460] However this sovereignty approach has been criticized by many legal scholars the major criticism being that even in a state of emergency the rule of law must still prevail.[461]

The Rule of law approach which basically implies that all the actions of the executive in times of emergency have to be subjected to the legal procedures.The approach had been criticized on grounds of constitutional and political theory rather than internal law separation of powers which may endanger legitimacy of courts.[462]The general public, the comprehensive rule of law approach may raise the objection that judges are inappropriately substituting their own views on a state of emergency for those of the democratically elected public representatives.[463]

THE RATIONALE, PROCEDURE AND CONSEQUENCES OF DECLARING A STATE OF EMERGENCY

A state of emergency is usually declared in situations where there is a national threat and measures are necessitated to control the threat with the rational being that it empowers government to perform actions or impose policies that it would not normally be permitted to do thus making their actions legal in the situation.[464] The key rationale for invoking emergency powers is to trigger federal disaster relief to states.[465]These emergency provisions are necessary because they enable the state to respond effectively to crises while keeping the exercise of emergency power within the rule of law.[466]

The major advantages of declaring a state of emergency is that it provides local governments with the powers necessary to coordinate and implement plans aimed at protecting people and property during a disaster.[467]Then also a declaration of a state of emergency permits a local governing body to promulgate orders and regulations necessary for the protection of life and property such as imposing a curfew.[468] Furthermore, declaring a state of emergency ensures that the local government and its officials and employees are immune from liability when exercising their official

[460] Supra note 3 page 501
[461] See the preamble of the Universal Declaration of Human Rights
[462] Supra, page 502
[463] Ibid
[464] MPs call for declaration of state of emergency posted on 02 April 2020. http://www,parliament.go.ug/news/4590/mps-call-declaration-state-emergency Visited on 28/7/2020 at 12:19 pm
[465] Amy Lauren Fairchild, the Ohio state University, Marian Moser Jones University of Maryland. What does a state of emergency mean in the face of the corona virus? March 26,2020 http://theconversation.com/amp/what-does-a-state-of-emergency-mean-in-the-face-of-the-corona-virus134439 Viewed on 28/7/2020 at 9:59pm
[466] Elliot Bulmer. Emergency powers. International IDEA Constitution Building Primer 18 page 6 (2018)
[467] Joan L Cassman, Cecillia M. Quick. Declaring a state of emergency: What you need to know May 1, 2011.Viewed on 28th July, 2020 at 10:59pm.
[468] Ibid

duties during an emergency.[469]A state of emergency basically legalizes all acts of the government in the bid to curb national pandemics like the COVID-19 Pandemic.

Besides legalizing the acts of the governments in situations of pandemics, declaring a state of emergency also has negative consequences to the various sectors of the government like the health sector thus infringing on human rights as well like the right to health.

The first negative consequences of declaring a state of emergency is that there is limited resource availability because almost all the resources are diverted for fighting the pandemic.[470]Then there is increased dependence on aid due to limited resource availability.[471] Health workers are also poorly paid and also equipment and supplieslike lack of drugs due to limited resourcesavailability.[472]

The other negative consequence is there is an impact on campaigns in that campaigns are disrupted because gatherings are prohibited and the like with the aim of the national crisis being curbed.[473] Disease control and outreaches are also disrupted thus infringing on the right to health of the population with the same aim of curbing the pandemic as lockdowns are put in place.[474]

LEGAL FRAMEWORK OF STATE OF EMERGENCY AND ITS COMPONENTS

A state of emergency in a general sense involves governmental action taken during an extraordinary national crisis that usually entails broad restricts on human rights inorder to resolve the crisis.[475]A state of emergency also derives from a governmental declaration,[476] made in response to an extraordinary situation posing a fundamental threat to the country.[477]A state of emergency also denotes a legal regime in which public institutions are vested with extraordinary powers to address existential threats to public order.[478] During a state of emergency a government gives itself special powers to try to control an unusual difficult or dangerous situation, especially when it involves limiting people's freedom.[479]

Section 1 of the Emergency Powers Act 1968 Cap 297 states that proclamation of emergency means

[469] Ibid
[470] Humanitarian Health Action. Effects and Response priorities in different types of emergency. WHO http://Who.int/hac/techguidance/tools/manuals/Who_field_handbook/annex_2/en/
[471] Ibid
[472] Ibid
[473] Ibid
[474] Ibid
[475] Claudia Grossman, A frame work for the examination of state of emergency under the American Convention on Human rights, 1 AM.U.J INT'L & POL'Y 35, 36(1986)
[476] Cornell Law School http://law.cornell.edu/Wex/stateofemergency viewed 27/7/2020 at 20:55pm.A government declaration is one that states that because of some crisis, the normal workings of political and social life are suspended in the given jurisdiction. A state of emergency may alter government operations, order specific action by individuals, and suspend regular civil rights.
[477] Backgrounder Security Sector Governance and Reform October 2005
[478] Jaime Oraa, Human Rights in states of Emergency in international law 1 (1992) page 7
[479] Longman Dictionary of contemporary English http://ldoceonline.com/dictionary

a proclamation issued under Article 110 of the Constitution declaring that a state of emergency exists. Thus a proclamation of a state of emergency should be according to the procedure provided for in the Constitution of the Republic of Uganda 1995 as amended.

State of emergency is enunciated in various legal instruments at the international, regional and national level.

Internationally, *Article 4 (1) of the International Covenant on Civil and political Rights*,[480] and *Article 27(1) of the American Convention on Human Rights*, state that in time of *public emergency which threatens the life of a nation* and the existence of which is *officially proclaimed*, the state parties to the present covenant to the extent strictly required by the exigenciesof the situation, provided that such measures are not inconsistent with their obligation under international law and do not involve discrimination solely on the ground of race , colour, sex , language , religion or social origin.In that for a state of emergency to be proclaimed there should not only be a public emergency but the emergency should affect the entire population and should be officially proclaimed which according to the prevailing situation in various countries in the world in Uganda, the COVID-19 Pandemic is affecting the entire population.

Article 15(1) of the European Convention on Human Rights and Article 30 of the 1961 European Social Charter also state that in time of war or *other public emergency threatening the life* of any high contracting party may take measures derogating from its obligation under its Convention to the extent strictly required by exigencies of the situation provided that such measures are not inconsistent with its other obligation under international law.[481]This provision basically implies that a nation can derogate from its obligations in the convention like an obligation to respect the right to movement in times of public emergency that threatens the life of the nation and it won't be held legally responsible.

General Comment No.29,[482] Paragraph 1 states that Article 4 of the covenant is of paramount importance for the system of protection for human rights under the Covenant. In addition, Paragraph 2 states that measures derogating from the provisions of covenant must be of an *exceptional* and *temporary nature*. Therefore, for a state to proclaim a state of emergency there should be a situation that is exceptional in nature like the COVID-19 Pandemic which has caused panic globally and the state of emergency should be temporary which varies from country to country, in Uganda it is for a period not exceeding ninety days as per Article 110 of the Constitution of the Republic of Uganda 1995 as amended.

[480]International Covenant on Civil and political Rights 1966
[481] Article F of 1996 European Social Charter
[482] General Comment No.29 on Article 4 of ICCPR adopted at the 1950th meeting, on 24th July 2001

Principle 25 of the Siracusa Principles,[483] states that *public health may be invoked as a ground for limiting certain rights inorder to allow a state to take measures dealing with a serious threat to health of the population or individual members of the population*.These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

Furthermore, *Principle 15 of the Siracusa Principles* states that no limitation on the exercise of human rights shall be made unless *provided for by the national law of general application* which is consistent with the covenant and is in force at the time the limitation is applied.

The Siracusa principles being a law that governs limitations also provide for a declaration of a state of emergency where a situation exists that affects the public health of the nation and the limitation in this case a declaration of a state of emergency should be provided for in the national law of which Uganda it is provided for in Article 110 of the Constitution of the Republic of Uganda 1995 as amended.

Regionally, *African Charter on Human and people's Rights, 1981* provides for the notion of a state of emergency however it does not allow for state parties to derogate from their treaty obligation during emergency situation.

Nationally,*Article 110 (1) of the Constitution*,[484] provides that the president may in consultation with the cabinet by proclamation may declare that a state of emergency exists inUganda, or any part of Uganda if the president is satisfied that the circumstances exist inUganda or any part of Uganda for instance in which the security or economic life of the country or that part is threatened by national disaster and which rendered necessary the taking of measures which are required for securing the public safety.

This provision provides for the procedure to be followed in declaration of a state of emergency in Uganda of which the President in consultation with the cabinet have to first ascertain certain circumstances like the nation, economic life being threatened, and whether the measures are necessary for the sake of public safety. Upon the ascertainment a state of emergency the president declares a state of emergencynot exceeding ninety days and it's subject to extension.

In The Constitution (Declaration of state of emergency) Proclamation 2007 SI No. 44 of 2004, a state of emergency was declared in the Northern and Eastern part of Uganda due to floods giving rise to loss of lives and propertyconstituting a natural disaster under Article 110 (1)(b) of the constitution.This declaration of a state of emergency in 2007 implies that even in this 2020 COVID-19 pandemic a declaration is very possible as the COVID-19 pandemic can be equated to floods as they lead to the death of people and this pandemic is also leading to death of people a so

[483] Siracusa Principles on the limitation and derogation provisions in the ICCPR.
[484] Constitution of the republic of Uganda 1995 as amended

far about three deaths have been reported so far.

The declaration of a state of emergency besides being provided for in the law has to fulfill certain elements of which some are entailed in the laws. These elements are unveiled in the essay below. The elements are well discussed in *Lawless V Ireland,*[485] where the ECtHR defined a public emergency as a danger of crisis that is: *Present or imminent,* exceptional, *concerns the entire population* and *constitutes a threat to the organised life of a community*.

First the circumstance has to be of a public emergency.

Article 15 of the *European Convention on Human Rights (*ECHR) states that state parties may take measures that derogate the rights of a nation where there is existence of a public emergency. *Paragraph 2 of the General Comment 29of Article 4 of the ICCPR* provides that measures derogating provisions of the covenant must be in a situation that amounts to a public emergency. In the case of *Lawless V Ireland,*[486] The ECHR defined a public emergency as a danger of crisis that is: Present or imminent, exceptional, concerns the entire population and constitutes a threat to the organised life of a community.

Secondly, the public emergency should threaten the life of a nation.

Paragraph 2 of the General Comment 29 of Article 4 of the ICCPR provides that for measures to derogate the provisions of the covenant to be taken the situation must amount to a public emergency threatening the life of the nation. Further *Paragraph 3* states that the committee in para 3 makes it clear that irrespective of whether Article 4(1) is invoked in armed conflict or some other kind of crisis, the situation has to be serious to constitute *"a threat to the life of a nation"*

In the lawless case,[487]the court held that the natural and customary meaning of the words other public emergency threatening the life of a nation is sufficiently clear considering that they refer to an *exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.*

In addition in the case of *Ireland V United Kingdom*,[488] the existence of an emergency threatening the life of a nation was in the view of court, perfectly clear from the facts of the case and had not been challenged by the parties before it.The court simply referred to the summary of facts which showed interalia that at the relevant time in Northern Ireland over 11,500 injured and more than 140,000,000 Euros worth of property destroyed.

In the prevailing circumstances in Uganda, there are 97,795 plus COVID-19 Cases and 2590 confirmed deaths which is public emergency as it affects the entire population as its evident that

[485] Lawless V Ireland [Lawless Commission]1 Eur.ct.H. R (Ser.B) at 82 & 90(1960-1961)
[486] Lawless V Ireland [Lawless Commission]1 Eur.ct.H. R (Ser.B) at 82 & 90(1960-1961)
[487] Eur. Court HR, Lawless Case (Merits), judgment of July 1961, Series A, No.3, Page.56, Para 28
[488] Ireland V United Kingdom, Judgment of 18 January 1978, series A, No.25, P 78, Para 205

nationwide everyone has been affected by the pandemic as everyone has been cautioned to wear facemasks, temperature testing and the emergency laws put in place for the entire nation which necessitates the declaration of a state of emergency.

In Uganda in a bid to tame the spread of covid 19, his Excellency Yoweri Kaguta Museveni issued several presidential directives. The directives were crowned by a national wide lockdown of almost all factors services, leaving just a handful categorized as essential services to continue working under strict standard operating procedures. The president also declared a national wide curfew to commence from 7:00pm and end at 6:30am throughout the period of the lockdown. The presidential directives and restrictions were justified as measures to curb the spread of the novel corona virus

It is critical to pose a typical question whether the presidential directives are binding and constitute law "In answer to this question an inquiry into constitutional in Uganda the 1995 constitution vests all the executive authority in the presidency to uphold safeguard the constitution and laws of Uganda promote the welfare of the citizens and protect the territorial integrity of Uganda.

In issuance of the state of emergency, the President would be required to cause the proclamation declaring the state of emergency to be laid before parliament for approval as soon as practicable and in any case not later than fourteen days after its issuance and the state of emergency would remain in existence for not more than ninety days. This is exactly where parliamentary involvement is by law required. But again, Section 3 of the Emergency Powers Act provides for posing of regulations by the Minister which may be expedient for interalia securing the public safety and for maintaining supplies and services necessary to the life of the community.

Just to pose an intriguing question was it necessary to declare a state of emergency in Uganda following the COVID 19 breakout in answer to this intriguing question.I appreciate the wise views of Dr Busingye that it was necessary to declare the state of emergency, however I would like to agree with Dr Ben Kiramba Twinomugisha who opines that declaring a state of emergency is constitutionally allowed under Articles 46 of the constitution of the Republic of Uganda 1995 (as amended) but that should be done as the last expedient. That is when all other options such as proceeding under the public Health Act and Regulations made there from have proved. At the moment, in light of the case of Covid 19 registered and infections not swiftly increasing one cannot conclude that the life of the country is at risk to necessitates a declaration of the state of emergency. It is a factual truth that covid 19 has resulted in social economic strain but the government is on the right track to contain the situation what the public has to do is to observe the public health guidelines, including social distancing, washing hands staying home and obeying the curfew. Government can also increase interventions to cater for the vulnerable groups inters of health care.

Article 46[489] clearly comes out that government can suspend all human rights and freedoms without necessary declaring a state of emergency. It therefore comes out serbatim from the foregoing analysis that it was not only unnecessary but also unwise for government to declare a state of emergency at the point in time. The public health legislation is robost enough to contain the situation. The second option is to legitimize the presidential directive emanates from Sections 10,11,27,36, 68 amongst other of the public Health Act Cap 281.This is exactly what government adopted to be able to come up with several instruments in order to regulate the Presidential Directives.

Inorder the respective provisions of the Public Health Act,[490] the Minister of Health is empowered to take measures to combat the spread of an infectious disease so for by press time, several statutory instruments had been gazetted to implement various measures announced under the presidential Directives over the period commencing the 20th April 2020 to 5th May 2020.These statutory instruments are detailed in content separately to it.

There are evident challenges and ambiguities between the Presidential Directives and the structure of the Health Instruments. Some of the Challenges have been depicted inform of premature enforcement of the Presidential Directives before they have been legislated into respective legal instruments as a requirement of the law. Many times arrests and detentions of innocent Ugandans by security personnel have been conducted before the presidential directives have been given the requisite legal force. This certainly tantamount to violation of rule of law. It should be noted that the presidential directives do not have the force of law and therefore to be able to enforce them with observance of rule of law respective legal instruments have got to be enacted first.

There are specific areas that require urgent attention in order not to compromise rule of law. For example, there are many changes and new matters which have been made in the presidential Directives after the legal instruments but to date they have not been included in any instruments in order to give them a legal force.

[489] The Constitution of the Republic of Uganda, 1995 (As amended)
[490] Cap 281

CONSTITUTIONALISM IN TIMES OF NATIONAL CRISIS

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that if the court does not temper its doctrinaire logic with a title practical wisdom it will convert the constitutional bill of Rights into a suicide pact."Justice Robert Jackson, Diss Op Terminiello v City of Chicago (1949). The framers of the 1995 constitution envisaged that there might be critical times in which to guarantee the well being of the state the government would need to be given greater room for action.

In such grave times, the proper course of action appears to be that which the chief Justice and Speaker urged upon the President that is to say, declare a state of emergency. If the President were mindeal to do this, I am sure the Attorney General and other persons who provide him formal and informal legal advice would pointo to the provisions of Article 110 of the constitution. The President is empowered in consultation with the cabinet by proclamation to declare that a state of emergency exists in Uganda or any part of Uganda. At that time a declaration of a state of emergency would be accompanied by a number of important inbuilt constitutional safeguards to ensure that human rights continue to be respected and protected while ensuring that the state has the necessary room for effective action.

IMPACT OR CONSEQUENCES OF THE STATE OR EMERGENCY.

In light of Uganda's recent experience with dealing with the Ebola Virus Disease, the country has very quickly developed a comprehensive plan to contain the spread of Covid-19. Preventive measures were taken as of March 18th, before any cases were recorded in the country. By the time Uganda had recorded its first case on March 22nd, health workers were already on high alert and the promotion of preventive behaviors, such as regular handwashing, was already largely implemented. This blogpost covers the period from March 18th to early June 2020. During this time, there has been a steady rise in the number of COVID-19 cases with the total number of recorded cases now standing at close to 700.

Uganda has addressed the pandemic crisis through a de facto state of emergency. The president chose not to trigger Art.110 of the constitution, which confers him the possibility to declare a state of emergency after parliamentary approval. Instead, he adopted a series of declarations, the legal status of which is quite unclear. The first of the kind was made on March 18th 2020, establishing a strict lockdown and curfew through measures (e.g., closing of schools, bars and churches; prohibition of public gatherings; 14 day-quarantine upon entry into Uganda.)

The Minister of Health later formalized them into a number of Rules and orders, as foreseen in section 29 of the Public Health Act CAP.281, which provides the Minister of Health with wide

powers to manage and prevent the propagation of pandemics.

However, most of these measures have been implemented on the sole of basis of the president's directives, even before being enacted in the Health Ministry's Rules and Orders. For instance, the March 18th President's directive only became a ministerial rule, published in the official gazette, on March 24th. Yet, the President's public announcements are not legally binding.

The internet website of the Presidency does offer transcriptions of president Museveni's directives, but Ugandans still have to rely on the media to develop an awareness of the restrictions to their rights and freedoms during the crisis. These reports are usually in English; no official translation in local languages is available.

This way of ruling constitutes a clear breach of international standards. The African Charter of Human and People's Rights provides that limitation to human rights – such as freedom of movement and freedom of assembly (Articles 11 and 12) must be provided for by law, for "the protection of national security, law and order, public health or morality."

A neutralized balance of powers. The stakes are not just theoretical. The decision not to declare a state of emergency has deprived the Parliament of its constitutional mandate to monitor or balance the executive powers' self -assigned' ''exceptional powers'' over the extent of restrictions to rights and freedoms over the past couple of months.

The Parliament's own actions have not avoided criticism either. It decided at an early stage to grant 20million shillings (around 4800 EUR) to each member of Parliament (MP's), on their private bank account, to tackle the pandemic crisis in their constituency. The High Court eventually ordered the MPs to return the funds to either the Parliamentary Commission Account, the National Covid 19 taskforce or the District Covid 19 taskforces.

CASE STUDIES OF NATIONS THAT HAVE DECLARED A STATE OF EMERGENCY

Many nations in the world in the event of the COVID-19 pandemic declared a national emergency or a state of emergency so as to address the national emergency and so as to put in place various measures to curb the threat. The focus in this Article will be on the United States of America and Ethiopia.

In the United States of America, President Trump in March 2020 signed an emergency declaration over the corona virus pandemic unlocking certain government powers to deal with the public health challenge.Congress also enacted more than 100 laws like National Emergencies Act, Stafford Act that permit a president to declare that emergencies exist thus freeing the government from abiding by some of its usual legal constraints like spending of additional funds and lowering legal barriers

to certain actions.[491]

The president with the declaration of a state of emergency freed up funds and lowered legal barriers for responding to the pandemic.[492]This declaration of state of emergency makes the measures that follow there under as well to abide by the rule of law thus legalizing the acts of the government in a bid to fight the pandemic.

In Ethiopia, the countryconceded and confirmed to its first COVID-19 Case on Friday 13th February 2020 and by 14th April 2020 the total cases had risen to 82 with 14 recoveries and 2 transferred to their home countries with 3 deaths.[493]

In accordance with Article 93 of the Constitution of the Federal Democratic Republic of Ethiopia the government declared a 5 months state of emergency in an effort to limit the spread of the Corona virus.[494]The council of ministers approved the state of emergency thus the proclamation March 2020 also known as "the state of emergency proclamation enacted to counter and control the spread of COVID-19".The accession of the State of emergency the Federal Attorney General HE. Adanech Abebe issues regulation to further define the measures associated with the state of emergency like banning of public gatherings,closure of schools[495],sporting events prohibited which even though they do infringe on certain liberties of the individuals, they comply by the rule of law.

Uganda as one of the nations that is affected by the COVID-19 pandemic has taken many measures as to manage the pandemic and preserve the public health. The country has based its measures on the Public Health Act Cap 281 which include imposition of curfew, closure of entertainment places, places of worship among others which comes with various consequences such as infringing human rights of the citizens. This calls for reformation of the implementation of these measures with the following recommendations.

A state of emergency enables the state to acquire extraordinary powers to curb the threat which makes all the acts done by the nation legal and makes the curbing of the threat efficient because majority of the funds are diverted for fighting the threat just like in United States of America and

[491]Charlie Savage. Trump declared an emergency over Corona virus. Here is what it can do. March 13 2020 https://www.nytimes.com/2020/03/13/us/politics/coronavirus-national-emergency.html
Viewed on 7/31/2020 at 8:59am

[492]Charlie Savage. Trump declared an emergency over Corona virus. Here is what it can do. March 13 2020 https://www.nytimes.com/2020/03/13/us/politics/coronavirus-national-emergency.html
Viewed on 7/31/2020 at 8:59am

[493] Ethiopia Declares State of Emergency to curb transmission of corona virus 14 April 2020 https://www.ethioembassy.org.uk.ethiopia-declares-state-of-emergency-to-curb-transmission-of-coronavirus/ viewed on 7/31/2020 at 8:31am

[494] See also Ethiopia declares a state of emergency to fight corona virus.8 April 2020 GMT +3www.aljazeera.com/news/2020/04/ethiopia-declares-state-emergency-fight-covid-19-200408142519485.html
Viewed on 7/31/2020 at 8:38am

[495] Ethiopia declares state of emergency amid COVID-19 8th April 2020 https://www.aa.com.tr/en/africa/ethipia-declares-state-of-emergency-amid-covid-19/1797422
Viewed pm 7/31/2020 at 8:41am

Ethiopia which declared states of emergency and further set up measures and enacted laws to govern the state of emergency thus making all their acts legal even though carried out with extra-legal powers thus avoiding legal liability as well. In addition, the rule of law is also respected as the notion of a state of emergency is constitutional as it is provided for in the Constitution of the Republic of Uganda 1995 as amended in Article 110.

Additionally, a state of emergency should also be declared as the elements of declaring a state of emergency suffice. There is a public emergency that's the novel Corona virus and it's a threat the entire nation as every one nation wide are affected by the pandemic in various aspects like economically.

Government through the legislature should enact laws to legalize the measures so as to abide by the rule of law.

Measures like use of Local Defence Unit personnel to implement measures like the imposed curfew should be legalized by enacting laws that provide for the operation of the Local Defence Unitpersonnel.Such a law will clearly demarcate the duties and obligation of these LDUs which will control the current brutality that's going on because their duties are not clearly demarcated thus breaching the rule of law.This recommendation is backed by the school of thought of the rule of law in that in a state of emergency the state should abide of with the national laws in the bid to control the spread of infectious diseases such as the COVID-19.

Government should also check the implementation of the measures so as to respect, protect and fulfil the human rights of its citizens.

The government has put various measures in the bid to control the COVID-19 Pandemic like distribution of facemasks, distribution of food to families whose livelihood has been interrupted due to the COVID-19 Pandemic. Such measures should be checked because some people will use such measures as grounds of embezzling funds for these measures thus not realizing the most important thing to do in such a crisis like the staff of the office of the prime minister who were charged with misuse of government funds. Therefore, the government while using the emergency laws like the Public Health Act to respond to the pandemic should check the implementation of such measures so as to achieve the aim of the measures and thus respecting human rights of the citizens.

The checking of the acts of the LDUs while also regulate the brutality of these personnel thus respecting the human rights of the citizens.

With the emergency of the novel corona virus in Africa most nations based on their national laws to respond to the national crisis with the hope that the threat will clear however with the persistence of the threat till date, some countries have declared a state of emergency so as to address the pandemic

while some have continued with the use of their emergency laws. The nations that have persisted with the use of their national laws have succumbed to criticisms and loss of confidence from the citizens due to the breach of rule of law in the bid to implement the measures put in place. The most suitable approach for such states is to declare a state of emergency so as to curb the national threat efficiently.

HOW THE STATE OF EMERGENCY CAN BE ABUSED.

The state of emergency can be abused by being invoked. An example would be to allow a state to suppress internal opposition without having to respect human rights. An example was the August 1991 attempted coup in the Soviet Union (USSR) where the coup leaders invoked a state of emergency; the failure of the coup led to the dissolution of the Soviet Union. It is further argued that emergency powers will always provide scope for abuse by the executive. Historically, emergency powers have experienced abuse by the executives.

The most infamous being the abuse of Article 48 of the Weimar Constitution, with Mueller contending this “led to steady shift of decision-making power from parliament to the president between 1918 and 1933.’’there can be no clear provisions that have provided scope for abuse.

PANDEMIC AND CONSTITUTION

The Corona virus disease has fundamentally challenged many aspects of international and national life that we had long taken for granted. As at current count over one million people around the world have tested positive for Covid 19 with over sixty-five thousand deaths thus far. In the midst of this national and global crisis, it might appear insensitive perhaps even distasteful to reflect on legal questions arising in this momemt. However, it is possibly precisely at such a time that we should be mindful if and cling to the safety and guidance to be found in law and in particular the constitution.

It should be recalled that based on a very problematic national history specifically involved in the preamble of the constitution is included a number of deliberate safeguards aimed at ensuring that the human rights of Ugandans would never again be violated with impunity. This is the spirit behind the design and content of chapter four of the constitution.

In particular, Article 43 of the constitution set out an elaborate and delicate framework for balancing individual rights and broader public concerns. On the one hand Article 43(1) stipulates that in the enjoyment of one's rights and freedoms as prescribed in the constitution no person may prejudice the fundamental or other human rights and freedoms of others or the public interest. On

the other under Article 43(2)[496] it is stressed that the term public interests as employed under clause shall not permit political persecution detention without trial or any limitation of the enjoyment of the rights and freedoms prescribed under the constitution beyond what is acceptable in a free and democratic society or what is provided in the constitution.

The formulation of Article 43(2)[497] was deliberate and each word as employed in that provision has particular significance. The effect of this provision was to set a high bar for the limitation of human rights. Any such limitation had to be shown to be such as was acceptable and demonstrably justifiable not just in any society but in a free and democratic one. Indeed, since 1995, a number of attempts at limiting human rights have been found to call below this very high threshold and have consequently been struck down by the courts.

It is important to stress the foregoing because it has immediate and direct implications for the options open to the state in its response to the covid 19 crisis. It appears that in the past weeks during which meeting the heads of the Judicial and legislative branches of government urged the President to declare a state of emergency. Apparently however an unnamed cabinet member was able to dissuade the President from adopting the course of action.

At the same time several far reaching measures have already been announced and effected to respond to the crisis. Most of all these measures have been purportedly taken under the authority of the public health Act. Now in the face of the challenge we all face, it is difficult to argue with the logical impulse behind these measures. The available scientific consensus appears to be that the spread of covid 19 is more effectively controlled by limited movement isolating those who might have been exposed to the virus and treating those who test positive. The measures adopted by the state seem to rhyme with the dictates of common sense. However, while the measures outlined above appear sensible they are infact of doubtful legality. If subjected to the strict rest under Article 43(2) of the 1995 constitution. To take but one example the blanket limitation on the operation of constitutional presidential abuses during covid.

Covid 19 which first appeared as a local health crisis with an outbreak in china, quickly become a global pandemic and a multiracial cris. International Organizations including the world Health organization and Africa Union have expressed deep concern about the pandemic because of related health crisis and the multi-raceted negative impacts of the pandemic in terms of civil, political and socio economic rights. Given the prevailing sense of uncertainty some believe that this is going to be a crisis for the long haul.

If the crisis continues for years how can governments, ensure that the emergency related measures

[496] Constitution of the Republic of Uganda, 1995 (As amended)
[497] Constitution of the Republic of Uganda, 1995 (As amended)

taken in all anglephone countries. How can governments ensure that emergency regulations and measures are not going to become ordinary law?

Emergency regulations and measures adopted have been impossible to implement due to the cultural and socio economic specifities of these countries or frequent hand washing because of lack of water.

Emergency regulations and measures have also given extended powers to the executive and as a consequence drastically reduced civil liberties in all targeted countries. The rights that have been affected the most under the current state of emergency measures are freedom of movement, freedom of peaceful association and freedom of belief and worship. In one instance, the lockdown of the population to avoid the spread of the virus caused delays in voter registration which in turn caused a controversy concerning the inclusitivity of all citizens in upcoming elections. The insensitive policing of lockdown measures with military and police deployed to enforce rules that are inconsistent with the rights enshrined in the applicable constitutions has been questioned by citizens and human rights defenders. respect for citizens right to privacy including protection of personal data) has become an issue in several countries in particular in light of governments potential use of private data to fight the pandemic. These reasons aggravated the deficit of public trust in governments and were the grounds for protests in Uganda.

In terms of constitutional frameworks, Uganda found it difficult to clearly express in her constitution what may or may not constitute an emergency. Firstly, the terminology itself may be confusing with various terms used such as state or emergency state of siege, emergency which do not entail any difference in practice and therefore can be used interchangeably. The term state of emergency may be used in all these situations. If a country's constitution provides a definition of emergencies that is too broad, this will leave room for abuse that politicians can easily exploit.

Private vehicles presumably based on the fact that some individuals were operating these on a commercial basis. Can this be said to be acceptable and especially demonstrably justifiable? One of these ways in which a measure can fail this high test is if it can be shown that the legitimate objective can be achieved through and alternative method which is less restrictive to human rights. In this regard, there are a range of less restrictive means to achieve this objective including through impounding cars found to be carrying occupants who have no clear relation to the driver or owner of the vehicle in question. Therefore, a number of the current measures instituted thus far while evidently sensible are actually of doubtful constitutionality.

CORONA VIRUS AS A CASE STUDY.

The corona virus was first discovered in 2007 when scientists warned that there was an extensive reservoir of SARS-Cov-like viruses in horseshoe bats. They emphasized that it was a threat and that there was a possibility SARS would re-emerge and other new viruses, which should not be ignored.[498]The first outbreak of SARS was in 2002 but it died down.[499]After all this time, COVID-19 has sprung up as the most dangerous respiratory disease pandemic since 1918, when the "Spanish" influenza pandemic killed close to 50 million people.[500]

In 2003, the China was infected with a virus causing Severe Acute Respiratory Syndrome (SARS) in the province of Guangdong.This virus was confirmed as a member of the Beta corona virus sub group and was named SARS-CoV.[501] The infected patients showed pneumonia symptoms with a lung injury, leading to acute respiratory distress syndrome (ARDS).SARS emerged in Guangdong province, China and then spread quickly around the globe with more than 8000 infected persons and 776 deceased.[502]

In the year of 2012, a few Saudi Arabian nationals were diagnosed with another coronavirus. The detected virus was confirmed as corona viruses thus the name Middle East Respiratory Syndrome Coronavirus(MERS-Cov). The World health organization reported that MERS corona virus infected more than 2,428 individuals and 838 deaths.[503] MERS-CoV is a member beta-coronavirus subgroup and phylogenetically diverse from other human-CoV. The infection of MERS-CoV starts from a mild upper respiratory injury, while progression leads to severe respiratory disease. Like SARS corona virus, patients infected with MERS-coronavirus suffer from pneumonia, followed by ARDS and renal failure.[504]

Nearing to the end of 2019, the government of China was informed about many cases of pneumonia due to an unfamiliar aetiology. The outbreak emanated from a sea food market in Wuhan city of China and rapidly infected more than 50 people.[505] The animals are frequently sold

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[498] Cheng VCC, et al 2007. *Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Re-emerging Infection*. ClinMicrobiol Rev.20: 660-694

[499] David MM, et al 2020. *The Origin Of Covid-19 And Why It Matters*, The American Journal of Tropical Medicine and Hygiene, 103(3), 2020, pp. 955-959

[500] Taubenberger JK, et. al. 2019. *The 1918 influenza pandemic: 100 years of questions answered and unanswered*, Sci Transl Med 11:eeaau5485

[501] Peiris J, et al 2004. *Severe Acute Respiratory Syndrome*, Nat Med; 10(12): S88-97; see also Pyrc K. et al 2007. *Identification of New Human Coronaviruses*, Expert Review of Anti-infective Therapy; 5(2): 245-53

[502] Muhammad AS. et al 2020. Covid-19 Infection: Origin, Transmission and Characteristics of Human Coronaviruses, Journal of Advanced Research, 24 (2020) 91-98

[503] Rahman A & Sarkar A. 2019. *Risk Factors For Fatal Middle East Respiratory Syndrome Coronavirus Infections In Saudi Arabia: Analysis Of The WHO Line List, 2013-2018*, American Journal of Public Health, 109(9): 1288-93

[504]Memish ZA, et al. 2013. *Family Cluster of Middle East Respiratory Syndrome Coronavirus Infections*, New England Journal of Medicine, 368(26): 2487-94

[505] Supra note 5

at the Hunan sea food market, such as bats, frogs, snakes, birds, marmots and rabbits.[506]

On 12 January 2020, the Chinese National Health Commission released further details about the epidemic which suggested viral pneumonia.[507] From the analysis based on sequence of isolating the patients from others, the virus was classified as coronavirus. Moreover, the genetic sequence was also provided for the diagnosis of viral infection.[508] Originally, it was proposed that the people who had contracted the novel coronavirus induced pneumonia in China might have visited the seafood market where live animals were sold or may have used infected animals or birds for food. However, further investigations showed that some people got the virus even with no history of having visited the seafood market.[509] These observations showed a human to the human spreading tendency of this virus, which was subsequently reported in more than 100 countries globally.[510] The human-to-human spreading of the virus happens because of close contact with a person who is infected, exposed to the coughing, sneezing, respiratory droplets or aerosols. These aerosols can penetrate the human lungs through inhalation through the nose or mouth.[511]

On 31st December 2019, China alerted the World Health Organisation that it had registered 44 cases of pneumonia with an unknown cause between December 31 and 3 January. Although there had been many cases of pneumonia in December and possibly November in Wuhan, this was the moment that the world's attention was drawn to the mysterious illness.[512] On January 9th, 2020, the virus claimed its first life, as China reported two days later. In the next thirteen days, Wuhan province was placed under lockdown. World Health Organisation noted that there was increasing evidence for human-to-human transmission. By the end of January, 9,927 cases and 213 deaths had been reported, and the United Kingdom reported its first case then. The infection was subsequently named Covid-19, and in mid-February, cases were recorded in Africa, and France registered its first death. On March 11, there were 125,875 cases and 4,615 deaths. The World Health Organisation declared the disease a pandemic. By April 2, there were over one million confirmed cases worldwide, with over 75,000 recorded deaths.[513]

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[506] Wang C, et al. 2020. *A novel coronavirus outbreak of global health concern*, The Lancet.
[507] Ibid.
[508]Riou J, et al. 2020. *Pattern of early human-to-human transmission of Wuhan 2019 novel coronavirus (2019-nCov)*, Eurosurveillance; 25 (4)
[509] Parry J, 2020. *China Coronavirus: Cases surge as Official Admits Human-to-Human Transmission*, British Medical Journal Publishing Group.
[510] Li Q, Guan X, et al. 2020. *Early transmission dynamics in Wuhan, China, of novel coronavirus-infected pneumonia*, New England Journal of Medicine.
[511] Phan LT, et al. 2020. *Importation and Human-to-Human transmission of a novel coronavirus in Vietnam*, New England Journal of Medicine.
[512] Clarke S, Antonio V, et al. 2020. *How Coronavirus spread across the globe-visualised*, The Guardian; April 09, 2020, available at; https://www.theguardian.com/world/ng-interactive/2020/apr/09/how-coronavirus-spread-across-the-globe-visualised (accessed on May 17, 2021)
[513] Ibid.

In Uganda, the Minister of Health, Dr Jane Ruth Aceng, confirmed that Uganda registered her first case of COVID-19 on Saturday 21st March 2020. The confirmed case was a 36- year old Ugandan male who traveled from Dubai on Saturday 21st March 2020 at 2:00 am using Ethiopian Airlines. As of April 02, 2020, the country had registered 44 confirmed cases of Covid-19. The significant number of the cases were travellers returning from United Arab Emirates (14), United Kingdom (14) and other countries. At this time, some districts like Makasa (3), Hoima (2), Adjumani (1), and Iganga (1) had also registered cases, and it was not clear if these were secondary to the on-going active transmissions.[514]As of May 17th 2021, the cases grew, and Uganda had confirmed 42,779 cases and recorded 347 deaths.

Therefore, the rampant growth of the virus had a significant impact on the different sectors of governments worldwide. Countries were tasked to adopt new measures in order to cope with the pandemic. Most countries went into lockdown, and a return to normalcy is still a dream. It can also be said that the pandemic has created a new normal, which might be around for longer than anticipated.

Against this rash development, many laws and policies were overridden, overhauled, modified or blatantly violated to cope with the new normal. Therefore, this paper examines the extent of this impact and whether it has been good or bad in both the short and long run.

The President announced Uganda's COVID-19 control legal measures, and then they were published as legal instruments by the Health Minister pursuant to the Public Health Act in the following days. This declaration was contrary to the known procedure of making law in Uganda, and as such, it distorts the separation of powers as we know them to the extent that the executive could make pronouncements that would later be codified for implementation. Consequentially, many extreme measures were promulgated and implemented to respond to the crisis. All institutions of learning were closed; incoming and outgoing passenger flights prohibited; most persons within the country were restricted, and most businesses were stopped from operating. Most of these measures were taken under the authority of the Public Health Act.

The Constitution of the Republic of Uganda, 1995, as amended under Chapter 6, 7 & 8, clearly defines the roles of the three arms of government. The import of this separation ensures a separation of powers and makes the rule of law more achievable by defining what one arm of government can do and what it cannot. As postulated by great philosophers like Professor AV Dicey, establishing these boundaries is a long-standing principle in law.[515]This principle ought to

[514] Dr. Jane Ruth Aceng, April 02, 2020. Update on the Covid-19 response in Uganda, Ministry of Health Press Release, available on; https://www.health.go.ug/covid/2020/04/02/update-on-the-covid-19-response-in-uganda/ (accessed on May 17, 2021)

[515] Harvey, WB, 1961. "*The Rule of Law in Historical Perspective*," Articles by Maurer Faculty, Paper 1168 available

be respected no matter the situation. The only exception that the Constitution provides is when a state of emergency has been declared under Article 46. Even then, the Constitution qualifies the emergency by allowing Parliament to pass laws that authorise the taking of reasonably justifiable measures for dealing with it.

Article 110 of the Constitution provides that the president may, in consultation with the cabinet, by proclamation, declare that a state of emergency exists in Uganda if the president is satisfied that circumstances exist in Uganda which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community. It further provides that this state of emergency only remains in existence for not more than 90days. This proclamation is laid before parliament for approval ordinarily not more than 14 days after it is issued.

It must be noted, however, that the presidential directives did achieve positive results. The best scientific evidence available at that time showed that the spread of the virus could be minimised by stopping movement and gathering people, covering one's mouth and nose using face masks, and constantly washing hands with soap or using a hand sanitizer. Most of the president's directives aimed at fulfilling this and, in extension, curtailed the spread of the virus.

With this being achieved, it would seem naïve to question the legality of the directives that ultimately slowed the spread of the virus down. Prof. Kabumba makes two arguments as to why it still makes sense to raise such arguments. That the State should not open itself up to legal challenges which could have been easily avoided by more careful and considered action; and (2) that it is critical at such a moment for the law to be respected lest, in solving one crisis, we create another.[516]The first argument speaks to the interests of the State; the second the interests of the citizen. In light of this confluence of interests, we can deduce a need for responses to the national crises (or international crises) based on scrupulous adherence to the Constitution.

This chapter aims to examine the legality of the response of the government of Uganda to Covid-19 and or other plausible pandemics. This chapter will analyse how the different arms of government heeded to the law and to what extent the separation of powers and the rule of law was followed in responding to the threat of a global pandemic. Additionally, this chapter will assess the impact of the illegalities on the daily lives of the citizens and the certainty of the law in the long run.

Therefore, this chapter will aim to patch the loopholes created in the response regarding respect for the rule of law, even in times of eminence, and suggest a solution to the aftermath impacts on human rights and certainty of the law.

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at, http://www.repository.law.indiana.edu/facpub/1168 (accessed May 17th, 2021)

[516] Ibid

The spirit of the ground norm of Uganda, the 1995 Constitution, is enshrined in its preamble. It recalls Uganda's history, characterised by political and constitutional instability, recognises the struggles against forces of tyranny, oppression and exploitation, and is committed to building a better future by establishing a socioeconomic and political order through a popular and durable national Constitution based on principles of unity, peace, equality, democracy, freedom, social justice and progress. This spirit ought to be seen in operation under any circumstance. The operations of the government in the wake of the pandemic present a threat to the Ugandan spirit; identity and existence at large might be in jeopardy.

The last global pandemic was in 1918 when there was little literacy and, therefore, little documentation on how the pandemic affected the different sectors of economies and States. The situation has since significantly changed for the better, and therefore, this study will create an account of the impact of Covid-19 on Uganda's legal system and add to the existing literature. If another pandemic should strike the globe, the generations from now will learn from our accounts not to make the same mistakes that the State has made in responding to the pandemic.

The chapter will entail an analysis of the presidential directive that was issued in the wake of the global pandemic. It will focus on establishing if these directives were legal and how their legality or illegality has affected the rule of law, separation of powers, human rights and the citizens' daily lives, and the certainty of the law. The chapter will also compare the response of the Ugandan government to other common law jurisdictions and evaluate if Uganda performed well or not.

In *International Humanitarian Legal Studies, 2020. "International Law in a Time of Pandemic", Journal of International Humanitarian Legal Studies 11(2020) 187-191.*

The editors postulate that the pandemic broke out in a time of great scepticism in science, a collapse of good governance and a growth of authoritarianism, a uprise of big–power rivalry, and waning multilateralism, which consequentially made the response to Covid-19 a political plaything both domestically and internationally and put severe strains on existing frameworks of global governance.[517]

The editors explore the broad range of obligations that States have in the context of a pandemic such as Covid-19, the right to international solidarity, with its three pillars of preventative solidarity, reactive solidarity, and international cooperation. They postulate that the principle of solidarity requires states and other institutions to offer their assistance to the developing and less-developed States affected by the virus. They also explore the measures taken to manage the

[517] *Gian L Burci, 2020. The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations, Journal of International Humanitarian Legal Studies 11 (2020) 204-217*

See p. 187

outbreak of Covid-19 (including lockdowns, quarantine, testing and the rationing of some medical interventions) from an international human rights perspective. They explain how states must balance rights to health and life against limitations that public health measures contain the virus on other human rights. [518]

Gian L Burci, 2020. The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations, Journal of International Humanitarian Legal Studies 11 (2020) 204-217

The author analyses how the legal and institutional regime to prevent and control the international spread of the pandemic, based on the WHO and the International Health Regulations, has been severely tested. He argues that critics have challenged the World Health Organisation's apparent politics and the ineffectiveness of the International Health Regulations(IHR) of 2005 as a mechanism to coordinate the international response to Covid-19. That the IHR have codified the mode of operation of the WHO Secretariat during their revision, but the presumption about WHO's epistemic power and the will of states parties to conform to WHO's leadership have proven overly optimistic. Furthermore, the author believes that addressing some of the significant flaws of the IHR 2005 could give them renewed energy and spur states towards a better coordinated and effective response to epidemics.

The author denotes that the WHO spread with so much speed, insidiousness and ferocity that it stressed many international political, institutional and legal regimes, from trade and human rights to regional integration in Europe and civil aviation. Consequently, the legal and institutional system of surveillance, alert and coordination against the international spread of disease centred on the WHO has been a casualty.

WHO informed member states at the start of 2020 after receiving a notification from China as prescribed under Article 6 of the IHR 2005 about the local outbreak in Wuhan of a typical pneumonia. After about a month of event assessment and apparent hesitations that had been the object of pointed criticism, the Director-General declared the outbreak as a 'public health emergency of international concern' (PHEIC) under Article 12 of the Regulations issued temporary recommendations of urgent measures.[519] After that eventful step and until the end of April, the IHR 2005 majorly vanished from WHO's communications as well as from the media. WHO instead

[518] *Gian L Burci, 2020. The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations, Journal of International Humanitarian Legal Studies 11 (2020) 204-217*

[519] WHO, 2020. "The World Health Organisation and Pandemic Politics", available at; www.who.int/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) accessed on 24th May, 2021.

placed itself outside the scope of IHR 2005 but within its general emergency importance as the central organisational hub of the response. It has provided guidance, research and scientific help through its interconnection of regional and domestic offices. The Director-General classified the outbreak as a pandemic on 11 March 2020, but that statement was not according to the IHR2005.

Ultimately, the author recognises that the IHR 2005 were not meant to guide international response to a pandemic of Covid-19's size and complexity. They were meant to prevent events of this magnitude and reduce the risk of uncontrolled spread with the related collapse of multilateral governance. The Director-General could have utilized the Regulations more appropriately, gathered the Emergency Committee more often and issued guidance on the basis of temporary recommendations. While this would have yielded more legal and political backing to those recommendations and energised the Regulations as the primary legal mechanism for guidance, the pace of the pandemic could have made the formal framework of the IHR 2005 too rigid.[520] Finally, while this narrative is idealistic, it may be another factor to tackle to make the IHR 2005 relevant and important in responding to unpredictable and unprecedented epidemics.

J.N. Hays, 2005. Epidemics and Pandemics: Their Impacts on Human History, ABC-CLIO. Inc., Santa Barbara, California 93116-1911

The author gives an accurate and up-to-date historical account of about fifty significant epidemics and pandemics. He presents information about the time, place, and scale of the epidemic, its significance, the background against which it occurred, how contemporaries understood and responded to it, and issues that remained unresolved about it then or have remained so since. He analyses the illustration of the vital phenomenon of virgin soil infection when a disease reaches a society with no previous exposure to it, like the Measles epidemic in 1875 Fiji.

Still, other epidemics have had literary or metaphoric importance, or referencesto them have entered into popular culture and everyday speech. The Plague of Thucydides has lived on in theworld of classical studies. References to consumption dominated literary andcultural discussions in (and about) the nineteenth century, as much because ofwho suffered from it as how many did. Furthermore, Typhoid Mary found here, whose "epidemic" may have only resulted in three deaths, but whose name hasbecome a metaphor for a transmitter of any trouble.

At the time of his writing, the author projects an impending pandemic, i.e. SARS and various influenzas derived from (for example) East Asian domestic fowl, which regularly seize headlines and generate worldwide fears. While this bookprimarily concerns the past, it concludes with some suggestions and questionsabout such present and future epidemics.

One of the most prominent measures of the significance of epidemics, in his opinion, has been

[520] See p. 216

totalmortality. For epidemics before the mid-nineteenth century, this has been hard to gauge, but some of the epidemics and pandemics in his book have taken millions of lives. By that standard, the new pandemics ofmalaria, tuberculosis, and AIDS have been and remain significant events. While not such great killers, other epidemics have disrupted societies and individuallives significantly; the recent mad cow outbreak illustrates such effects.

Many epidemic stories of the recent past and present have either not metthose standards of significance, or their effects remain uncertain. More perspectivemay be needed. In November 2002, a new disease, SARS, appeared in southernChina. In the following eight to nine months, about 8,100 people becameinfected with the disease, and 774 died. In late July 2003, however, theWorld Health Organization declared that the epidemic was over. In terms ofmortality, therefore, SARS was not a pandemic remotely on the scale of others. It seriously disrupted travel plans for some months, primarily to, from, andwithin East Asia.

Much of the fear generated by experiences such as the SARS episode of 2003, or the recurring worries about avian flu from Asia, is based on the precedent ofthe pandemic of 1918–1919. Therefore, it may be essential to considerhow the world of the early twenty-first century differs from the world of 1918, especially in its ability to resist or turn back a pandemic disease.

The author believed that, in many ways, biomedical science and the world's political systems arebetter equipped to confront an epidemic now than they were in 1918. In the twentieth century, people understood the nature of viruses and were able to isolate them successfully. With that knowledge came the ability to prepare vaccines that might prevent disease. The empiricaldevelopment of vaccines that had begun with Jenner and smallpox in the lateeighteenth century now had a theoretical basis and could be extended to manyother ailments, including poliomyelitis and the varieties of influenza.

Furthermore, when writing this book, the author recognizes that international political cooperation to resist epidemics has advanced, although many obstacles remain as one of the United Nations' most successful agencies, the WHO has undertakenand published mortality statistics, drafted international conventionson such responses as quarantines and upheld cooperative international attacks on AIDS. Many domestc governments have vibrant departmentsand offices to promote public health and the control of diseases. For example, in the United States, the Centres for Disease Control andPrevention, wield influence, power, and public money.

In addition, populations in the world share another advantage: bythe early twenty-first century, many of them (more or less) have been medicalized. Recent opinion has adopted the notion that diseases call for reactionsfrom the sector of biomedicine; when a cold strikes, one consults a physician. When manypeople have accepted medicalization, they will more likely have recourse to

thevaccines and antibiotics offered by modern biomedicine. Epidemics, especiallythose that move by contagion (as most do) from one person to another, mayrun out of susceptible victims.

Generally, the author believes that the information available to the world by 2005 is ample to help it adapt to any pandemic or epidemic, or better still, expunge it in a shorter time than the previous times.

Christian W. McMillen, 2016.Pandemics: A Very Short Introduction, Oxford University Press, New York.

The author provides a rich history of pandemic and epidemic disease and suggests that much of the world confronts such things now has been shaped by the past. History is often forgotten or rediscovered when we confront contemporary epidemics and pandemics, and therefore patterns from the past are repeated thoughtlessly.

The author gives an insight into the meanings of epidemics and pandemics. An epidemic is generally considered to be an unexpected, widespread rise in disease incidence at a given time. A pandemic is best thought of as a vast epidemic. Ebola in 2014 was by any measure an epidemic-perhaps even a pandemic. Pandemic Influenza killed fifty million people around the world in 1918 (pandemic). He postulates that pandemics should only be looked at as events, i.e. that they come and go because then we ignore others like HIV/AIDS, Tuberculosis and Malaria. Pandemics can either be discrete events or persistent. Tuberculosis, malaria and HIV/AIDS, which affect enormous swaths of the globe and kill millions and millions each year, are persistent pandemics.

The author analyses the different themes that have grown over time regarding pandemics and epidemics. He notes that one of the fundamental themes was the laboratory revolution in the late nineteenth century. The finding of bacteria as the cause of diseases such as tuberculosis meant that centuries-old explanations for disease aetiology vanished. This discovery enabled medicine to develop effective therapies, as well as understand how to prevent infections. However, the laboratory revolution also cultivated an undue amount of confidence in the power of biomedicine to rid the world of infectious diseases. It fostered the belief that the way to do so was far more dependent on attacking germs than attacking the social conditions that gave rise to disease in the first place.

The other theme is the relationship between poverty and disease and the geography of epidemics and pandemics. All of the diseases that the author writes about, while controlled by modern medicine, are affected by social conditions. That is, there is a reason why cholera disappeared from the USA more than a century ago but is still present in much of the developing world, or that HIV/AIDS disproportionately affects sub-Saharan Africa, or that the plague was worse among the poor than the rich during Marseille's 1720 epidemic. Some places have been able to transcend the

conditions that allow infectious diseases to flourish, while others have not.

Pandemics and epidemics over the years have also helped the modern state to grow. As early as the fifteenth century, Italian city-states formed state-sponsored health boards in response to the plague. The cholera pandemic of the nineteenth century caused nationwide efforts at quarantineefforts that the central state could only carry off. Measures such as compulsory vaccination also demonstrate this growth.

The author also notes, and significantly so, that epidemics and pandemics cannot exist without a dense and mobile population. None of these diseases emerged in pandemic form until humans had settled down to the farm and begun trading with one another. Infectious diseases need to be transmitted fromhost to host to survive; that host must be susceptible. Smallpoxremained such a killer among American Indians because it wasable, over centuries, to find non-immune populations; once thosepopulations diminished, the disease naturally declined. Trade andtravel were well developed by the fourteenth century; the plaguetook advantage of this. TB exploded when conditions allowed it: the densely packed cities and workplaces of industrializing Europe in the eighteenth century. AIDS has relied on humanmobility to move around the globe. When pandemic influenza spread around most of the planet in a matter of months in 1918, it could only have done so because of the newly built transportation and trade networks and the high mobility brought on byWorld War I. Human, animal, and insect movement are critical inthe spread of epidemics and pandemics.

The author acknowledges that people—eyewitnesses, novelists, poets, memoirists, government bureaucrats, journalists, historians, anthropologists, epidemiologists, kings, queens, and presidents—have been writingabout epidemics and pandemics for centuries, reflecting on what causes them, what might stop them, and how people have reacted to them. The world has, collectively, accumulated an untold amount of source material of value not only to historians. We have accumulated a record of successes and failures that should aid those working on epidemics and pandemics now.

However, despite all this information, the author notes that the world is still relearning upon things history already taught. For example, in spring 2015, theWHO released a statement admitting its lacklustre response tothe Ebola pandemic and calling attention to several “lessonslearned.” It was striking that in 2015among the lessons learned were such things as the “lessons ofcommunity and culture.” That it took Ebola to show the value oflocal people and their knowledge is surprising. The WHO “learned the importance of capacity”—which means the WHO learned thatthe world could not handle epidemics. TheWHO was “reminded that market-based systems do not deliver commodities for neglected diseases.” Why did it take Ebola to relearn that vital fact? The WHO

also learned that gains in malaria control or women surviving child birth could be reversed when "built on fragile health systems." Is it trulypossible that this lesson had not been learned before 2015? These lessons are not new; the history of epidemics and pandemics has been teaching them for centuries.

The author believes that pandemics are not about to stop happening. He predicts that a pandemic might come from an old and familiar foe such as influenza or might emerge from a new source—perhaps a zoonosis that has made its way into humans. How will the world confrontpandemics in the future? Patterns established long ago will likely re-emerge. However, how will new challenges, like global climate change, affect future pandemics and our ability torespond? One thing is clear: in the face of a severe pandemic, much of the developing world's public health infrastructure will be woefullyoverburdened. One sure way to ease the suffering that will beencountered in any future pandemic is to invest in building a robust public health infrastructure anywhere one is lacking. The effects of pandemic and epidemic diseases have been and will be far worse in the least able to respond. Althoughthis might seem to be simple common sense, it is clear from the "lessons learned" by the WHO in the wake of the Ebola epidemicthat it is still routinely forgotten.

Fareed Zakaria, 2020. Ten Lessons for a Post-Pandemic World, W.W. Norton & Company

The author analyzes the world's ill preparation. He notes that governments spend trillions of dollars on building vast militaries, tracking the movement of combatants across theglobe, andpractice war tactics against potential enemies. The United States, for example, devotesalmost three-quarters of a trillion dollars to its defence budget every year. However, the world wasnot prepared to fight against a tiny microbe. It may eventually turn out that this viral microbe will cause the most significant economic, social, and political damage to human kind since World War II.

The writer does not jot about the pandemic but rather its aftermath and, more importantly, the world's response to it. Any significant shock can have diverse effects, depending on the stateof the world and how human beings react. In the case of coronavirus, the impact is being built bythe fact that the world is immensely interconnected; that numerous countries wereambushed by the pandemic and that in its wake, many of themshut down their societies and economies in a manner like never before in human history.

The justification for writing about the post-pandemic world is not because the Coronavirus is behind us but because the world has crossed a crucial threshold. Most of the world's population now knows how a pandemic operates. We have seen the difficulties and costs of countering it. The Covid-19 virus could persist, but even if it isdefeated, new outbreaks of other sickensses are bound to happen in thefuture. With what we have learned from this entire experience, we now live in a new era: post-pandemic.

The author suggests three possible consequences of the pandemic; that it will prove to be the hinge event of modern history, a moment that foreveralters its course. Alternatively, that after the vaccine, we will quickly return tobusiness as usual. Alternatively, still that the pandemic will not reshape history somuch as accelerate it. As Lenin once said, the author reckons that there are decades when nothing happens, and then there are weeks when decades happen; the post-pandemic world is going to be, in many aspects, a sped-up version of the world we knew. However, when you put lifeon fast-forward, events no longer proceed naturally, and the consequences canbe disruptive, even deadly. In the 1930s, many developing countries were modernizing rapidly, moving people from agriculture to industry. TheSoviet Union decided to accelerate that process brutally. This decision, thecollectivization of agriculture, led to famine, the "liquidation" of millions offarmers, a hardening of dictatorship, and the deformation of Soviet society. Aworld on steroids can suffer unpredictable side effects.

The author asserts that the coronavirus may be novel, but plagues are not. He explains all the plagues that this world has faced before and the impact each one of them has had on the lives of people, societies and nations at large. He, therefore, argues that the world ought to have known. In more recent times, outbreaks of SARS, avian flu, swine flu, andEbola spread swiftly and widely, causing many experts to alert the world that it wasprobably going to face a massive global epidemic soon. The public listened, too. In 1994, Richard Preston in his book, *The Hot Zone*, gives an account the origins of theEbola virus. Additionally, the 2011 film Contagion, based upon the SARS epidemic of 2002–3 and the swine flu pandemic of 2009, envisioned a virus that claimed 26 millionlives worldwide. In 2015, Bill Gates gave a TED Talk warning that "ifanything kills over 10 million people in the next few decades, it is most likely tobe a highly infectious virus." In 2017, he sounded an even louder alarm, predicting inhis speech at the Munich Security Conference that there was a high likelihood that such anoutbreak would happen in the following ten to fifteen years. By then, it did not attract much attention to imagine a pandemic and to pressfor investing more time, resources, and energy toward preventing or eradicating it.

The author notes that history has taught us that things start very small and ultimately bring the world to its knees. He makes an example out of the 9/11 bombings, which brought to centre stage the anger of radical Islam, the fights in the MiddleEast, and the West's complicated friendship with both. The 2008 global crisis was set rolling by good times, leading to asset prices shooting up, which spurred speculation, then birthed bubbles, and finally, yielded collapse; and now, the coronavirus began as a health concern in China and soon became a global pandemic.

The author describes the world that is being ushered in as a consequenceof the Covid-19 pandemic. He, however, notes that people canchoose which direction they want to push themselves, their

societies, and theirworld. We have greater leeway now. In most times, history follows along aset path and makes change complex. However, coronavirus has upsetsociety. Things are already transforming, and in that setting, further change becomes more achievable than ever.

John M. Barry, 2005. The Great Influenza: The Story of the Deadliest Pandemic in History, Penguin Group (USA) Inc., 375 Hudson Street, New York.

The author narrates the ordeal of the upspring of and explosive spread of the Influenza virus of 1918. He writes about the nature of the disease, its spread, and how it affected the world. Nevertheless, his story of the 1918 influenza virus is not simply one of havoc, death, and desolation of a society, fighting a war against nature superimposedon a war against another human society. It is also a story of science, discovery, how one thinks, and how one transforms the way one thinks, of how amidst near-utter confusion, a fewmen sought the calmness of contemplation, the utter cool that precedes not philosophizing but grim, determined action.

This is because the influenza pandemic that broke out in 1918 was the first great interaction between nature and modern science. It was the first great interaction between a natural force and a society that included individuals whorefused to submit to that force orcall upon divine intervention to save themselves from it. These individuals instead were determined to confront this force directly, with developing technology and with their minds.

The writer does explore the 1918 Pandemic itself and several questions that do not involve influenzaper se. One involves how the bigger society reacted to a serious challenge. Another provokes anyone making a decision: What criterion do you follow to gather information that most likely brings a good one? Inshort, how do you find outthat you have found out? More narrowly, he also explores how an investigator should do science, even under the most stressful conditions.

He reckons that one cannot depart from this subject without answering other questions: the increased chance of danger of another influenza pandemic, whatwe can take away from the one of 1918–1919, and how we can utilise those lessonsto the growth of a new pathogen, whether that microbe is aweapon of terror or a new natural catastrophe—such as Severe Acute Respiratory Syndrome, SARS, the illness which spread from animals to human beingsin 2003 and almost became a major pandemic.

The response to the first querry is not reassuring. The author believesevery expert oninfluenza agrees that the ability of the influenza virus to reassert genesmeans that another pandemic cannot only happen. It almost certainlywill happen. The author interestingly asserts that SARS, although more lethal than the 1918 influenza virus, is less dangerous for several reasons; first, SARS requires reasonably close contact to spread, while influenza is among the most contagious diseases. Also, in SARS, the virus reaches the climax in the upper respiratory tract, where sneezesand coughs

are likely to spread the virus a week or even longer aftersigns and symptoms develop. This offers public health officials time to identify, find, and seclude cases. By contrast, the influenza virus could spread from person to person before any signs develop for a victim to know that he or sheis sick.

The writer also notes that given the immense increase in population since 1918, the spread of any pathogen is bound to be more reaching because of the increased mobility of people and the population increase. This may, in effect, frustrate the efforts to find a cure or vaccine in the time since the disease would ordinarily have savaged more people than it had in 1918.

The author makes a critical argument that the final lesson, a basic one yet one most difficult to carry out, isthat those who are in positions of authority must reduce the panic thatcan grip all society. Society cannot operate if it is selfish. Those in authority must keep the public's trust. The formula to do thatis to destroy nothing, to put the best reputation on nothing, to try to manipulateno one. Lincoln said that first, and best, "Leadership must make whatever horror exists concrete. Only thenwill people be able to break it apart."[521]

John Finch, 2020. Legal Aspects of Covid-19 Pandemic Management for Community Nurses.

The author sets out to investigate how things have developed concerning the law on professional responsibility. He reckons that the legal obligations change in the face of national emergencies in some respects, while others do not. This is because the nature of a pandemic can easily be related to that of a war. One cannot declarea fight on a potentially deadly virus any more than one can declare war on terror. War may involve declarations of martial lawgovernment by armiesand it may well include the requisitioning of private premises by legal decree. Those stages are still far off with the spread of COVID-19, and hopefully they never will. The author wonders that if the war-footing is not the way to go in the COVID-19 crisis, what is? The many approaches addressedby the numerous countries now affected appear to resolvethemselves into a straight choice: voluntarism or legal rules.

The writer explains the extent of the old rule of duty of care and how this duty extends in times of a global pandemic. The law relating to care duties, be it owed by practitioners to their patients or owed byemployers and managers to their staff, is predicated on reasonableness. What is reasonable is directly influenced by resource availability, including, principally, staffand equipment.

Regarding staffing levels sufficient to meet patients'needs, several factors need to be consideredin weighing what is reasonable in fulfilling the legalduty of care. One of the most significant issues expressedby Governments and the media is patient carecaused by practitioners contracting the virus. Ear, nose, throat and respiratory doctors whohave contracted the virus tend to make

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headlines, although there havebeen few reports of the effect of little or no forwork of the much larger practitioner body of nurses. Sadly, time is almost sure to tell.

The author recognises that in any event, if a mistake is made and harm occurs, the law imposes liability only and only if there is a sufficient causallink between the mistake and the ensuing result. So, a practitioner can make all the (misjudgement) callsthey like, but if harm is not caused, there is no legal liability. He adds that policies on the deployment of workers and the allocationof patient treatment may have to be reviewed or, at least, carefully examinedand that a policy unsupported by critically argued principle may be positivelydangerous. Pursuing a policy for its own sake could leadto the imposition of legal responsibility, both civil and criminal, on the part of those who persist. New circumstances may require a thorough change of community nursing care policies basingon the demographics of a certain locality as well aspractical logistics.

On the aspect of patient confidentiality, the author notes that the general rule is that it is legally permissible to share information about a patient so far as appears necessary to reduce or eliminate the danger. Contrary to widespread belief across thehealth professions, no tort or civil wrong committedby breaking a patient's confidence. If persuasion fails, adeparture from patient confidentiality may be the only feasible option available to the practitioner.

David P. Fidler, 2020. "To fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence, Oxford University Press

The author writes that in global health, germs do not recognise borders. However, in a world where borders define the exercise of political power, international cooperation is critical to combating pathogenic threats. Practical cooperation, including international law, can produce political herd community-resistance within and between states to political behaviour that disrupts measures needed to protect nations and individuals from infectious diseases.

He observed that the spread of the pandemic had been exacerbated by the underlying power instabilities that take attention away from the pathogen. The ideological conflicts between nations and within countries have undermined effective strategies for pandemic control.U.S. criticisms of China's handling of COVID-19 attacked theCommunist Party, emphasized the authoritarian nature of the Chinesegovernment, and highlighted the nationalism stoked by China's media andpandemic diplomacy. Advocates of liberal democracy expressed concerns that authoritarian governments and politicians worldwide were exploiting the pandemic to increase their authority at the expense of self-government and human rights. COVID-19 did not create the growing conflict between liberalismand authoritarianism, but the pandemic exacerbated interstate relations' increasingly prominent ideological components.

The U.S. abandonment of global leadership during the pandemic owedmuch to hyper-partisan

domestic politics. The Trump administration increased on its "America First" attitude by blaming China for the outbreak, deciding to withdraw from WHO, and not participating in achievingequitable vaccine access. President Trump continued to divide the Americanpublic by ignoring science, denigrating expertise, attacking opponents, and refusing to take responsibility for his administration's response. Such divisiveness fuelled disinformation that intensified the war of political ideas tearing atthe nation's fabric.

The fraying of cooperation and the loss of political herd immunity contributedto problems that the international community encountered with internationallaw during the pandemic. Controversies arose with the IHR (2005). The search for a vaccine exposed how states have not crafted an internationallegal framework for critical aspects of pandemic response—sharing pathogen samples and the need for equitable access to pharmaceutical interventions. The pandemic also created concerns for international humanrights law.

WHO member states built the IHR (2005) to require countries to preparefor and respond to disease events in ways informed by science, public health strategies, and WHO guidance. Earlier outbreaks, such as the West African Ebola epidemic in 2014, revealed problems with the regulations.[522]However, the COVID-19 pandemic has delivered the most severe blow tothe IHR (2005) by generating disputes about fundamental aspects ofthe regulations.

How the pandemic exposed controversies and gaps ininternational law suggests that global health governance lacks an effective law system. In a world distorted by geopolitics and riven with ideological hostility, shared interests and values are evaporating, leaving international law bereft of the political conditions needed for international cooperation to protect population health against dangerous pathogens.

International Development Law Organisation, 2020. The Vital Role of Law in the COVID-19 Response,

Contrary to much literature reviewed. The author in this writing gives the lessons of maintaining the rule of law in times of a global pandemic. She lists that the rule of law offers an overarching framework to ensure health, justice and inclusiveness, even during a pandemic like COVID-19. Respecting to the rule of law means that law-making processes focused on public health emergencies and controlling infectious diseases need to be transparent. Laws should be publicly disseminated and enforced fairly, and when required, independently adjudicated throughcourts and tribunals that ensure the administration of law and its substantive content is consistent with international human rights standards.

[522] Lawrence O Gostin and Rebecca Katz, 2016. The International Health Regulations: The Governing Framework for Global Health Security, 54(2) Milbank Q, 264-313.

Secondly, solid legal and policy frameworks are vital to prevent and mitigate the consequences of public health emergencies. It does this in two ways; it establishes the institutional structures and formal processes through which governments respond to disease outbreaks; it sets limits for coercive power over individuals and businesses to mitigate the risk of disease spread.

Also, the rule of law is vital to control the transmission of infectious diseases and ensure respect for fundamental human rights. When public health laws authorize interferences with rights such as freedom of movement or the right tocontrol one's health and body, privacy rights, and property rights, they should balance these private rights with the public health interest ethically and transparently. Public health powers should be built on theethical principles of public health necessity, reasonable and adequate means, proportionality, distributivejustice, and transparency. Openness and accountability are needed to generate public trust and are also likely to improve public health decision-making. Without public trust and voluntary cooperation, governments will find it harder toachieve their goals and act in the public interest.

Furthermore, the rule of law and good governance are indispensable to realise the right to health during COVID-19 and beyond. The right to health is a fundamental human right and isindispensable for human well-being, well-functioning societies and economies, and for theability toexercise all other human rights. Realizing the right to health is a legal obligation enshrined in the United Nations International Covenant on Economic, Social and Cultural Rights and other international and regionaltreaties and the constitutions and statutes of many States.

Cameron Stewart, et al. 2020. COVID-19: Restrictive practices and the law during a global pandemic – an Australian perspective, International Journal of Mental Health Nursing (2020) 29, 753–755

The writers approach the pandemic from theperspective of people who have had to deal with restriction because of the nature of their lives: for example, the elderly, mentally disturbed people and prisoners. They postulate that further restrictions to their already existing enigma increase the sensitivity to such seclusion.

The already existing laws about restrictions on mental health in Australia are not uniform. However, they usuallyfall under each jurisdiction's regulation of compulsorytreatment orders, emphasising them being seen as 'last resort', pursuant to the notion of being the least restrictive alternative of caring for the person and regularly reviewing reports submitted.

COVID-19 has added another perspective to this picturethrough the introduction of the public health law. Australian health authorities can invokepublic health orders that allow for an extensiverange of orders, including dictating the person's conduct, forcible detention, testing, and treating any person reasonably suspected of beingCOVID-19 positive.

The utilisation of restrictive practices in public health ordersraises several challenges for mental health practitioners.[523] Firstly, public healthorders lack tight regulation of restrictive practices that exist in mental health and guardianshiplaw, especially in how they lack theaspect of the 'leastrestrictive means'.

Secondly, mental health teams are not bound to have a working knowledge of public health law but may nevertheless be asked to act following it.[524] Poor information of regulation may lead healthcare practitioners to authorize the restrictive practice illegally.[525]Thirdly, some health practitioners have previously been uncomfortable and slow to enforce public health orders due to a bewildering sense of feeling like a 'jailer'.[526] Any such reluctance needs to be considered concerning the protection of others[527] and, of course, protecting oneself.

The literature concerning global pandemics is vast, much of the work written is scientific, and therefore it leaves a gap on the legal connotations of the same. With the world entangled in understanding the origin and cause of the pandemic, little has been discussed on the legality of this process of adapting to it.

THE CHALLENGE POSED BY THE PANDEMIC TO THE LAW-MAKING PROCEDURE IN UGANDA

As seen earlier, the law-making process takes quite some time to bring the law into enactment. The justification for this period can be attributed to the need to uphold democracy, transparency, and community involvement. If laws were passed any earlier, any of these would stand threatened and, in the long run, would affect the good governance of the country and the social contract of the same.

However, the nature of pandemics is that it has no respect for timelines. They tend to spread at unprecedented speeds and causing effects more profound than any law, however well crafted, could ever atone. This, therefore, poses the greatest threat to the law-making process because the parliament will under normal circumstances not be able to pass a law in time to manage the mode of operation during times of the pandemic.[528]

[523] Arnold, A., Bickler, G. & Harrison, T. S. 2019. The first 5 years of Part 2A Orders: the use of powers from court applications to protect public health in England 2010–15, Journal of Public Health, 41, 27–35.
[524] Power, T., Baker, A. & Jackson, D. 2020. Only ever as a last resort': Mental health nurses' experiences of restrictive practices, International Journal of Mental Health Nursing, 29, 674–684.
[525] Lamont, S., Stewart, C. &Chiarella, M. 2019. Capacity and consent: knowledge and practice of legal and healthcare standards, Nursing Ethics, 26, 71–83.
[526] Kerridge, I., Lowe, M. & Stewart, C. 2013. Ethics and Law for the Health Professions, 4th edn. Sydney: Federation Press.
[527]Coker, R. J. 2003. Public health impact of detention of individuals with tuberculosis: systematic literature review. Public Health, 117, 281–287.
[528] Steiner, J., Woods, L. and Twigg-Flesner, C. (2003) Textbook on EC Law, Oxford, Oxford University Press, pp. 57-

Therefore, the challenge was that the government had to take drastic measures to slow down the speed at which the virus was spreading out, and this was to be done while respecting the law. At that time, several far-reaching measures were promulgated, and implemented, to respond to the crisis: all institutions of learning were closed, international borders closed, movements of many people within the country restricted and the majority of business stopped from operating.[529]

To the extent that this was done on mere directives, without regard to any known law-making procedures, it made the directives doubtful on their constitutionality and, therefore, on whether they should be allowed to operate. This, in effect, caused a ripple of violations to other substantive laws since the directives were not constitutionally backed.

Effects of the difficulties encountered by the government in global pandemics

The failure by the government to follow the ordinary law-making process has, in turn, affected the observation of other substantial laws. Central to this is the Human rights violation. Most of the directives issued by the president were to do with movement, assembly, health, to mention but a few. To a certain extent, these rights were limited for purposes of curtailing the spread of the virus. As much as the move was for good intention, the mode of doing the same was not backed up by law and amounted to a violation.

Article 43 of the Constitution of the Republic of Uganda provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. The provision further describes public interest that public interest under this Article shall not permit, among other things, any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society what is provided in this Constitution. Dr Busingye breaks down the meaning of this provision that the formulation of Article 43(2) was deliberate, and each phrase as used in that provision has particular importance. The effect of this provision was to set a high bar for the limitation of human rights.[530]

The courts interpreted Article 43 in **Charles Onyango Obbo and anor v Attorney General, Constitutional Petition No. 15 of 1997**, which the Supreme Court upheld. The court elaborately stated thus;

-62.

[529]Busingye K., 2020. *The 1995 Constitution and Covid-19 by Dr. BusingYEKKAbumba*, [online], available at; https://observer.ug/viewpoint/64295-constitution-and-covid-19-are-presidential-directives-unconstitutional (accessed on 27th May, 2021)

[530] Ibid

"FREE AND DEMOCRATIC SOCIETY

This phrase now appears in the human rights provisions of many constitutions of the countries of the Commonwealth; Canada, Papua, New Guinea, Namibia, Zimbabwe, Nigeria and Zambia, to mention but a few. The phrase is not defined in any of the Constitutions, but the Courts of those Countries have developed and assigned definite meanings to the phrase. The meaning assigned to it is remarkably similar despite differences in social, cultural and political systems prevailing in each of the jurisdictions I have mentioned above. The most prominent authority on the meaning of the phrase "Free and democratic society" can be found in the decision of the Supreme Court of Canada in the case of ***Regina Vs Oakes (supra),*** *which many commonwealth jurisdictions have followed with similar Constitutional provisions as Canada. In the Canadian Constitution, the phrase "free and democratic society" is used in section 1, which is almost similar to our Article 43 (2), where the same phrase is used. The Supreme Court of Canada stated: -*

"A second contextual element of interpretation of S.1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits of the rights and freedoms refers the Court to the purpose for which the Charter was originally entrenched in the Constitution. Canadian Society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for culture and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

ACCEPTABLE AND DEMONSTRABLY JUSTIFIABLE

This is the phrase used in Article 43 (2) of our Constitution. In the Canadian Constitution, they use "reasonable and demonstrably justified." In my view, there is no significant difference between the two phrases. In the Canadian case of ***Regina Vs Oakes (supra),****the phrase was given meaning as follows:-*

"To establish that a limit (to rights and freedoms) is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective that the measures responsible for the limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a

Constitutionally protected right or freedom

The standard must be high in order to ensure that objectives that are trivial or discordant with the principles integral to a free and democratic society do not gain (Our Article 43 (2)) protection. It is necessary, at a minimum, that an objective related to concerns that are pressing and substantial in a free and democratic society before it can be characterised as sufficiently necessary.

Secondly, once a sufficiently significant objective is recognised, then the party invoking s.l must show that the means chosen are reasonably and demonstrably justified. This involves a form of PROPORTIONALITY TEST... Although the nature of the proportionality test will vary depending on the circumstances, the Court will be required to balance the interest of society with those of individuals and groups in each case. There are, in my view, three essential components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: ***R Vs Big M Drug Mart Ltd Supra.*** *Thirdly, there must be proportionality between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of "sufficient importance."*

It can be argued, and successfully, that the government failed to meet this threshold laid down by the constitutional court twenty years before the current pandemic. The government set in the wake of the pandemic fell short of the threshold that is well prescribed in the law. One of the way show a measure can fall short of this high test is if it can be proven that the objective (the protection of public health in this instance) can be achieved through another alternative method that is less restrictive to human rights .[531] It can be said that the declaration of a state of emergency by the president would have allowed for directives that would be passed following the provisions of the Constitution.

THE LAW VIS A VIZ THE REALITY ON STATE OF EMERGENCY AMIDST PANDEMICS IN UGANDA

The COVID-19 pandemic is a public health concern which affected almost the whole globe; the Pandemic has negatively affected the world leading many states to declare a state of emergency.

Due to the various states obligation to protect the health and lives of their citizens, some states like the United States of America and Ethiopia declared a state of emergency while other states like The legislative body of Uganda enacted emergency laws like The Public Health (Control of COVID-19) Rules, 2020 to respond to the pandemic which resulted to various consequences on the other human

[531] Ibid

rights of the citizens. The most appropriate measure to be taken is declaring a state of emergency because the state is clothed with the responsibility of balancing both the health rights and other human rights of its citizens.

The novel Corona virus/ COVID-19 Pandemic remained a myth to Africa and specifically Uganda upon its first attack in Wuhan, China until Saturday 21st March 2020 when the country woke up to the saddening news of the first corona virus case of 36-year-old Ugandan male who arrived from Dubai.

The attack of the COVID-19 Pandemic on various states awakened various obligations of states to its citizens and birthed many impacts on the state's economy. Many states declared lockdowns with locking of schools, places of worship, restaurants, among others. Uganda, in addition to the preventive measures she put in place like sanitizing and washing hands, Uganda also adopted the same strategy of the partial lockdown with schools, bars, places of worship being closed, curfew of 7pm to 6:30am imposed, movement being restricted inter alia.

Uganda based this partial lockdown actions on emergency laws like the Public Health Act Cap 281 whose main aim is to preserve public health, then various statutory Instruments which were promulgated like the public health (control of COVID-19) Rules 2020 and public health (control of COVID-19) (Amendment)Rules 2020 inclusive of other amendments as the situation changes.

Some states, the basis of their partial lockdowns was declaring a state of emergency so as to curb the pandemic. International treaties and national constitutions of such countries legalize declaring a state of emergency and also provide for a procedure to declare a state of emergency so as to curb such a national and global threat.

The strategy adopted by states like Uganda of using Emergency laws to respond to the COVID-19 Pandemic is tied to many consequences like infringement of constitutional human rights since use of emergency laws to respond to the pandemic the state is to respect all human rights as its curbing the pandemic as compared to a situation where a state of emergency is declared and a state is permitted to breach certain rights to curb such a pandemic. The human rights that are breached in use of emergency laws include the right to freedom of movement due to the curfews imposed, freedom of association due to banishing of public gatherings which is vital to democracy, freedom of torture due to deployment of LDU's among others.

Most states might prefer using emergency laws due to fears of accountability to international Human rights organizations which monitor implementation of the international treaties like the international Covenant on civil and political rights because upon declaration of a state of emergency many demarcations are made. However, declaration of a state of emergency enables checks of power which helps in intercepting illegal tendencies like breach of human rights and corruption.

The emergency laws or declaring of a state of emergency, what is the most appropriate means of responding to the COVID-19 pandemic crisis?

This Article is examining the declaration of state of emergency amidst the COVID-19 Pandemic as a strategy to curbing the pandemic is a viz use of emergency laws and the likely legal, economic and social consequences.

The Constitution of the Republic of Uganda, 1995, as amended.

The constitution is the highest law of the land, and any other law which contravenes the constitution is null and void to the extent of its inconsistency.[532]Therefore, the powers that allow anybody to make law are enshrined in this constitution. Chapter six of the Constitution provides for the Legislature and its roles, making laws.

Article 79(1) of the Constitution states that subject to the Constitution's provisions; Parliament shall have the power to make laws on any matter for the peace, order, development and good governance of Uganda. Therefore, this provision gives the parliament the power to make any law that governs the daily workings in the jurisdiction of Uganda.

Article 79(2) further provides that except as provided in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament. This provision bars any other body or person from making any other law for governing the country except as provided by the law.

The two provisions vest all the law-making power into the parliament, and the parliament has overtime devised a procedure of making the laws, which is peculiar to their work and has over time brought forth the laws that manage the country.

It is important to note that the Constitution envisages other times when laws can be made without following the provisions of Chapter six strictly. Indeed, Article 99(5) of the Constitution provides that the signature of a Minister may authenticate a statutory instrument or other instrument issued by the President or any person authorised by the President; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President.

This provision of the law seems to give the president the power to make statutory instruments that the minister can pass as law upon signature by the minister. Recently, the president of Uganda made declarations which were later codified by the Minister of Health and signed for operation as guidelines during the subsistence of the law. However, these laws were made according to the powers given to the minister for secondary legislation, as discussed in the subsequent writings.

[532] Article 2 of the Constitution of the Republic of Uganda, 1995, as amended

Statutory law

The Acts of parliament lay out quite elaborately how the law-making process flows right from when the Cabinet Minister proposes the bill up to its publication in the gazette. The process began when the Ministry concerned Cabinet through a Cabinet Memorandum with a proposal for Cabinet to approve the principles for the bill's drafting. Cabinet approval is required before drafting the subject legislation.[533]Paragraph 2(b) of Section (Q-b)[534], however, permits a 'Bill to be drafted by the First Parliamentary Counsel if the Attorney General or Solicitor General authorizes the bill's drafting without reference to Cabinet.' According to the paragraph, this authority is granted only in exceptional circumstances. The request for the authority is made through the responsible Minister.

Cabinet then appraises the proposals as contained in the Cabinet Memorandum of the Ministry concerned and approves the principles based on which a Bill is to be drafted. When Cabinet approves the principles for drafting a Bill, it authorizes the responsible Minister to direct the First Parliamentary Counsel/Attorney General to draft the necessary legislation.[535]

The Ministry concerned would then request the First Parliamentary Counsel through the Attorney General to draft the legislation based on the approved principles as found in a Cabinet Minute. Where the instructions are ambiguous, the First Parliamentary Counsel will inquire from the relevant Ministry for more instructions and, where necessary, request that Ministry to identify an officer in the Ministry to cooperate with the office of First Parliamentary Counsel in the drafting of the Bill. In making the legislation, the office of the First Parliamentary Counsel will work with the relevant Ministry to make an agreed draft. The relevant Ministry may again consult relevant bodies and individuals as to what contents should be in the Bill.[536]

The relevant Ministry will have to submit the Bill to Cabinet for approval and a Cabinet Memorandum and any comments of the stakeholders. No Bill without exception is published unless it has been sent to the Cabinet for approval.[537] In drafting the bill, the draftsperson must understand the need to keep the Law Officers informed, like the Attorney General and the Solicitor General.[538]

When the Bill is being sent to Cabinet for approval, the Cabinet memorandum of the Ministry will have to be accompanied by:

> **(a)** a certificate of compliance issued by the Office of the First Parliamentary Counsel acknowledging that the Bill has been made by the Office of the First Parliamentary Counsel

[533] Paragraph 2 of Section (Q-b) of the Uganda Public Service Standing Orders, 2010.
[534] Ibid
[535] Ministry of Justice and Constitutional Affairs, March 2014. Manual On The Legislative Process In Uganda, First Parliamentary Council, available at; https://www.jlos.go.ug/index.php/document-centre/legislation/326-legislative-process-in-uganda/file (accessed on 27th May, 2021)
[536] Ibid
[537] Paragraph 7 of Section (Q-b) of the Uganda Public Service Standing Orders, 2010
[538] paragraph 6 of Section (Q-b), Ibid

following the directions approved in the Cabinet resolve issued for the drafting of the Bill or that the Bill has been drafted based on a waiver of prior Cabinet approval in principle by the Attorney General or the Solicitor General[539]

(b) a certificate of financial implications issued by the Ministry of Finance under section 10 of the Budget Act, 2001 and rule 107 of the Rules of Procedure of Parliament, 2012 (the Rules), acknowledging in respect of the Bill in question that the financial implications if any, on revenue and expenditure over not less than two years after it comes into force. Rule 107(2) of the Rules requires the certificate of financial implications to be signed by the finance Minister.

Cabinet may reject or approve the Bill or may approve the Bill subject to amendments. The Office of the First Parliamentary Counsel will then include any amendments approved by Cabinet in the Bill and seek the minister's signature concerned to an explanatory memorandum attached to the Bill.[540] Rule 106(2) of the Rules requires that all Bills shall be accompanied by an explanatory memorandum setting out the policy and principles of the Bill, the defects in the existing law if any, the remedies proposed to deal with those defects and the necessity for the introduction of the Bill. According to rule 106(3), the explanatory memorandum shall be signed by the Minister or by a member introducing the Bill (in the case of a Private Member's Bill).

The First Parliamentary Counsel authorizes the Government Printer, the Uganda Printing and Publishing Corporation (UPPC), to print and publish the Bill in the Uganda Gazette. The Ministry concerned then must issue a Local Purchase Order (LPO) to be issued in favour of the Government Printer (UPPC) to cover the costs of printing and publishing the Bill.

Rule 106(1) of the Rules of Procedure of Parliament says that all Bills must be published in the Gazette. After publication, the relevant Ministry supplies about 450 copies of the Bill to the Parliament Clerk for use by parliamentarians. The relevant Ministry must also have to send to Parliament the certificate of financial implications to be tabled in Parliament for the bill's First Reading.[541]

The Bill then goes through the criterion of Parliament necessary for passing a Bill. Rule 114 of the Rules provides that each and every Bill shall be read three times before its being passed. The criteria is prescribed by the Rules from Parts XVIII - XXI –

(a) First Reading, a formality, marks the bill's formal introduction in Parliament, and the Bill is then sent to the relevant Sessional Committee of Parliament for consideration. At this stage, the

[539] para. 2(b) of Section (Q-b) of the Uganda Public Service Standing Orders
[540] Supra note 33
[541] Ibid

committee generally invites the relevant Minister to introduce the Bill and invites other stakeholders to say their views on the bill's provisions, and the committee may sometimes have hearings for the purpose;

(b) Submission of Report by the Sessional Committee. The committee submits a report on the Bill to the plenary of Parliament. At the same time, Parliament considers the Bill at Second Reading which is a discussion on the principles of the Bill and not on its details. Pursuant to rule 119(5) of the Rules, the Second Reading of the Bill does not happen earlier than the fourteenth day after publication of the Bill in the Gazette, unless the sub-rule is formally suspended for this purpose;

(c) Committee of the Whole House Stage: At this stage, Parliament deals with the provisions of the Bill, clause by clause and all suggested amendments to the Bill. Part XX of the Rules regulates the Committee Stage.[542]

(d) At Committee Stage, the Speaker of Parliament sits in the House's well as chairperson of the Committee of the Whole House, to consider the amendments to the Bill.[543]

(e) According to rule 123(4) of the Rules of Procedure of Parliament, the Committee of the Whole House considers the proposed amendments by the Committee and may consider the suggested amendments, on notice, where the amendments have been presented but rejected by the Committee concerned or where, for sufficient cause, the amendments have not been presented before the relevant Committee.

(f) Report of Committee after Committee Stage: This is where the Committee of the Whole House reports to the plenary on the Bill committed, and amendments are considered.[544]

(g) Re-committal: This is a stage that comes at the conclusion of the Committee Stage where it is felt that there are still some amendments that have to be considered or reconsidered.[545]

(h) Third Reading and passing of the Bill: At this stage, the Bill is not discussed, and it is passed as a step of procedure upon a motion "That the Bill be now read the Third Time and do pass."[546]

Sections 8 - 13 of the Acts of Parliament Act, Cap.2 regulate the compilation and presentation of copies, assent by the President, presentation of a Bill for assent under Article 90(1) of the Constitution, the numbering of Acts, original copies of Acts assented to by the President or becoming law without the assent of the President and publication of Acts in the Gazette. Important to note is section 14 (3)[547], which provides that where an Act gives power to a Minister to enact a statutory instrument to bring an Act into force, such power may be exercised even though the Act

[542] rules 120 - 124
[543] See rule 122(1)
[544] See rule 125.
[545] See Part XXI rule 127
[546] rule 126 of the Rules
[547] Acts of Parliament Act, Cap.2, Laws of Uganda

has come into force or not.

However, the Constitution too provides for the bringing of Bills by private members of Parliament. Article 94 (4) provides that the rules of procedure of Parliament must include the following provisions-

(a) a member of Parliament has the right to bring a private member's Bill

(b) the member bringing the private member's Bill shall be accorded reasonable help by the department of Government whose scope of operation is affected by the Bill

(c) the office of the Attorney General shall accord the member bringing the Private Member's Bill professional help in the drafting of the Bill."

Following Constitutional provisions, rule 110 provides for the Private Member's Bill, and rule 111 of the Rules provides for the procedure in respect of a Private Member's Bill thus; a Private Member's Bill must be introduced first by way of a motion to which shall be attached the proposed draft of the Bill. If the motion is upheld, the printing and publication of the Bill in the Gazette is the Clerk's responsibility. Following the Bill's publication in the Gazette, Bill's progress shall be the same as that followed in respect of a Government Bill.

CONSEQUENCES OF THE PROCEDURE USED IN THE PUBLIC HEALTH ACT CAP 281.

The procedures followed in the Public Health Act regarding responding to the COVID-19 Pandemic pose various challenges especially legal challenges because as the minister is putting in place the various rules to regulate the spread of the COVID-19 Pandemic he/she is supposed to balance other laws in place especially the Supreme law of the land the 1995 Constitution of the Republic of Uganda which provides for the various rights of the Citizens of the Republic. The rule of law is supposed to be respected as compared to a situation where a state of emergency is declared because with the declaration of state of emergency the government is permitted to carry out Acts that in normal circumstances they would not be allowed to do the same.

THE LEGITIMACY OF THE LIMITATIONS IMPOSED BY THE PRESIDENTIAL DIRECTIVE.

It is important to establish whether the restrictions imposed by the presidential Directives are not in conflict with rights and freedoms as enshrined in the several Articles of the Grand Norm of the land and other related Acts of Parliament.

I find a lot of comfort in the timely writing of Prof.Ben Kiromba Twinomugisha where he states that the constitution is clear, in the enjoyment of his rights and freedoms, no person shall prejudice

the fundamental or other human rights and freedoms of others or the public interest. Prof.Ben persists that a person who has tested positive for corona virus wouldn't complain that his or her right to liberty has been violated after being quarantined or put into isolation. That person's rights to liberty and movement may justifiably be restricted for reasons of preventing him of her from infecting others with the deadly virus, failure of which directly results in violation of other right to life. In effect a person can be justifiably disadvantaged of his right to liberty for the reason of stopping the layout of a transmissible disease.

Prof. Ben further asserts that within the provisions of the constitution public interests shall not permit any limitation of the enjoyment of the rights and freedoms that is beyond what is acceptable and demonstrable justifiable in a free and democratic society or what is provided in the constitution. It is clear from the foregoing that the Presidential Directives were legally hazed with the ultimate goal of promoting the welfare of the citizens and protecting the territorial integrity of the country. What remained critical for the agencies which were entrusted to implement the Presidential directives to continue executing their actions within the confines of the law. it is unfortunate that a number of cases involving violations of freedom from torture, cruel, inhuman and degrading treatment by enforcement agencies have been registered.

Therefore, the president of the Republic of Uganda must be commenced for strongly castigating the security personnel especially the Local Defence Unit (LDUs) against misinterpreting his directives on enforcement of the lockdown. Addressing the nation on 8th April 2020 the President in his address wondered why the security personnel were beating people like cows.

THE IMPACT OF EMERGENCY DECLARATIONS AND STATE ACTIONS TO COMBAT EPIDEMICS ON HEALTH CARE.

As the novel corona virus ("COVID-19") outbreak continues, a growing number of state governors have declared states of emergency that allow state agencies to combat the spread of disease and advance access to care, such as through waiver of certain state laws.

State declarations are taking different forms, with some states issuing robust measures that relax the current legal frame work to offer health care providers additional flexibility to provide treatment and promote access to care.

These state declarations, as well as federal orders and regulatory changes, including informal internet-only guidance materials, will continuously impact providers' responses to COVID-19 and operations.

The recent emergency declarations issued in more than 40 states in response to the COVID-19 outbreak have taken varied approaches in addressing the duration, geographic area, and specific

health agencies leading response activities, as well as, in some cases, waiving or suspending specific health agencies leading response activities, as well as, in some cases, waiving or suspending specific health care rules and regulations. Some of these declarations address topics of particular interest to health care providers relating to licensure, reimbursement, and operations (e.g., facility visitor policies, telehealth services, emergency transport, and elective procedures.)

In addition, other state declarations, such as in New York and California, allow for flexibility in emergency transport by permitting emergency medical service personnel to transport patients to medical facilities other than hospitals.

On March 13,2020, President Trump declared a national emergency in response to the novel corona virus outbreak. This declaration allows the federal government to increase federal funding for states to respond to the crisis and expand the scope of their emergency actions as the COVID -19 outbreak continues. State actions taken in response to the outbreak are intended to help expand access and eliminate barriers to care by; developing networks of emergency volunteer health care professionals , developing emergency health care centers, creating and requiring use of diagnostic and treatment of patients, expanding who can provide testing for COVID-19, waiving cost sharing related to screening and testing for COVID-19, ensuring access to alternative methods of treatment, such as telemedicine, and determining procedures for isolation and quarantine. To achieve these objectives, many state emergency declarations give authority to state agencies, such as departments of health, to issue emergency regulations.

THE MAJOR CONSEQUENCES ARE IN RELATION TO THE HUMAN RIGHTS OF THE CITIZENS.

The freedom of association, movement are being infringed on which affects democracy. Article 29 of the Constitution of the Republic of Uganda as amended, provides that every person shall have a right to freedom to assemble to demonstrate, to assemble and to associate with others. Every Ugandan shall have a right to move throughout Uganda and to enter in and out of Uganda.

The Freedom from torture and inhumane and degrading treatment as provided for in Article 24 of the constitution of Uganda 1995 as amended is being infringed with deployment of (Local Defence Unit) LDU personnel in the streets to enforce the curfews specifically. The brutality by LDUs is not a new thing as it has existed since 1987 when LDUs were introduced to keep law and order in rural areas.[548]Since 1987 LDUs remain operating extra legally in our communities despite not having a

[548] Brighten Abaho.LDUs another form of insecurity. July 7,2020
https://www.pmldaily,co/oped/2020/07/brighten-abaho-ldus-another-form-of-insecurity.html
viewed on 7/30/2020 at 5:45pm

law providing for their existence.[549]

The LDUs personnel are first and foremost not provided for in the law .In a petition filed before the civil division of the High Court in Kampala, the lawyer Mabirizi says that it is illegal for the UPDF under president Museveni's command and guidance from cabinet to recruit, train and maintain LDUs as they are not provided for in the UPDF, Uganda police and Uganda prisons service.[550]

It is evident with the various cases where LDU personnel have been dragged to court for brutality in the guise of implementing the president's orders of the COVID-19. For example recently at least seven LDU personnel have been sentenced to two months in military prison for brutality, which is a clear indication that people's rights are being infringed on in implementing the emergency laws thus questioning the legality of these enforcement agencies.[551]

Another recent infringement on the right to freedom of torture was the one connected to the death of a Makerere student by the names of Tegu Emmanuel which the law students at Makerere University under their umbrella body expressed that "the violence and impunity with which these acts were executed shows the extent to which the respect of the rule of law and confidence in state action has declined. Such behaviour goes against the dictates of the constitution of Uganda, particularly under Article 24 which guarantees freedom of every Ugandan citizen from torture cruel and in humane or degrading treatment."[552]

These illegalities lead to the loss of confidence on the state or government by the citizens and brings about insecurities in the nation and breach of the constitution and international instruments as there is no respect of the rule of law which is expected of countries like Uganda that are responding to the COVID-19 crisis by use of these emergency laws other than declaring a state of emergency.

The concentration of powers in the hands of the Executive with little to no judicial or Parliamentary oversight, combined with the lack of clarity of the status and content of measures. These include excessive use of force by security forces, including Local Defense Units, in enforcing the lockdown measures, as well as harassment of journalists and human rights defenders in a worrisome trend of shrinking civic space in Uganda. These will be further explored in future explored in future posts

[549] Ibid

[550] Kenneth Kazibwe. Lawyer drags government to court over existence,recruitment of LDUS.August 13,2019 at 9:07am https://nilepost.co.ug/2019/08/13/lawyer-drags-government-to-court-over-existence-recruitment-of-ldus/Visited on 7/30/2020 at 5:56pm

[551] Seven LDUs convicted over brutality. The independent April 15 2020 http://www.independent.co.ug/seven-LDUs-convicted-over-brutalityVisited on 30/7/2020 at 5:25pm

[552] Edwin Sabiiti.Makerere Law student demand for justice for killed university student.July 6, 2020. https://the legalreports.com/2020/07/06/Makerere-law-students-demand-justice-for-killed-university-student/ viewed on 7/30/2020 at 5:36pm

on both the impact of mobility restrictions on Ugandan's rights and freedoms and judicial administration.

Additionally, the handling of COVID 19 patients has also raised serious human rights concerns. Many have complained about being in isolation centers or taken to health facilities where they have received inadequate medical attention and poor nutrition, and have been treated in an inhumane or degrading fashion.

Health care workers themselves at the frontline of the fight, have also complained about not getting the appropriate equipment to do their jobs. When they wanted to protest, the state of emergency regime prevented them from doing so.

The extended powers given to security forces in some countries go beyond restricting the movement of people. In most cases in Africa, only a state of emergency or national disaster gives governments, in this case the executive branch, immediate and extended powers to make such decisions legal and enforceable. Depending on the country, declaring a state of emergency or of national disaster follows distinct processes and confers different powers on the executive. In most cases, a state of emergency gives more extensive powers to the executive and, as consequence, drastically reduces civil liberties.

The involvement and control of other branches of government is typically limited at first and then eventually becomes necessary to extend the state of emergency, for instance court challenges; in some countries, such as the Democratic Republic of Congo (DRC) and Malawi, these measures were challenged in court. In the first case, before the state of emergency was declared on 24 March and a lockdown of parts of the capital city – province Kinshasa was imposed, President Felix Tshisekedi had announced, on 18 March, measures to restrict the movement of people, including banning public gatherings, closing schools, restricting travel and closing public establishments such as bars and restaurants.

Many believed that instituting those measures before declaring the state of emergency was unconstitutional. Some also argued that Tshisekedi was supposed to consult with and get approval from both Parliament and the senate before declaring the state of emergency. The constitutional court, however, ruled that Tshisekedi's state of emergency declaration was in fact based on the law.

What has transpired in the DRC is also linked to the political climate before the outbreak of COVID-19, tumultuous political arrangement with former president Joseph Kabila's Front Commun pour le Congo (FCC), which holds a majority in Parliament and the senate.

Due to the abuses seen during the COVID-19 lockdowns around the world. UN High Commissioner for Human Rights Michelle Bachelet recently warned that "the public health emergency risks becoming a human rights disaster.

There has been a tendency towards what can be described as the misuse of the state of emergency for repressive or purely political purposes. “But emergency powers should not be used as a weapon to quash dissent, control the population and even perpetuate their time in power. Exceptional measures should be used to cope with the pandemic, nothing more, nothing less,” says Bachelet.

The current environment makes it even more difficult for civil society and human rights defenders to oppose this shift. The fear is that the pandemic will persist over time and that his decline in human rights will continue even beyond this crisis.

In fact, as a state of emergency cannot be a permanent regime, some countries are in the process of passing or have passed laws that allow the maintenance of the restrictions imposed in the fight against COVID-19. This legalizes, de facto, a kind of “regime of exceptions, “which in many cases can hardly pass constitutional muster. In addition, the current environment makes it even more difficult for civil society and human rights defenders to oppose this shift.

What is at stake is not a philosophical or ideological debate about democracy or human rights, but rather the very lives of the people for whom these measures are being taken.

POLITICS AND COVID-19

The corona virus was first discovered in 2007 when scientists warned that there was an extensive reservoir of SARS-Cov-like viruses in horseshoe bats. They emphasized that it was a threat and that there was a possibility SARS would re-emerge and other new viruses, which should not be ignored.[553] The first outbreak of SARS was in 2002 but it died down.[554] After all this time, COVID-19 has sprung up as the most dangerous respiratory disease pandemic since 1918, when the “Spanish” influenza pandemic killed close to 50 million people.[555]

In 2003, the China was infected with a virus causing Severe Acute Respiratory Syndrome (SARS) in the province of Guangdong. The virus was confirmed as a member of the Betacoronavirus subgroup and was named SARS-CoV.[556] The infected patients showed pneumonia symptoms with a lung injury, leading to acute respiratory distress syndrome (ARDS). SARS emerged in Guangdong province, China and then spread quickly around the globe with more than 8000 infected persons and 776 deceased.[557]

[553] Cheng VCC, et al 2007. *Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Re-emerging Infection*. ClinMicrobiol Rev.20: 660-694

[554] David MM, et al 2020. *The Origin Of Covid-19 And Why It Matters*, The American Journal of Tropical Medicine and Hygiene, 103(3), 2020, pp. 955-959

[555] Taubenberger JK, et. al. 2019. *The 1918 influenza pandemic: 100 years of questions answered and unanswered*, Sci Transl Med 11:eeaau5485

[556] Peiris J, et al 2004. *Severe Acute Respiratory Syndrome*, Nat Med; 10(12): S88-97; see also Pyrc K. et al 2007. *Identification of New Human Coronaviruses*, Expert Review of Anti-infective Therapy; 5(2): 245-53

[557] Muhammad AS. et al 2020. Covid-19 Infection: Origin, Transmission and Characteristics of Human Coronaviruses,

In the year of 2012, a few Saudi Arabian nationals were diagnosed with another coronavirus. The detected virus was confirmed as coronaviruses thus the name Middle East Respiratory Syndrome Coronavirus (MERS-Cov). The World health organization reported that MERS coronavirus infected more than 2,428 individuals and 838 deaths.[558] MERS-CoV is a member beta-coronavirus subgroup and phylogenetically diverse from other human-CoV. The infection of MERS-CoV starts from a mild upper respiratory injury, while progression leads to severe respiratory disease. Like SARS coronavirus, patients infected with MERS-coronavirus suffer from pneumonia, followed by ARDS and renal failure.[559]

Nearing to the end of 2019, the government of China was informed about many cases of pneumonia due to an unfamiliar aetiology. The outbreak emanated from a seafood market in Wuhan city of China and rapidly infected more than 50 people. The live animals are frequently sold at the Hunan seafood market, such as bats, frogs, snakes, birds, marmots and rabbits.[560]

On 12 January 2020, the National Health Commission of China released further details about the epidemic which suggested viral pneumonia.[561] From the sequence-based analysis of isolates from the patients, the virus was identified as a novel coronavirus. Moreover, the genetic sequence was also provided for the diagnosis of viral infection.[562] Initially, it was suggested that the patients who had contracted the novel coronavirus induced pneumonia in China might have visited the seafood market where live animals were sold or may have used infected animals or birds for food. However, further investigations showed that some people got the virus even with no history of visiting the seafood market.[563] These observations indicated a human to the human spreading capability of this virus, which was subsequently reported in more than 100 countries globally.[564] The human-to-human spreading of the virus occurs due to close contact with an infected person, exposed to coughing, sneezing, respiratory droplets or aerosols. These aerosols can penetrate the human body (lungs) via inhalation through the nose or mouth.[565]

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[558] Rahman A & Sarkar A. 2019. *Risk Factors For Fatal Middle East Respiratory Syndrome Coronavirus Infections In Saudi Arabia: Analysis Of The WHO Line List, 2013-2018*, American Journal of Public Health, 109(9): 1288-93

[559] Memish ZA, et al. 2013. *Family Cluster of Middle East Respiratory Syndrome Coronavirus Infections*, New England Journal of Medicine, 368(26): 2487-94

[560] Wang C, et al. 2020. *A novel coronavirus outbreak of global health concern*, The Lancet.

[561] Ibid.

[562] Riou J, et al. 2020. *Pattern of early human-to-human transmission of Wuhan 2019 novel coronavirus (2019-nCov)*, Eurosurveillance; 25 (4)

[563] Parry J, 2020. *China Coronavirus: Cases surge as Official Admits Human-to-Human Transmission*, British Medical Journal Publishing Group.

[564] Li Q, Guan X, et al. 2020. *Early transmission dynamics in Wuhan, China, of novel coronavirus-infected pneumonia*, New England Journal of Medicine.

[565] Phan LT, et al. 2020. *Importation and Human-to-Human transmission of a novel coronavirus in Vietnam*, New England Journal of Medicine.

On 31st December 2019, China alerted the World Health Organisation that it had regsitered 44 cases of pneumonia with an unknown cause between December 31 and 3 January. Although there had been several cases of pneumonia in December and possibly November in Wuhan, this was the moment that the world's attention was drawn to the mysterious illness.[566] On January 9th, 2020, the virus claimed its first life, as China reported two days later. In the next thirteen days, Wuhan province was placed under lockdown. World Health Organisation noted that there was increasing evidence for human-to-human transmission. By the end of January, 9,927 cases and 213 deaths had been reported, and the United Kingdom reported its first case then. The infection was subsequently named Covid-19, and in mid-February, cases were recorded in Africa, and France registered its first death. On March 11, there were 125,875 cases and 4,615 deaths. The World Health Organisation declared the disease a pandemic. By April 2, there were over one million confirmed cases worldwide, with over 75,000 recorded deaths.[567]

In Uganda, the Minister of Health, Dr Jane Ruth Aceng, confirmed that Uganda registered her first case of COVID-19 on Saturday 21st March 2020. The confirmed case was a 36- year old Ugandan male who arrived from Dubai on Saturday 21st March 2020 at 2:00 am aboard the Ethiopian Airlines. As of April 02, 2020, the country had registered 44 confirmed cases of Covid-19. The majority of the cases were travellers returning from United Arab Emirates (14), United Kingdom (14) and other countries. At this time, some districts like Makasa (3), Hoima (2), Adjumani (1), and Iganga (1) had also registered cases, and it was not clear if these were secondary to the on-going active transmissions.[568]As of May 17th 2021, the cases grew, and Uganda had confirmed 42,779 cases and recorded 347 deaths.

Therefore, the rampant growth of the virus had a significant impact on the different sectors of governments worldwide. Countries were tasked to adopt new measures in order to cope with the pandemic. Most countries went into lockdown, and a return to normalcy is still a dream. It can even be argued that the pandemic has created a new normal, which might be around for longer than anticipated.

Uganda's COVID-19 control legal measures were announced by the President, and the Minister of Health published them as legal instruments under the Public Health Act a few days later. This declaration went against Uganda's established legal procedure, and as a result, it distorts the

[566] Clarke S, Antonio V, et al. 2020. *How Coronavirus spread across the globe-visualised*, The Guardian; April 09, 2020, available at; https://www.theguardian.com/world/ng-interactive/2020/apr/09/how-coronavirus-spread-across-the-globe-visualised (accessed on July 28, 2021)
[567] Ibid.
[568] Dr. Jane Ruth Aceng, April 02, 2020. Update on the Covid-19 response in Uganda, Ministry of Health Press Release, available on; https://www.health.go.ug/covid/2020/04/02/update-on-the-covid-19-response-in-uganda/ (accessed on May 17, 2021)

separation of powers as we know it, allowing the executive to make pronouncements that would later be codified for implementation. As a result, various far-reaching initiatives to respond to the situation were declared and implemented. All schools and educational institutions were closed; incoming and outgoing passenger planes were barred; most people were confined within the country; and most companies were prohibited from operating. The majority, if not all, of these actions were conducted in accordance with the Public Health Act.

The presidential election in Uganda was place on January 14, 2021. Weeks of violence preceded it, including the arrest of opposition candidates, the kidnapping of party and campaign staff held at undisclosed military locations, and the killing of at least 54 protestors and bystanders by the 2 military between November 18-20, 2020, as well as the wounding and mutilation of hundreds. The arrest and incarceration of lawyers working for opposition candidates accompanied the violence. The military spread out across Uganda's towns and cities two days before the election, creating an atmosphere of dread and compulsion that caused many, if not all, voters to stay home.

The Electoral Commission banned campaigning in much of Kampala and other municipalities a week before the poll. The prohibition was imposed only to urban strongholds of opposition candidates, with the pretence of preventing gatherings due to COVID-19. The election was held under a repressive and coercive environment. Beginning the day before the election, military and police forces fanned out across Uganda. Armed personnel carriers and other military vehicles made their way through Kampala and other cities.

As a result of these events, there were far reaching impacts on the economy and human rights of citizens of Uganda. The roles and powers of the legislature as we know them were significantly altered by the pandemic.

The constitution is the supreme law of the land, and any other law which contravenes the constitution is null and void to the extent of its inconsistency.[569] Therefore, the powers that allow anybody to make law are enshrined in this constitution. Chapter six of the Constitution provides for the Legislature and its roles, making laws.

Article 79(1) of the Constitution provides that subject to the Constitution's provisions; Parliament shall have the power to make laws on any matter for the peace, order, development and good governance of Uganda. Therefore, this provision gives the parliament the power to make any law that governs the daily workings in the jurisdiction of Uganda.

Article 79(2) further provides that except as provided in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda except

[569] Article 2 of the Constitution of the Republic of Uganda, 1995, as amended

under authority conferred by an Act of Parliament. This provision bars any other body or person from making any other law for governing the country except as provided by the law.

The two provisions vest all the law-making power into the parliament, and the parliament has over time devised a procedure of making the laws, which is peculiar to their work and has over time brought forth the laws that manage the country.

It is important to note that the Constitution envisages other times when laws can be made without following the provisions of Chapter six strictly. Indeed, Article 99(5) of the Constitution provides that the signature of a Minister may authenticate a statutory instrument or other instrument issued by the President or any person authorised by the President; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President.

This provision of the law seems to give the president the power to make statutory instruments that the minister can pass as law upon signature by the minister. Recently, the president of Uganda made declarations which were later codified by the Minister of Health and signed for operation as guidelines during the subsistence of the law. However, these laws were made according to the powers given to the minister for secondary legislation, as discussed in the subsequent writings.

Article 110 of the Constitution provides that the President may, in consultation with the Cabinet, by proclamation, declare that a state of emergency exists in Uganda or any part of Uganda.

If the President is satisfied that circumstances exist in Uganda or in that part of Uganda in which Uganda or that part of it is threatened by war or external aggression; in which the security or the economic life of the country or that part is threatened by internal insurgency or natural disaster; or which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community.

This state of emergency only subsists for ninety days and then expires, except where Parliament extends the days for a period not exceeding ninety days at a time. Such a declaration by the president must be laid before Parliament for approval as soon as practicable and in any case not later than fourteen days after it was issued.[570]

It is important to note that subject to the Constitution's provisions; Parliament must enact such laws as may be necessary for enabling effective measures to be taken for dealing with any state of emergency that may be declared under this article.[571] This means that after the declaration, any orders made by the president must be codified by parliament.

[570] Article 110 (1) (2) (3) (4) of the Constitution of the Republic of Uganda, 1995, as amended
[571] Article 110 (7), Ibid

The law-making process takes quite some time to bring the law into enactment. The justification for this period can be attributed to the need to uphold democracy, transparency, and community involvement. If laws were passed any earlier, any of these would stand threatened and, in the long run, would affect the good governance of the country and the social contract of the same.

However, the nature of pandemics is that it has no respect for timelines. They tend to spread at unprecedented speeds and causing effects more profound than any law, however well crafted, could ever atone. This, therefore, poses the greatest threat to the law-making process because the parliament will under normal circumstances not be able to pass a law in time to manage the mode of operation during times of the pandemic.[572]

Therefore, the challenge was that the government had to take drastic measures to slow down the rate at which the virus was spreading, and this was to be done while respecting the law. At that time, several far-reaching measures were announced, and effected, to respond to the crisis: all schools and educational institutions were closed, incoming and outgoing passenger flights prohibited, movements of most persons within the country restricted and the majority of business restricted from operating.[573]

To the extent that this was done on mere directives, without regard to any known law-making procedures, it made the directives doubtful on their constitutionality and, therefore, on whether they should be allowed to operate. This, in effect, caused a ripple of violations to other substantive laws since the directives were not constitutionally backed.

The failure by the government to follow the ordinary law-making process has, in turn, affected the observation of other substantial laws. Central to this is the Human rights violation. Most of the directives issued by the president were to do with movement, assembly, health, to mention but a few. To a certain extent, these rights were limited for purposes of curtailing the spread of the virus. As much as the move was for good intention, the mode of doing the same was not backed up by law and amounted to a violation.

Article 43 of the Constitution of the Republic of Uganda provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. The provision further describes public interest that public interest under this article shall not permit, among other things, any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and

[572] Steiner, J., Woods, L. and Twigg-Flesner, C. (2003) Textbook on EC Law, Oxford, Oxford University Press, pp. 57--62.

[573] Busingye K., 2020. *The 1995 Constitution and Covid-19 by Dr. Busingye Kabumba*, [online], available at; https://observer.ug/viewpoint/64295-constitution-and-covid-19-are-presidential-directives-unconstitutional (accessed on 28th July, 2021)

demonstrably justifiable in a free and democratic society what is provided in this Constitution. Dr Busingye breaks down the meaning of this provision that the formulation of Article 43(2) was deliberate, and each word as employed in that provision has particular significance. The effect of this provision was to set a high bar for the limitation of human rights.[574]

The courts interpreted Article 43 in **Charles Onyango Obbo and anor v Attorney General, Constitutional Petition No. 15 of 1997**, which the Supreme Court upheld. The court elaborately stated thus;

"FREE AND DEMOCRATIC SOCIETY

This phrase now appears in the human rights provisions of many constitutions of the countries of the Commonwealth; Canada, Papua, New Guinea, Namibia, Zimbabwe, Nigeria and Zambia, to mention but a few. The phrase is not defined in any of the Constitutions, but the Courts of those Countries have developed and assigned definite meanings to the phrase. The meaning assigned to it is remarkably similar despite differences in social, cultural and political systems prevailing in each of the jurisdictions I have mentioned above. The most prominent authority on the meaning of the phrase "Free and democratic society" can be found in the decision of the Supreme Court of Canada in the case of ***Regina Vs Oakes (supra),*** *which many commonwealth jurisdictions have followed with similar Constitutional provisions as Canada. In the Canadian Constitution, the phrase "free and democratic society" is used in section 1, which is almost similar to our article 43 (2), where the same phrase is used. The Supreme Court of Canada stated:-*

"A second contextual element of interpretation of S.1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits of the rights and freedoms refers the Court to the purpose for which the Charter was originally entrenched in the Constitution. Canadian Society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for culture and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

[574] Ibid

ACCEPTABLE AND DEMONSTRABLY JUSTIFIABLE

This is the phrase used in article 43 (2) of our Constitution. In the Canadian Constitution, they use "reasonable and demonstrably justified." In my view, there is no significant difference between the two phrases. In the Canadian case of ***Regina Vs Oakes (supra),*** *the phrase was given meaning as follows:-*

"To establish that a limit (to rights and freedoms) is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective that the measures responsible for the limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a

Constitutionally protected right or freedom

The standard must be high in order to ensure that objectives that are trivial or discordant with the principles integral to a free and democratic society do not gain s.l (Our article 43 (2)) protection. It is necessary, at a minimum, that an objective related to concerns that are pressing and substantial in a free and democratic society before it can be characterised as sufficiently necessary. Secondly, once a sufficiently significant objective is recognised, then the party invoking s.l must show that the means chosen are reasonably and demonstrably justified. This involves a form of PROPORTIONALITY TEST... Although the nature of the proportionality test will vary depending on the circumstances, the Court will be required to balance the interest of society with those of individuals and groups in each case. There are, in my view, three essential components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: ***R Vs Big M Drug Mart Ltd Supra.*** *Thirdly, there must be proportionality between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of "sufficient importance."*

It can be argued, and successfully so that the government failed to meet this threshold laid down by the constitutional court twenty years before the current pandemic. The government set in the wake of the pandemic fell short of the threshold that is well prescribed in the law. One of how a measure can fail this high test is if it can be shown that the legitimate objective (the protection of public health in this instance) can be achieved through an alternative method that is less restrictive to human rights (in this case, the right to movement).[575] It can be said that the declaration of a state of emergency by the president would have allowed for directives that would be passed following the provisions of the Constitution.

[575] Ibid

COMPULSORY VACCINATION AND ITS PREDICAMENTS ON FUNDAMENTAL HUMAN RIGHTS IS IT AN EXECUTIVE UNFETTERED MANDATE?

Introduction:

When the case of **Vavricka V Czech Republic** was brought before the European Committee Court for Human Rights in 2015, the significance of the court's assessment of the case could not have been foreseen. Parents in the Czech Republic had refused to have their children vaccinated for various reasons, including their religious reservations, and were punished with either fines or exclusion from Kindergarten. Today, more than five years later, Covid-19 has a firm grip on Europe and the world. Even before breakthroughs in vaccine development were achieved, there were discussions about whether would or should be made compulsory. Opponents of (compulsory) vaccination often cite 'fundamental rights' as the basis for their stance. But what do fundamental rights or rather what does the European Court on Human Rights as the final European authority on the common European body of fundamental rights have to say about compulsory vaccination? This question thus, calls for a brief survey of the court's case law with regard to compulsory vaccinations, including the most recent decision, **Vavricka V Czech** Republic, and thus, attempts to serve as a guide when it comes to predicting how the court might rule on (possible) future cases.

WHAT IS COMPULSORY VACCINATION

Unsurprisingly, a vaccination system in which the enforcement of a duty to vaccinate ultimately ensured by the compulsory administration of the vaccine constitutes 'compulsory vaccination'. However, in most cases, states opt for rather indirect, relative forms of enforcement, which impliedly negative consequences in the case of the refusal to vaccinate but do not include compulsory administration. Such indirect means maybe fines or the linking of one's vaccination status to the enjoyment of certain (non- essential) services, like preschool, or situations, e.g., attending a concert. Considering that medical interventions are only to be carried out with the free and informed consent of the person concerned, it seems appropriate to define every vaccination system that mandates any negative consequence as a result of refusing to carry out vaccination as 'compulsory vaccination' subject to justification, as these consequences can and are intended to influence one's decision to get vaccinated. This seems to be in line with the definition of compulsory vaccination underlying the court's recent decision in Vavricka V Czech Republic, the court speaks of 'compulsory vaccination', although the duty can't be directly imposed, the highest fine for not vaccinating one's child is EUR400, which can only be imposed once, and the exclusion from educational institutions only concerns preschool, which is not part of the Czech Republic's

mandatory education. In the court's opinion, the consequences of non-compliance borne by the applicants cannot be meaningfully dissociated from the underlying duty. On the contrary, they flow immediately and directly from the applicant's attitude towards it and are therefore intrinsically connected to it. Hence, even if a vaccination is never forcefully administered, the negative effects, arising as a direct consequence of non-vaccination may limit the ability to exercise fundamental rights and constitute an inference. However, certain legal consequences interfere more intensely with fundamental rights than others, which is why the choice of these consequences subsequently has an influence on the assessment of proportionality of compulsory vaccination.

Vaccines are one of the most effective tools for protecting people against COVID-19. Consequently, with COVID-19 vaccination under way or on the horizon in many countries, some may be considering whether to make COVID-19 vaccination mandatory in order to increase vaccination rates and achieve public health goals and, if so, under what conditions, for whom and in what contexts. It is not uncommon for governments and institutions to mandate certain actions or types of behavior in order to protect the wellbeing of individuals or communities. Such policies can be ethically justified, as they may be crucial to protect the health and wellbeing of the public. Nevertheless, because policies that mandate an action or behavior interfere with individual liberty and autonomy, they should seek to balance communal well-being with individual liberties. While interfering with individual liberty does not in itself make a policy intervention unjustified, such policies raise a number of ethical considerations and concerns and should be justified by advancing another valuable social goal, like protecting public health. This document does not provide a position that endorses or opposes mandatory COVID-19 vaccination. Rather, it identifies important legal & ethical considerations and caveats that should be explicitly evaluated and discussed through ethical analysis by governments and or institutional policy-makers who may be considering mandates for COVID-19 vaccination.

THE CONCEPT OF COMPLUSORY VACCINATION

In 1976, British physician Edward Jenner developed the first vaccination, which employed the cow pox virus [vaccinia] to protect humans against small pox and similar viruses. Prior to that, Asian physicians used the notion of vaccination to protect infants from smallpox by giving them dried crusts from the lesions of adults who had the disease. Some people developed immunity, while others contracted the sickness. Jenner's contribution was the use of a chemical that was similar to smallpox but was safer. As a result, he took advantage of the rather uncommon condition in which immunization to one virus offers protection against another virus.

Injecting sheep with a preparation containing attenuated versions of the bacillus that causes anthrax established immunization against the disease in 1881, and four years later he discovered a protective solution against rabies.

Following Pasteur's death, a widespread and rigorous search for new vaccines was undertaken, with vaccinations against bacteria and viruses, as well as venoms and other toxins, being developed. By 1980, small pox had been eradicated globally thanks to vaccination, and polio occurrences had dropped by 99 percent.

Mumps, measles, typhoid fever, cholera, plague, tuberculosis, tularemia, pneumococcal infection, tetanus, influenza, yellow fever, Hepatitis A, and Hepatitis B are among the diseases for which vaccines have been developed. Some forms of encephalitis and typhus have vaccines, however some of them aren't 100 percent effective or are only used in high-risk populations. Vaccines against viruses are especially important for immune protection, as viral infections do not respond to antibiotics like bacterial infections do.

The difficulty in vaccine development is to create a vaccination that is effective enough to prevent infection without making the person sick. To that end, scientists have developed a variety of vaccines. Weakened or attenuated vaccinations are made up of microorganisms that have lost their potential to cause significant sickness but still promote immunity. They can cause a subclinical or mild type of disease. Measles, mumps, polio, and tuberculosis vaccinations are among those that have been attenuated.

Vaccinations that contain organisms that have been destroyed or inactivated using heat or chemicals are known as activated vaccines. Immune responses are elicited by inactivated vaccinations, but they are often less complete than those elicited by attenuated vaccines.

Advances in laboratory technology allowed vaccine development approaches to be developed in the late twentieth century. Medical researchers could figure out which genes in a pathogen encode proteins that trigger the immune response to that organism. Immune-stimulating proteins [antigens] might then be mass-produced and employed in vaccinations. It also enabled pathogens to be genetically modified and weakened viral strains to be created. In this technique, pathogens' toxic proteins can be removed or changed, resulting in a safer and more effective means of producing attenuated vaccines.

THE LEGALITY OF COMPLUSORY VACCINATION

Literally, vaccination is defined as an act of introducing a vaccine into the body to produce immunity to a specific disease.

Medically, vaccination is defined as the suspension of attenuated or killed microorganisms that is viruses, bacteria, or rickettsia are administered for prevention, amelioration or treatment of an

infectious disease. For example, anthrax vaccine a cell fee protein extract of cultures of Bacillus anthracis used for immunization against Anthrax.

According to the **American Heritage Medical Dictionary 2007 ,2004,** A vaccine is a preparation of weakened or killed pathogen such as a bacterium or virus or of a portion of the pathogen structure that upon administration to an individual stimulates antibody production or cellular immunity against the pathogen but is incapable of causing severe infection.

According to the **Legal Dictionary Thesaurus**. Vaccine is any preparation used to render an organism immune to some disease by inducing or increasing the natural immunity mechanism

In an **Article written by Emily K Brunson, Contributor to SAGE Publications Encyclopedia of Epidemiology [2008**] whose work for that Encyclopedia formed the basis of her contributions to Britannica. She defined a vaccine as a suspension of weakened, killed or fragmented microorganisms or toxins or of antibodies or lymphocytes that is administered primarily to prevent disease. Vaccines are usually administered by injection but some are orally or even nasally in case of a flu vaccine.

The Genesis of Vaccination

The first vaccine was introduced by British Physician Edward Jenner who in 1976 used the cow pox virus [vaccinia] to confer protection against small pox, related virus in humans. Prior to that use, however the principle of vaccination was applied by Asian Physicians who gave children dried crusts from the lesions of people suffering smallpox to protect against the disease. While some developed immunity, others developed the disease. Jenner's contribution was to use a substance similar to, but safer than small pox to convey immunity. He thus exploited the relatively rare situation in which immunity to one virus confers protection against another viral disease.

In 1881 French microbiologist Louis Pasteur demonstrated immunization against anthrax by injecting sheep with a preparation containing attenuated forms of bacillus that causes the disease, four years later he developed a protective suspension against rabies

After Pasteur'stime, a widespread and intensive search for new vaccines was conducted and vaccines against bacteria and viruses were produced as well as vaccines against venoms and other toxins. Through vaccination, small pox was eradicated worldwide by 1980, and polio cases declined 99 percent

Other diseases for which vaccines have been developed include mumps, measles, typhoid fever, cholera, plague, tuberculosis, tularemia, pneumococcal infection, tetanus, influenza, yellow fever, Hepatitis A, Hepatitis B. Some types of encephalitis and typhus although some of those vaccines are less than 100 percent effective or are used only in populations of high risk. Vaccines against viruses provide especially important immune protection, since unlike bacterial infections, viral infections do not respond to antibiotics.

THE VACCINE TYPES

The challenge in vaccine development consists of devising a vaccine strong enough to ward off infection without making the individual seriously ill. To that end, researchers have devised different types of vaccines. **Weakened or attenuated vaccines** consist of microorganisms that have lost the ability to cause serious illness but retain the ability to stimulate immunity. They may produce a mild or subclinical form of disease. Attenuated vaccines include those of measles, mumps, polio and tuberculosis

In activated vaccines are those that contain organisms that have been killed or inactivated with heat or chemicals. Inactivated vaccines elicit an immune response, but the response often is less complete than with the attenuated vaccine

In the late 20thcentury, advances in laboratory techniques allowed approaches to vaccine development to be refined. Medical researchers could identify the genes of a pathogen that encode then protein or proteins that stimulate the immune response to that organism. That allowed the immunity stimulating proteins [antigens] to be mass produced and used in vaccines. It also made it possible to alter pathogens genetically and produce weakened strains of viruses. In that way harmful proteins from pathogens can be deleted or modified, thus providing a safer and more effective method which to manufacture attenuated vaccines.

The outbreaks that warranted the vaccines

There have been five in the last 140 years with the 1918 flu pandemic in being the most severe, this pandemic being the most severe, is estimated to have been responsible for the deaths of 50 to 100 million people. The most recent, the 2009 Swine flu pandemic, resulted in under a million deaths and considered relatively mild.

The Historical medical library of the college of physicians of philaphedia

Influenza is an infectious disease commonly characterized by fever, muscled aches, sore throat, headache and fatigue. It is generally caused by two types of influenza, influenza A and influenza B, influenza C causes upper respiratory tract infections in young people but is not as common as other two types. Most people infected with influenza feel ill for several days and then recover.

People's protection from viruses depends on having been exposed to the virus before through infection. In either case, the immune system remembers the virus creates virus specific antibodies that will neutralize the virus when it next enters the body. But influenza viruses mutate or change, rapidly, every few year's influenza viruses mutate or change enough to result in a new strain. This process is known as antigenic drift. People who have been exposed to a related strain of throat virus will likely have some preexisting immunity to it in the form antibodies and the illness that results may be mild

Spanish influenza 1918-19

No other epidemic has claimed as many lives as the Spanish influenza epidemic in 1918-19. Worldwide as many as 40 million people died as this virulent illness swept through city after city [some estimates put total deaths closer to 70 million. Stories of people dying within hours of first feeling ill, the morality rate was highest among adults under 50, who were for unknown reasons particularly vulnerable to serious disease resulting from this strain of influenza

The first cases of influenza speared in Kansas in early spring 1918. Later that spring, officials reported large numbers of cases from Europe, through this flu seemed no more dangerous than the usual variety. However, in late summer, the virus became more deadly soon waves of infection moved through nations, towns and continents overwhelming hospitals and medical personnel. The Spanish Influenza came from the devastating effects of the flue in the autumn 1918.

In 1918 influenza had neither treatment nor an effective vaccine. Indeed, most exports at the time thought that a bacterium caused influenza rather than a virus. And though vaccines existed for several other diseases and a few useless and possibly harmful antifoul vaccines were concocted, an effective influenza vaccine was decades away

Later in the 1919 saw the last of the Spanish Influenza, the virus drifted into relative harmlessness through the 1920s and continued to circulate for several decades. Scientists have been able to classify the various responsible for the 1918 -19 pandemic H1N1 influenza.

Asian influenza 1957-58

Influenza remained a yearly occurrence after the 1918 occurrence after 1918 pandemic, but no new virulent influenza type emerged until early 1957. In February of that year, evidence began to surface about a serious wave of flue cutting a path through China

Maurice Hilleman, a microbiologist at Walter Reed Army Medical Centre, noticed news reports about in Asia. The number of cases led him to think that a new type of influenza was emerging and that a pandemic threatened. Hilleman and his team obtained a sample of the virus from a US serviceman, they soon determined that most people lacked antibody protection from the New influenza virus, which was an H2N2 type. Only certain older people who had survived an influenza pandemic of 1889 -1890 showed antibody response to the new virus.

Worldwide from 1957-1958, about 2 million people died from Asian flu with about 70,000 deaths in the United States.

Hong Kong Flue 1968-69

As in the pandemic just ten years earlier, the first signs of a new influenza. A strain emerged in Asia, the virus H3N2 reached the United States in September 1968 and peaked in the winter months. A vaccine became available but was not produced early enough to provide significant

protection. About 34000 people died in the United States during this pandemic, some scientists think that a similarity with 1957-58 Asian flu may have helped protect people from more serious disease.

Asian flu threat 1997 –Present

The next significant threat to emerge influenza came again from Asia, where an avian influenza [H5N1] infected birds and the spread to humans, a number of humans became ill and died from the virus The outbreaks were particularly severe in 2003-2004 when tens of millions of poultry and water fowl died from the flue. The virus however did not spread from person to person but only among birds and then to humans.

The most recent pandemic is the corona virus pandemic also known as the covid 19 pandemic which has ravished the entire world and killed millions of people, it has been surrounded by several controversies as to whether it was actually naturally caused or it was scientifically made.

The origin of the corona virus,

According to the **Oxford dictionary**, Virus is defined as an agent that typically consists of a nucleic acid molecule in a protein coat and is too small to be seen by light microscopy and is able to multiply only within the living cells of a host.

According to the **National Human Genome Research Institute**, a virus is a collection of genetic code, either DNA or RNA surrounded by a protein coat

On **December 30th, 2019**, cases of an unknown pneumonia were reported and soon associated to the exposure to the Wuhan sea food market. On **January 26th2020**, 33 of the 585 environmental samples from the Wuhan seafood market were found to contain the novel coronavirus nucleic acid suggesting the virus originated from wild animals sold on the market. At this point Wuhan seafood market being the suspected source of the epidemic became an official conclusion

However, an **Article in The Lacent paper** stated that the first patient was recorded on the **1st of December 2019** and had any relation with the Wuhan sea food market and no epidemiological link between the first patient and the latter cases. On **December 10th 2019,** there were more 3 cases and 2 cases of the 3 had no relation to the Wuhan seafood market and no one sells bats in the sea food market

On the **29th of January 2020**, Jinjatar hospital reported 99 cases and 50 of them had no history of exposure this was reported in the New England journal

Daniel Lucey says that if the new data are accurate the first human infections must have occurred in November 2019, if not because its incubation time between the infection and the symptoms surfacing,

The questions as to the origin of the virus and the cause started rising and the number pf cases

arose, on **January 18th2020**, question about why they included seafood criteria yet there were number of patients were not in any relation to sea food started to point out a cover up.

Discoveries about Shi Zhengli from her published 4papers about the SARS outbreak 2003 and research on how the coronavirus can be transmittable to humans, on **January 27th** the virus exploded and on the 3rd of February the Wuhan virus was inconsistent with the bat coronavirus. After Sars, the virology Centre was established by France and china agreed after SARS The Wuhan institute went ahead to patent the treatment from USA whistle blowers stated that Shi Zhengli might have led to the virus escaping from the level 4 laboratory.

Furthermore, **Nobel Prize winner 2018 Japanese physician, scientist and immunologist, Dry Tasuku Honjo** stated that coronavirus is not natural, if it were natural it will not have affected the whole world due to the difference in temperatures in different countries precisely countries with the same temperature as China. He says having worked in the Wuhan laboratory for 4 years the virus must have been manufactured and therefore based on his research and acknowledges he concurs 100 percent that corona is not natural.

Several suits have been filed against the communist party and the Chinese government

On 24th March 2021, in the United States; Texas Layer Larry filed a complaint in the Texas Federal court seeking at least 20 million dollars from the Chinese government

On the 4th of April, 2021, in the United Kingdom, the British think tank, Henry Jackson society advocated for compensation of 351 billion pounds from the communist party to the UK

On the 4th April 2021, the All India Bar Association filed a complaint to the United Nations Human Rights council seeking unspecified amount.

Kennedy suit

With the disputes about how the coronavirus came up many are relating it to conspiracy theories of the **one world order, one world economy and one world religion and 5G network** and the negligence of the communist party by it covering up the outbreak and information about the cause of the corona virus and its existence which has cost many countries lives. Data has become like oil as many countries are in need of it, they cause war themselves on the social media and people embark on these wars

With the rise of the super power countries most of them are greedy for power and will stop at nothing to see that the world is ruled by them and everything in it or around it. China, United States is the most powerful countries having an economic war

With the rising cases of the coronavirus and some of the countries being under the lockdown and restrictions being made on the movement in and out of the country the question arises as to whether we as a world are not headed for a world where vaccination against coronavirus shall become a pre

requisite for travelling hence compulsory vaccination. Different countries have different laws that govern their medical personnel as to how such incidents are to be handled and here we question the legality using **Uganda as the case in point** checking its laws in relation to curbing spread of infectious diseases.

Section 19[576],it provides that public health allows restrictions on some rights so as to achieve overriding goals.

Article 16 [2] of the African charter on human and people's rights [577], it states that parties to this charter shall take necessary measures to protect the health of their people and ensure that they re**ceive medical attention when they are sick.**

Article 43,[578]it provides for enjoyment of rights and freedoms, no person shall prejudice fundamental or other human rights and freedoms of others or the public interest.

In conclusion, we can go ahead and question the legality of the compulsory vaccination as per the rights of the people but we have to agree that the state has the mandate to ensure protection of its citizens and take all necessary measures. The theories and questions about vaccines have been in existence and pandemics will continue to test our human capacity on how ready we are to stop them.

It's worth noting that the European court of Human Rights (ECHR) ruled that mandatory vaccination is necessary in democratic society, and even suggested that penalty against parents who refuse to vaccinate their children would be upheld[579].

LEGAL CONSIDERATIONS AND THE INTERFERENCES WITH FUNDAMENTAL HUMAN RIGHTS.

In this section I focus on the constitutional issues concerning compulsory vaccination laws. My position is that every state requires compulsory vaccination of all children, unless there is a medical reason why the child should not be vaccinated. In other words, there should be no exception to the compulsory vaccination requirement on account of the parents' religion, philosophy, or conscience or for any reason other than medical necessity. Simply put, the government's interest in protecting children and the preventing the spread of communicable disease justifies mandatory vaccinations for all children. However, certain legal consequences interfere more intensely with fundamental rights than others, which is why the choice of these consequences subsequently has an influence on the assessment of proportionality of compulsory vaccination. Arguments in this section raised

[576] The public Health Act Cap 281
[577] African charter on Human and Peoples rights
[578] 1995 constitution of the Republic of Uganda
[579] Look at Vavricka and others versus Czech Republic where the it was dicussed whether the impact of Covid 19 impact would likely impact vaccine policy

against compulsory vaccinations will be examined with regard to their coverage in the fundamental rights to which they refer. The analysis will focus on the right to life as enshrined in Article 2 of the European Commission of Human Rights & Article 22 of the 1995 Ugandan constitution as amended, the right to respect of privacy and family as envisaged within Article8 & Article 26 of the 1995 Ugandan Constitution as amended respectively and the freedom of thought, conscience and religion. Since the court and the European Commission of Human Rights have dealt with alleged interferences with the said rights by vaccination in previous cases first, the argument that the risk of death associated with vaccination is high as voiced in **Boffa & 13ors Vs San Marino** is hereby assessed in light of the right to life. Thus, diseases are part of life some of course, as the current Covid 19 pandemic shows, affect our daily lives more severely than others. Some again, have lost their terrifying nature mainly because of vaccines. The World Health Organization estimates that vaccinations against diphtheria, tetanus, pertussis, influenza and measles save the lives of up to 3million people each year. But vaccination s doesn't offer absolute protection and side effects as well as vaccine associated deaths however, rare they can occur. its therefore reasonable to consider whether, and if so how, the right to life addresses such situations. The effective functioning of this protection of this right to life is to be ensured by implementing appropriate legal frameworks as well as enforcement or control mechanisms, and by conducting effective investigations into deaths, even if states are not responsible themselves. These principles also apply to the sphere of public health but if all necessary measures are to be taken, appropriate regulations are in place and an effective investigation was conducted, the states cannot be accountable. However, the court doesn't define which particular measures are to be taken as this fall within the state's 'margin of appreciation' therefore a variety of measures can fulfil the imposed positive obligations.

For vaccines which interfere with an individual's bodily integrity, this means that the right to life is only affected when potentially life-threatening circumstances arise in the individual case. Such a threat posed by the vaccination is conceivable, for example, in the case of allergies or other contraindications on the part of the person concerned. Vaccine-associated deaths, on the other hand, clearly do fall within the scope of protection. Since the primary aim of vaccination programs is to protect the individual concerning as well as the population as a whole, these are technically to be regarded as unintentional killings, for which the state is additionally required to have breached its obligation to take 'appropriate steps to safeguard life' to be liable. In this regard the decision rendered by the European Commission on Human Rights in Association of **Parents Vs the United Kingdom** explicitly states that if a state maintains a control and monitoring system that aims to minimize vaccine associated side effects, isolated fatalities don't constitute an interference with right of life. This of course can only be true for isolated fatalities that were unforeseeable.

Therefore, a prerequisite for the states to ensure compliance with the positive obligation to protect lives is, that an individual examination has been made to rule out the existence of contraindications. This, consequently implies the obligation to provide for exceptions to the duty to vaccinate when medically indicated.

Compulsory vaccination is therefore not per se an interference with the right to life in its manifestation as a prohibition of intentional killings as long as sufficient precautionary measures are in place not even if isolated life-threatening events or deaths occur. But could **Article2 of European Human Rights Commission & Article22 of the 1995 Ugandan Constitution as amended,** on the other hand, oblige the state to introduce compulsory vaccination through its positive obligations? The state's duty to protect its population from foreseeable or typical threats to life, does also include requirements for the sphere of health care. In order to prevent threats, the sates must enact protective regulations including such dealing with infectious diseases, as the uncontrolled spread of infectious diseases can pose a threat to the population.

However, an infection with a disease is generally not to be qualified as a direct threat to life, which means that **Artile2 and Article22 of the European Human Rights Commission & the constitution of Uganda as amended** is again only affected I situations in which a life-threatening factor enters into the equation. It is conceivable that life is endangered by infection, for example people belonging to a high-risk group who cannot be immunized or vaccinated. This applies to people without a fully working immune system e.g., because they suffer from chronic illness or severe allergies, undergo chemotherapy or are simply too young or too old to be vaccinated. These people are more dependent on 'herd immunity', which describes the condition that the disease can no longer spread as easily because a large part of the population has been vaccinated and therefore immune. Non-vaccinated people endanger herd immunity, and by that endanger those dependent on herd immunity, as they do not contribute to it through their own immunity and additionally contract and spread infectious diseases more easily. The existence of this danger to life is known to the states, as the existence of regulations tackling the problem of infectious diseases demonstrate, which is why a failure to act, at least in the case of epidemics or pandemics, where the abstract danger becomes concrete, would qualify as an interference.

Since there are no specifications as to which measures need to be taken in order to comply with the duty to protect life, different approaches may be permissible in the organization of health care systems. Moreover, there is no agreement among the convention states on how to deal with infectious diseases, which generally enlarges the margin of appreciation left to the states. The states therefore have a great deal of discretion in their choice of means. Thus, although there is an obligation to take measures to immunize the population in general, this obligation can be met both

through compulsory vaccination and through voluntary vaccination plans. But the absence of an obligation to introduce compulsory vaccination doesn't in turn constitute a prohibition to introduce such a comparatively strict measure as in the words of the court, matters of health care policy, in particular as regards general preventive measures are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs. Finally, the obligation to conduct an effective investigation also applies to vaccine associated deaths, as a link between vaccination and death can only be established through appropriate investigations. This is due to the fact that death can shortly after the administration of a vaccine may be coincidental and not causal as e.g., it is possible that the cause of death may be completely unrelated to the vaccination or death was caused by inappropriate handling, contamination or other medical errors, but not by the vaccine itself. If the investigations were insufficient or completely omitted, this would constitute an interference.

Secondly, the notion of 'private life' essentially safeguards the right to make decisions over one's own body and body and life. The vigilance in this, is a creature of **Objective XX under the National Objectives and Directive Principles of state Policy**, as stipulated in the 1995 Constitution enjoins the state to take all practical measures to ensure the provision of basic medical services to the population. This consequently includes health related decisions as well. Medical treatment typically interferes with one's physical (also possibly one's psychological or even moral) integrity and any generally only be carried out with the consent of the person concerned. The case law of the erstwhile commission and the court considers every medical intervention against the will of the individual an interference with Article8 of the European Commission for Human Rights a clear reflection of **Article 26 of the 1995 Ugandan constitution as amended**. As compulsory vaccination in its absolute form is by definition carried regardless of whether one has consented or not, the lack of consent as well as the intrusion of the person's physical integrity undoubtedly interfere with the afore mentioned Articles. In **Vavricka Vs Czeck Republic**, however, the court went one step further and held that the duty to get vaccinated and the consequences attached to it cannot be dissociated. Thus, even if no vaccination was actually administrated against one's will, the direct negative consequences arising from the non-compliance with the duty to get vaccinated constitute an interference with then right to respect for private life, thereby also subjecting relative, indirect forms of compulsory vaccination to the scrutiny of the court.

Another way the freedom of choice, as the essence of the right to privacy manifests is in the ability to decide whether certain personal information data should remain secret. This particularly applies to health data. Therefore, the collection, storage and use of data by the state, if no consent was given is an interference requiring justification. Also, states must enact legal frameworks capable of

preventing abuse or arbitrary use of personal information. Data protection is relevant for compulsory vaccination as its effective monitoring would most likely require an overview of the vaccination status of the population i.e., the collection, storage and processing of this information. This would thus constitute a further interference with the right to privacy if the individuals didn't agree or the legal framework was deemed insufficient or wasn't enacted at all. At least for member states of the EU, however a sufficient legal framework should be in place through the General Data Protection Regulation. However, an obligation to introduce compulsory vaccinations cannot be derived from the fundamental human rights either. Thus, the state must under certain circumstances provide for measures to eradicate diseases, but the court doesn't specify which means are to be implemented to do so. The fact that there is no obligation does, once again, not in turn constitute a prohibition to introduce compulsory vaccination as choice of means.

HOW TO INTRODUCE COMPULSORY VACCINATION

As far as court's examination of justification is concerned, the focus is clearly on whether the interference is 'necessary in a domestical society'. The issue of whether the interference is 'prescribed by law' and if it pursues a legitimate aim was treated as more of a formality in previous cases dealing with compulsory vaccination. This shows, for example in **Solomakhin Vs Ukraine**, where the court answered these questions in one sentence only: the court further notes that such reference was clearly provided by law and pursued the legitimate aim of the protection of health. Admittedly. The court dealt with these two conditions at greater length in **Vavricka Vs Czeck Republic** than in **solomakhin Vs Ukraine** however, this wasn't due to any particular problems arising but probably rather to the particular relevance of the case, of which the court was seemingly aware as indicated by some strikingly detailed elaborations within the judgment.

To be considered 'prescribed by law' there must be an act attributed to the state introduces the measure but there is no restriction to written laws. Further, this act must meet formal and substantive requirements. Formally, it has must be enacted in accordance with national legal order i.e., by the competent organ and following prescribed procedure. There is no limitation to primary legislation, legal acts and law. Also, the content of this act must be clear, foreseeable and adequately accessible being subject to mechanisms that preclude misuse.

The 'legitimate aims' at least one of which a measure must further in order for it to be potentially justified are listed in the respective paragraphs 2 of Articles 8& 9 of the European Commission of Human Rights. **Both Articles 8 & 9 of the European Commission for Human Rights and similarly Article43 of the 1995 Ugandan Constitution** allow interferences in the interest of 'public safety', the 'protection of health or morals' and 'protection of the rights and freedoms of

others' this can include national security, the economic wellbeing of the country and the prevention of disorder or crime. In order to justify compulsory vaccination, several of the legitimate aims could be considered applicable. In addition to the 'protection of the human rights and freedoms of others, the protection of health is, unsurprisingly, particularly relevant. Since vaccinations against diseases which are transmissible from one person to another, protect the individual, but also society, the protection of health is affected in both its individual & societal dimensions. In the context of the above Articles, the legitimate aim of prevention of disorder or crime would also be conceivable, if the intentional and or negligent endangerment of others by communicable diseases is forbidden by law in the jurisdiction concerned.

ETHICAL CONSIDERATIONS AND CAVEATS REGARDING MANDATORY PANDEMIC VACCINATION.

The following considerations and caveats should all be explicitly evaluated and discussed through an ethical analysis by governments and/or institutional policy-makers who may be considering mandates for COVID-19 vaccination. They should be considered alongside other relevant scientific, medical, legal, and practical considerations not described in this document.

Necessity and proportionality.

Mandatory vaccination should be considered only if it is necessary for, and proportionate to, the achievement of an important public health goal (including socioeconomic goals) identified by a legitimate public health authority. If such a public health goal (e.g., herd immunity, protecting the most vulnerable, protecting the capacity of the acute health care system) can be achieved with less coercive or intrusive policy interventions (e.g., public education), a mandate would not be ethically justified, as achieving public health goals with less restriction of individual liberty and autonomy yields a more favorable risk-benefit ratio. As mandates represent a policy option that interferes with individual liberty and autonomy, they should be considered only if they would increase the prevention of significant risks of morbidity and mortality and or promote significant and unequivocal public health benefits. If important public health objectives cannot be achieved without a mandate for instance, if a substantial portion of individuals are able but unwilling to be vaccinated and this is likely to result in significant risks of harm their concerns should be addressed, proactively if possible. If addressing such concerns is ineffective and those concerns remain a barrier to achievement of public health objectives and or if low vaccination rates in the absence of a mandate put others at significant risk of serious harm, a mandate may be considered "necessary" to achieve public health objectives. In this case, those proposing the mandate should communicate the reasons for the mandate to the affected communities through effective channels

and find ways to implement the mandate such that it accommodates the reasonable concerns of communities. Individual liberties should not be challenged for longer than necessary. Policy-makers should therefore frequently re-evaluate the mandate to ensure it remains necessary and proportionate to achieve public health goals. In addition, the necessity of a mandate to achieve public health goals should be evaluated in the context of the possibility that repeated vaccinations may be required as the virus evolves, as this may challenge the possibility of a mandate to realistically achieve intended public health objectives.

Sufficient evidence of vaccine safety

Data should be available that demonstrate the vaccine being mandated has been found to be safe in the populations for whom the vaccine liberties should not be challenged for longer than necessary. Policy-makers should therefore frequently re-evaluate the mandate to ensure it remains necessary and proportionate to achieve public health goals. In addition, the necessity of a mandate to achieve public health goals should be evaluated in the context of the possibility that repeated vaccinations may be required as the virus evolves, as this may challenge the possibility of a mandate to realistically achieve intended public health. Furthermore, coercive exposure of populations to a potentially harmful product would violate the ethical obligation to protect the public from unnecessary harm when the harm the product might cause outweighs the degree of harm that might exist without the product. Even when the vaccine is considered sufficiently safe, mandatory vaccination should be implemented with no-fault compensation schemes to address any vaccine-related harm that might occur. This is important, as it would be unfair to require people who experience vaccine-related harm to seek legal remedy from harm resulting from a mandatory intervention Such compensation would depend on countries' health systems, including the extent of universal health coverage and how they address harm from vaccines that are not fully licensed (e.g., vaccines authorized for emergency or conditional use)

Data on efficacy and effectiveness should be available that show the vaccine is efficacious in the population for whom vaccination is to be mandated and that the vaccine is an effective means of achieving an important public health goal. For instance, if mandatory vaccination is considered necessary to interrupt transmission chains and prevent harm to others, there should be sufficient evidence that the vaccine is efficacious in preventing serious infection and/or transmission. Alternatively, if a mandate is considered necessary to prevent hospitalization and protect the capacity of the acute health care system, there should be sufficient evidence that the vaccine is efficacious in reducing hospitalization. Policy-makers should carefully consider whether vaccines authorized for emergency or conditional use meet evidentiary thresholds for efficacy and effectiveness sufficient for a mandate

Sufficient supply

In order for a mandate to be considered, supply of the authorized vaccine should be sufficient and reliable, with reasonable, free access for those for whom it is to be made mandatory (i.e., there should be few barriers that make it difficult for populations affected by the mandate to access the vaccine). The absence of a sufficient supply and reasonable, free access would not only render a mandate ineffective in achieving vaccine uptake, but would create an unduly burdensome, unfair demand on those who are required to be vaccinated but are unable to access the vaccine. Such a mandate would threaten to exacerbate social inequity in access to health care

Public trust

Policy-makers have a duty to carefully consider the effect that mandating vaccination could have on public confidence and public trust, and particularly on confidence in the scientific community and public trust in vaccination generally. If such a policy threatens to undermine confidence and public trust, it might affect both vaccine uptake and adherence to other important public health measures, which can have an enduring effect. In particular, the coercive power that governments or institutions display in a program that undermines voluntariness could have unintended negative consequences for vulnerable or marginalized populations. High priority should therefore be given to threats to public trust and confidence amongst historically disadvantaged minority populations, ensuring that cultural considerations are taken into account. Vaccine hesitancy may be stronger in such populations and may not be restricted to concerns of safety and efficacy as mistrust in authorities may be rooted in histories of unethical medical and public health policies and practices as well as structural inequity. Such populations may regard mandatory vaccination as another form of inequity or oppression, making it more difficult for them to access jobs and essential services. The extent to which mandatory vaccination policies accommodate conscientious objection may also affect public trust. There should, however, be strict scientific and prudential limits to appeals for accommodation or "conscientious objection", especially when such accommodation might be used by individuals to 'free ride' the public health good of herd immunity or if they threaten public health and others' right not to be infected with a virulent infectious disease

Ethical processes of decision-making

Transparency and stepwise decision-making by legitimate public health authorities should be fundamental elements of ethical analysis and decision-making about mandatory vaccination. Reasonable effort should be made to engage affected parties and relevant stakeholders, and particularly those who are vulnerable or marginalized, to elicit and understand their perspectives. Steps should be taken in good faith to respect human rights obligations not to discriminate or disproportionately disadvantage vulnerable populations. Legitimate public health authorities that

are contemplating mandatory vaccination policies should use transparent, deliberative procedures to consider the ethical issues outlined in this document in an explicit ethical analysis, including the threshold of evidence necessary for vaccine safety and efficacy to justify a mandate. As in other contexts, mechanisms should be in place to monitor evidence constantly and to revise such decisions periodically.

Conclusion.

Vaccines are effective for protecting people from COVID-19. Governments and or institutional policy-makers should use arguments to encourage voluntary vaccination against COVID-19 before contemplating mandatory vaccination. Efforts should be made to demonstrate the benefit and safety of vaccines for the greatest possible acceptance of vaccination. Stricter regulatory measures should be considered only if these means are not successful. A number of ethical considerations and caveats should be explicitly discussed and addressed through ethical analysis when considering whether mandatory COVID-19 vaccination is an ethically justifiable policy option. Similar to other public health policies, decisions about mandatory vaccination should be supported by the best available evidence and should be made by legitimate public health authorities in a manner that is transparent, fair, nondiscriminatory, and involves the input of affected parties.

PROJECTED CONSEQUENCES IN RESPECT TO COMPULSORY MEDICATION

Normally, when the world is faced with disease, there is always an effort to invent a cure. While this is desirable to return the world to normalcy, it often creates competition among states and opposition towards medicines developed for the sake of curbing the disease.

For example, vaccination against Covid-19 is seen as a way back to normality, an opportunity to run away from the current restrictions which do not allow shaking hands, hugging or traveling freely. For some people, vaccination promises freedom from the fear that the virus may strike them, a relative or a friend, hope of reinvigorating a moribund livelihood or resuming a child's disrupted education.[580]

The controversy over vaccines is not novel. When Edward Jenner invented the first vaccination against smallpox in 1796, it was at first seen as miraculous solution to an illness which was killing millions of people worldwide. But it did not take long before his vaccination began to create opponents and when smallpox vaccination was made mandatory in the UK by the Vaccination Act of 1853, the legislation increased resistance.[581]

[580]Anne McMillan, Friday 19 March 2021. "Mandatory vaccination: legal, justified, effective?" International Bar Association, [online] available at; https://www.ibanet.org/Article/70E1F93E-A23B-4F1A-A596-AEEF84750241 (accessed on May 28th, 2021)
[581]Ibid

In the late 19th century there was immense anti-vaccination sentiment in many parts of Britain. Anti-vaccination fora were formed and large numbers of people took to the streets to demonstrate against what they thought of as an invasive practice. Objections included religious or health issues, along with the recurring narrative of the trampling of individual rights, which reflect in the cries of modern day vaccine objectors. The scale of anger caused the legislation to be amended in 1898 to allow for conscientious objection to receiving a vaccine.[582]

With the Covid-19 pandemic, the concern has gained popularity and not just in Britain. Around the world the conflicting ideology over vaccines seems as strong today as it was when Jenner first discovered his vaccine to smallpox. Two centuries later, familiar objections are being raised by vaccine opponents, some of which beg a hearing. There is a need to recognise that past general vaccine sceptics and/or those simply buying into the latest narrative expressed on social media, many people may have genuine fears and anxieties about vaccination in general.[583]

One characteristic of vaccination is that its preventative rather than curative nature and so is generally given out on a widespread scale, thus enlarging any potential risk. As the European Commission President, Ursula von der Leyen who is a qualified physician, said when justifying the long time, it took for the European Union to pass early Covid vaccines safe: 'A vaccine is the injection of an active biological substance into a healthy body. We are talking about mass vaccination here, it is a gigantic responsibility.'[584]

The problem of how to overcome vaccine fear is compounded by obscure areas in scientific and medical research. There may have been great advances in research since the 19th century, but even so, results are not always clear or complete. This can lead to genuine concerns about possible ill effects and the waters are further muddied by extremist pseudo-scientific or sometimes demonstrably fake claims (such as that the Covid vaccines are being used to implant microchips in people's bodies).[585]

Such concerns are undoubtedly exacerbated when insufficient information is given by governments regarding the potentially, if comparatively rare, adverse effects of vaccines. Robert Krakow, a US attorney who has represented many clients claiming injury by vaccines, suggests that extremist claims gain more traction precisely because governments are not fully transparent and thus lose public trust. 'The government effort to hide the existence of vaccine risk (by choosing to not

[582]Ibid
[583]Ibid
[584]Speech by President von der Leyen at the State of the Union conference of the European University Institute, 6th May, 2021, [online] available at; https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_2284 (accessed on May 28th, 2021)

[585]Supra note 51

acknowledge vaccine injuries) only sows greater distrust than if the government were more honest about the risks,' he says. 'I do think the rise in the number of people willing to believe in such theories and act on them is directly attributable to the government's duplicity, engendering extreme distrust.'[586]

One fear is that providing full disclosure of all known risks (including rare ones) may in itself provoke resistance to vaccines. Likewise, admitting areas where information is lacking, such as that the long-term effects of Covid vaccines are unknown, may have the same effect. Nevertheless, states should, generally, provide information transparently, as opposed to patronising their citizens through decision-making in a black box. From a political perspective, such an approach might simply feed conspiracy theorists and results in reduced compliance with governmental measures. From a legal perspective, there may even be an obligation resulting from the duty to protect the right to life and bodily integrity.[587]

Notably, there has been immense resistance to Covid-19 vaccination by influential people. Social media users are still actively sharing the video[588] uploaded by TV host Madona Koidze on August 14, 2020, in which Robert F. Kennedy Jr., an American anti-vaccine advocate and environmental lawyer, who is the nephew of former U.S. president John F. Kennedy, speaks about vaccines during an American talk show JONI Table Talk.[589] Kennedy recollects failed attempts of creating vaccines against SARS-Cov, respiratory syncytial (sin-SISH-uhl) viruses and dengue fever, saying that vaccines against these diseases had caused "enhanced immune response." He claims that the novel coronavirus vaccines may pose the same threat, noting that such doubts are further strengthened by the fact that Anthony Fauci, director of the U.S. National Institute of Allergy and Infectious Diseases, allowed vaccine manufacturers to skip animal trials and to go directly to human trials.

Thus, the challenge for governments and legislators is immense: how to devise an effective response to an ever-evolving threat which is taking the lives of citizens and undermining the economic and social fabric of nations. A vaccine offers the obvious solution, but should it be mandatory?[590]

The legal position on mandating vaccination for certain activities, both public and private, varies widely between countries. A study published last year in Vaccine, entitled 'Global assessment of national mandatory vaccination policies and consequences of non-compliance', examined this issue in 193 countries. The study found that over 100 countries have some kind of nationwide mandatory

[586] Brian Shilhavy, 2019. https://www.cga.ct.gov/2020/phdata/tmy/2020HB-05044-R000219-Wrinn,%20Chris%208-TMY.PDF
[587] Supra note 51
[588] https://www.facebook.com/madona.koidze17/posts/3502923619740672
[589] https://www.youtube.com/watch?v=HuMbRBTZhCY
[590] Supra note 58

vaccination policy. Of those, 62 states impose one or more penalties for non-compliance, mostly financial or educational (such as refusing school enrolment).[591]

Several countries have vaccination policies which could viewed as ‘mandatory’ to the extent that children without certain vaccines cannot attend school and/or their parents face fines or even imprisonment. But the principle of informed consent to medical procedures (sometimes required to be in writing) comes under severe strain when parents are ‘encouraged’ to vaccinate children under threat of such measures.[592]

Officially the Australian government has said that it will not make Covid-19 vaccination mandatory, but Alison Choy Flannigan, Publication and Newsletter Editor of the IBA’s Healthcare and Life Sciences Law Committee, says it is likely that ‘the vaccine will be made a condition of access to some government services’. Australia has taken a strong line in the past with its ‘no jab, no pay’ policies, blocking the right to certain tax reliefs for parents who refuse to vaccinate their children.

In Brazil, the Supreme Court has already ruled that it is legal for local governments to make Covid vaccination mandatory, while specifying citizens cannot be physically forced to have the vaccine. However, certain restrictions of the rights of vaccine refusers are envisaged, such as being disallowed a state benefit or refused school enrolment, not to mention being denied access to public transport or restaurants.

In the UK, the current policy is against any form of coercion. Yet, at the time of writing, one third of care home staff have declined a Covid vaccination. Thus, arises the difficult question of whether the right to bodily integrity can, or should, continue to prevail despite the risks to others, in this case the clinically vulnerable elderly? Could alternatives to vaccination, like frequent testing and the wearing of protective clothing, fill the gap? Is it only a matter of time before we see legal action if someone dies as a result of contracting Covid-19 from an unvaccinated staff member or official?

From just these few examples, it is apparent that national laws are inconsistent, with governments still grappling with complex, competing issues. And, as Connolly points out, punitive measures may do little to ‘overcome the crucial issue’. ‘How do you ensure enforcement? If the message is vaccination saves lives, including potentially your own or those of loved ones, there are perhaps better ways of getting that message across and ensuring take up.’ As the situation evolves, measures by countries restricting the rights of the unvaccinated seem likely to continue and it is perhaps inevitable that some of these will be challenged in the courts.

The effects of the president's directives on human rights and the regular operation of the rule of law

[591]Ibid
[592]Ibid

are far-reaching as far as the certainty of the law is concerned. Certainty of the law creates stability, and this stability ensures the development of a state.[593] In the preceding, there must be a sustainable way of employing the law in every circumstance, even in a global pandemic.

The 2019 novel coronavirus pandemic has challenged legislatures around the world. Questions have arisen about parliaments' operation during the pandemic, their role in combating covid-19, and their relationship with the executive and other state actors. This chapter will make an effort to analyse how other commonwealth countries have responded to global pandemics. This analysis will then be compared to the response of Uganda to the same. This will help establish if the Ugandan government's failures were not peculiar to her or not and, if not, to what extent did the state fail.

United States of America

The United States has responded to the COVID-19 pandemic at all levels of government. Congress has enacted legislation, and the President and the executive agencies have promulgated rules and regulations and taken other action to implement responses to COVID-19 to alleviate economic and societal impacts. State governments have acted in similar ways, enacting legislation and relying on their state agencies to respond to the pandemic, often targeting specific situations that impact their populations. Although local governments have narrower jurisdictional authority than state or federal governments, they have been on the front lines, supporting first responders and municipally-funded programs. Examples of local government responses range from creating mask mandates and policies to administrating funding received from state and federal governments for pandemic response.[594]

The coronavirus pandemic has prompted a comprehensive government response from the federal, state, and local governments. The federal government has enacted legislation to stimulate the economy and promote a robust public health response. It has also implemented policies through agency regulations and temporary rules to utilize the funding provided by Congress. State governments have approached the situation in a more varied way, targeting their specific populations with public health policy and economic responses. Local governments have responded within the framework of power delegated to them by their state governments, focusing their emergency powers on policies to protect their citizens and support their municipal economies.[595]

Under the US Constitution, Congress has the sole power to authorize funding out of tax revenue

[593] Corley, P., &Wedeking, J. 2014. *The (Dis)Advantage of Certainty: The Importance of Certainty in Language.* Law & Society Review, 48(1), 35-62. Available at; https://www.jstor.org/stable/pdf/43670375.pdf?refreqid=excelsior%3Aa0d4f9115320544cb232279f5f88fad9 (accessed on 27 May, 2021)

[594] The Library of Congress, 2020. "Responses to COVID-19 in the United States", [online] available at; https://www.loc.gov/law/help/covid-19-responses/us.php accessed on 27th May, 2021

[595] Ibid

and may do so for those purposes enumerated in the Constitution, including providing funding for the general welfare of the United States.[596] Within Congress's ambit is the power to respond to disasters and public health emergencies; however, during times of crisis, such as the coronavirus pandemic, many emergency powers have been delegated by Congress to the President, with direction from Congress on how to administer and distribute monetary relief through federal agencies.[597] The Constitution also provides that Congress must pass a law, referred to as an appropriation, to draw upon money in the Treasury.[598]Funding for public health and disaster response is provided under emergency spending, and generally, supplemental appropriations made due to a national emergency are exempt from other budgetary constraints.[599]

During the pandemic, Congress has enacted several public laws providing funding to help government agencies, states, localities, businesses, and individuals respond to the coronavirus. This funding has been designed to provide government intervention for public health resources (such as creating testing infrastructure) and stimulate the economy (in grants for businesses and direct payments to citizens). Congress has passed several critical pieces of legislation in response to the pandemic, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136), the Families First Coronavirus Response Act (FFCRA) (Pub. L. No. 116-127), and the Coronavirus Preparedness and Response Supplemental Appropriations Act (Pub. L. No. 116-123). In many instances, these laws direct federal agencies to use the funding provided to implement temporary rules in response to the pandemic.[600]

It can be concluded that the USA's laws envisaged such situations, and therefore, the legal response was predetermined. This means that their approach to the pandemic was eased by the fact that whatever was done was in the ambits of the law, and as such, no consequences were left to face.

Australia

Australia has a federal system of government with powers divided under the Constitution between the Commonwealth government and the country's six states and two mainland self-governing territories.[601] The matters over which the Commonwealth Parliament has legislative powers are

[596] Article 1 and 8(1) of the US Constitution

[597] See Jennifer K. Elsea et al., Cong. Res. Serv., R46379, Emergency Authorities under the National Emergencies Act, Stafford Act, and Public Health Service Act 1-2, [online] available at; https://perma.cc/XLU5-55UN (accessed on 27th May, 2021)

[598] Article 1 and 9(7) of the US Constitution.

[599] See James V. Saturno, Bill Heniff Jr., & Megan S. Lynch, Cong. Res. Serv., R42388, The Congressional Appropriations Process: An Introduction 19, [online] available at; https://perma.cc/2K5A-JNPT (accessed on 27th May, 2021)

[600] Supra note 53

[601] Kelly Buchanan, 2015. Australia: Legal Responses to Health Emergencies, [online] available at; https://www.loc.gov/law/help/health-emergencies/australia.php#_ftn1 (accessed on 27thMay, 2021)

listed in sections 51 and 52 of the Constitution.[602] Most of these legislative powers are concurrent, meaning that they are shared with state and territory parliaments. There is a conflict between state and federal laws, and the federal law will override the state law to the extent of the inconsistency.[603]

Section 96 of the Constitution provides the Commonwealth Parliament with the power to grant financial assistance to any state "on such terms and conditions as the Parliament thinks fit." In practice, this may include tying grants to the implementation of specific policies by the states.[604] Often such policies are the subject of agreements between the state and federal governments, such as through the mechanisms of the Council of Australian Governments (COAG). In addition, state and territory parliaments may refer matters within their legislative powers to the Commonwealth Parliament.[605]

Section 51(ix) of the Constitution provides that the federal government has legislative powers concerning quarantine. In addition, the commerce and trade powers under section 51 are interpreted broadly, enabling the Commonwealth Parliament to make laws in a range of health-related areas.[606]However, all other matters related to human health fall within the states' residual powers.

Public hospitals are owned and operated by state and territory governments, which also fund and deliver various health programs and services. However, due to long-term funding and policy arrangements, the federal government partially funds public hospitals and "is primarily responsible for health service funding; regulation of health products, services and workforce; and national health policy leadership."[607] Various national agreements impact funding, policy, and implementation arrangements within the health sector.

Under Australia's federal system, states and territories have primary responsibility for health care and emergency management matters. The federal government provides various funding, policy leadership, and coordination assistance in national responses to public health emergencies. It also has quarantine powers and powers related to border management that can be utilized to epidemic or threaten an epidemic. National agreements, as well as the National Health Security Act 2007, establish structures and processes for preventing and responding to national health emergencies, with different entities providing oversight and coordination at the national level and states and territories applying their laws, jurisdictional responses, and coordination processes. This includes a

[602] Section 51 and 52 of the Australian Constitution.
[603] Section 109, Ibid.
[604] Christopher Reynolds, 2011. *Public and Environmental Health Law*, the Foundation Press, Alexandria, Australia, p.44–45.
[605] section 51(xxxvii) of the Australian Constitution,
[606] Supra note 63, at p. 40–41.
[607] Australian Bureau of Statistics, 2012. *Health Care Delivery and Financing, in 1301.0*, Year Book Australia.

national notification and surveillance system under which state and territory authorities report certain diseases to a central authority, making information available for analysis and discussion. In the event of a public health threat, state and territory public health laws provide a range of powers to enable action to be taken by authorities. This can include ordering medical examinations, treatment, and detention of individuals.[608]

Along with state and territory governments, the Australian government has taken a range of actions in response to the 2014 Ebola virus disease (EVD) epidemic in West Africa. This includes an enhanced screening of passengers at airports, stopping the processing of visa applications from citizens of affected countries, issuing national guidance to public health units and laboratories, and developing detailed state and territory response plans. As of October 2014, around twenty people who arrived in Australia from EVD-affected countries had been placed on home quarantine.[609]

Australia's response to the pandemic received much criticism as one that violated human rights[610]; however, the same legal system was well endowed for emergencies like the one presented by the pandemic. This made it easier to curb the spread without any illegal actions by the government.

People's Republic of China

The global pandemic of the novel coronavirus broke out in China in late 2019. This means that China was the first country worldwide to be affected by the virus, and the measures were taken were rushed and immediate. The lockdown measures put in place by the Chinese government were so severe and strict that they were described by the World Health Organization's country representative to China, Dr Gauden Galee, as 'new to science' and 'not […] tried before as a public health measure'.[611]

Indeed, on 23 January 2020, the Wuhan Command Centre on the Prevention and Control of the Novel Coronavirus Pneumonia Epidemic (Wuhan Command Centre) issued its Public Notice No 1[612], which shut down all public transport, including outbound trains and flights[613], effectively cutting off Wuhan from the rest of China. On 10 February 2020, Public Notice 12 was issued by the Wuhan Command Centre. This Notice imposed the immediate close-off of all residential blocks in

[608] Supra note 60
[609] Ibid
[610] Bevan Shields, November 12, 2020. 'A serious breach': Geoffrey Robertson says flight cap violates human rights, The Sydney Morning Herald, [online] available at; https://www.smh.com.au/world/europe/australia-s-covid-19-flight-caps-breach-human-rights-geoffrey-robertson-20201107-p56cc8.html (accessed May 27th, 2021)
[611] China Media Project, 2020. The truth about "Dramatic Action", [online] available at; https://chinamediaproject.org/2020/01/27/dramatic-actions/ (accessed on May 27th, 2021)
[612] Announcement of the City Headquarters for the Prevention and Control of Pneumonia Epidemic Caused by New Coronavirus Infection (No. 1), [online] available at; http://www.wh.gov.cn/zwgk/tzgg/202003/t20200316_972434.shtml (accessed on May 27th, 2021)
[613] Dr. June Wang, 2020. China's legal response to Covid-19, [online] available at, https://lexatlas-c19.org/chinas-legal-response-to-covid-19/ (accessed on May 27th, 2021)

Wuhan and ordered those diagnosed with or suspected of being infected by Covid-19 to stay inside their apartments. Two days later, the Wuhan Command Centre issued another notice, elaborating the meaning of 'closed-off management'. According to the Notice[614], only one entry/exit point, staffed with inspection personnel all hour round, was allowed for each residential block and the actual implementation of such measures were to be undertaken by district governments. In practice, this effectively locked up some 11 million residents in their apartments without any mobility allowed.

China also began to encourage using a health QR code system, a mechanism first introduced in Hangzhou in early February 2020, when the Notice on the Prevention and Control of Novel Coronavirus Pneumonia Epidemic with Scientific Precision[615] was issued on 24 February 2020. An early study suggests that the health QR code has helped control the spread of Covid-19 in China[616], but, as it was effectively compulsory for everyone, the health QR code raised concerns about privacy as it relied on 'troves of data the authorities have collected from individuals — including their personal information, location, travel history, recent contacts and health status.'[617] Many worried that their personal information might be leaked and that their information security could not be ensured.[618]

Finally, while most public notices on restrictions did not mention sanctions on the violation, Chinese laws have always imposed civil sanctions, such as fines, to violate social order. For instance, Article 50 of the Law of the PRC on Administrative Penalties for Social Order Administration[619] imposed a fine of up to 500 Yuan RMB (in addition to detention between five and ten days) in the case of non-compliance with government orders or decisions issued in times of emergency. For more severe cases, criminal sanctions are always available to the law enforcement authorities.[620]

In light of these strict draconian lockdown measures imposed in many cities in China, it has been puzzling to many that no state of emergency, either for a specified area or for a province or even

[614] https://www.sohu.com/a/373152524_100199096

[615] Notice on the prevention and control of the new crown pneumonia epidemic in accordance with the law, scientifically and accurately, [online[available at; http://www.gov.cn/xinwen/2020-02/25/content_5483024.htm (accessed on May 27th, 2021)

[616] M.V. Beusekom, April 28th, 2020. Study: Contact tracing slowed COVID-19 spread in China, Centre for Infectious Diseases Research and Policy, [online] available at; https://www.cidrap.umn.edu/news-perspective/2020/04/study-contact-tracing-slowed-covid-19-spread-china (accessed on May 27th, 2021)

[617] Nectar Gan and David Culver, April 16th, 2020. China is fighting the coronavirus with a digital QR code. Here's how it works, CNN Business, [online] available at; https://edition.cnn.com/2020/04/15/asia/china-coronavirus-qr-code-intl-hnk/index.html (accessed on May 27th, 2021)

[618] Helen Davidson, April 1st, 2020. China's coronavirus health code apps raise concerns over privacy, The Guardian, [online] available at; https://www.theguardian.com/world/2020/apr/01/chinas-coronavirus-health-code-apps-raise-concerns-over-privacy (accessed on May 27th, 2021)

[619] Law of the People's Republic of China on Public Security Administration Penalties, Article 50

[620] Supra note 72

nationwide (as indeed most cities in China were partially locked down), was ever declared.[621]In contrast to many other countries where such an emergency was promptly declared to allow the application of restrictive and emergency measures, the failure to declare such an emergency is extraordinary in light of the 2004 constitutional revision[622]. The original 1982 Constitution provided the Standing Committee of the National People's Congress to declare martial law to be implemented throughout the country or province.[623] The State Council was also granted the power to do the same in parts of a province. During the 2004 revision of the Constitution, it was decided to replace the power to impose martial law to declare a state of emergency[624] to cover natural disasters such as the 2003 outbreak of SARS. A law on emergency was proposed but until this day not enacted. This means that there has been a lack of detailed procedures for declaring an emergency, but at the same time, it is clear that an emergency can be declared by either the SCNPC or the State Council, depending on the scope of application of the declaration. In the absence of a state of emergency declaration, the Constitution and all laws and regulations protecting fundamental rights should have, theoretically, continued their regular operation. Failure to do so cast a shadow over the legitimacy and legality of many lockdown measures imposed in China.[625]

In conclusion, whereas China had the necessary laws to accommodate the global pandemic, she still went ahead to pass notices which raised eyebrows on their legality and, therefore, their efficacy. As much as it can be argued that China had the least time to react to the pandemic, it cannot be argued that the operation trend followed was constitutionally necessary.

India

Like many other countries, India was not prepared enough to tackle the pandemic with its legal machinery. The Indian Government requested all state governments to invoke the Epidemic Disease Act (EDA) of 1897 to address the COVID-19 emergency. The Central Government also used the powers provided in the Disaster Management Act (DMA) of 2005. As the country was facing its first significant health emergency since independence, the existing legislative measures to deal with a COVID-19situation were lacking and required certain amendments to address such situations in the future.[626]

The Indian Constitution is the longest in the world, including a preamble and 448 Articles. The

[621] Ibid

[622] Amendments to the Constitution of the People's Republic of China (2004), [online] available at; http://www.npc.gov.cn/wxzl/wxzl/2004-04/19/content_334620.htm (accessed May 28th, 2021)

[623] Constitution of the People's Republic of China (1982)

[624] Articles 67 (21), 80, and 89 (16) of the Constitution of the People's Republic of China (1982)

[625] Supra note 72

[626] Kiran K.G., Donthagani V., and Veeraiahgari R.R., February 28th, 2021. *COVID-19 and the legislative response in India: The need for acomprehensive health care law*, [online] available at; https://onlinelibrary.wiley.com/doi/epdf/10.1002/pa.2669 (accessed on May 28th, 2021)

Constitution is divided into12 schedules and 22 parts. India is declared a "sovereign, socialist, secular, democratic republic" and secures all its citizens "justice, liberty, equality, and fraternity." Considering these broader principles, legislations are drafted, discussed, and passed in Parliament and state legislatures and executed. In this context, it is a fundamental responsibility of the state to protect the lives of its citizens in unforeseen situations and calamities.[627]

The Indian Constitution ensures the Righto Health for all without any discrimination.[628]Article 21 in the Indian Constitution provides for the citizen's fundamental right to life and personal liberty, which can be argued, was violated as the country enacted a complete nationwide lockdown. Provisions related to health are mentioned in Part IV of the Constitution in terms of the Directive Principles of State Policy. Article 39(a) lays out the State's responsibility to provide security to citizens by ensuring the Right to adequate means of Livelihood. Article 39(e) provides that it is State's responsibility to ensure that the "health and strength of workers, men, and women and the tender age of children are not abused." Article 41 imposes a duty on the State to "provide public assistance in cases of unemployment, old age, sickness, and disablement." Article 42 makes provision to "protect the health of the infant and mother by maternity benefit." Article 47 is about "raising the level of nutrition and the standard of living of people and improving public health.

The Right to Health is not explicitly mentioned in the Indian Constitution, as is the Right to Education, but various judgments[629]included the Right to Health as part of Article 21 of the Indian Constitution. Hence, the role of government is crucial in providing health care to all citizens.

However, "health emergency" is not part of the emergency provisions of the Indian Constitution. The Indian Constitution empowers the President of India to declare three kinds of emergencies: national emergency, state emergency, and financial emergency. A national emergency is imposed if the country's security is threatened on the grounds of war, external aggression, or armed rebellion. The imposition of a lockdown and strict measures to contain the spread of disease impacted citizens' fundamental rights; therefore, there Isa need to explore various constitutional methods to include health emergencies in the emergency provisions with proper consultations with various stakeholders.[630]

The EDA, which was enacted during the British colonial era, was promulgated to tackle the bubonic plague in the Bombay State (now Maharashtra State). The Act is 125 years old, with only

[627] Ibid
[628] Kumar, R., 2015. *Right to health: Challenges and opportunities*. Indian Journal of Community Medicine, 40(4), 218–222
[629] See Consumer Education and Resource Centre v Union of India(1995), State of Punjab and others v Mohinder Singh Chawala(1997) and Paschim Banga Khet Mazdoor Samity v State of WestBengal (1996)
[630] Supra note 85

four sections. The law was described as "extraordinary" but "necessary"[631] and emphasized that people must "trust the discretion of the executive in the grave and critical circumstances".[632] Hence, any action taken on the grounds of epidemics must consider all grave and critical circumstances. The general public may not oppose such decisions for the "greater good" for all. The law was vital in containing other outbreaks in the country like Cholera (1910), Spanish Flu (1918–20), Smallpox (1974), Swine flu (2014), and the Nipah Virus (2018). The EDA is the only act that provides legal interventions in a national or sub-national epidemic.[633]

The DMA was enacted in 2005 with the objective "to provide for the effective management of disasters and for matters connected in addition to that or incidental to that." The act consists of 79 sections and covers a wide range of issues like the establishment of the National Disaster Management Authority (NDMA), State Disaster Management Authority(SDMA), and District Disaster Management Authority (DDMA), measures to be taken by the Governments during the disaster, penalties, and offences of the violators. The NDMA was established under the act, and the Prime Minister is the ex-officio Chairperson and nine other members. Subsequently, a guideline on the Management of Biological Disaster 2008 was passed and currently, the NDMA deals extensively with biological disasters and health emergencies.

Section 62 of the DMA gives powers to the Central Government to issue directions to all ministries or departments of the Government of India and state/UT governments. On11 April 2020, the Central Government invoked section 69 of theme, which delegated the Home Secretary's powers to the Secretary, Ministry of Health and Family Welfare for coordinating various activities among ministries and states/UTs. Unlike the other laws, this act "provides for an exhaustive administration set up for disaster preparedness." Violators are punishable for up to 1 year in jail or a fine, or both.[634] The law describes the offence as obstructing any officer or employee from performing their duty or refusing to comply with directions.[635]Forth better execution of the national lockdown, numerous states like-wise summoned section 144 of the Criminal Procedure Code.

One major issue with the DMA is whether an epidemic or pandemic can be considered a "disaster" as per its definition. Section 2(d) of the DMA States that: "Disaster means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident

[631] by John Woodburn, the Council Member of the Governor-General of India in Calcutta during the discussion on the bill introduced in 1897

[632] Rai, K. S., April 2, 2020. *How the epidemic diseases act of 1897 came to be*. The Wire, [online] available at; https://thewire.in/history/colonialism-epidemic-diseases-act (accessed on May 28th, 2021)

[633]Patro, K. B., Tripathy, J. P., & Kashyap, R., 2013. *Epidemic diseases act1897, India: Whether sufficient to address the current challenges?* Journal of Mahatma Gandhi Institute of Medical Sciences, 18(2), 109–11

[634] under Sections 51 to 60 of the Act

[635] RSTV Bureau, 2020. *Epidemic Act and Disaster Management Act enforced to combat COVID-19*, [online] available at; https://rstv.nic.in/epidemic-act-disaster-management-act-enforced-combat-covid-19.html (accessed May 28th, 2021)

or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area." One can interpret that a health emergency of the kind created by the COVID-19 pandemic falls under "grave concerns," but such interpretation will not serve any purpose in effectively managing the epidemic. There are intricacies and technicalities associated with the health emergency that is not covered by this legislation.[636]

England

The public health crisis system in England is based on broadly drafted modernized legislation and regulations. It operates on a local level with primary health care providers using national guidelines to draft emergency plans. Designated agencies or departments are responsible for coordinating local efforts if the crisis becomes national or spills over into more than one local area. Multiagency groups help to coordinate the response. Cooperation and coordination are emphasized as essential to manage public health crises. The legislation regarding infectious diseases has recently been amended to take into account modern-day challenges and scientific knowledge.[637]

The Secretary of State has a legal duty to protect public health in England from disease and other dangers.[638] The Secretary has established several bodies and programs to meet this duty. The National Resilience Capabilities Programme (NRCP) is the core framework through which the government prepares for emergencies across all parts of the United Kingdom.[639] This program aims to ensure that the UK has a well-prepared infrastructure that can address rapidly and effectively a wide range of emergencies. The program is divided into several different groups, one of which includes infectious diseases in humans.[640] The Department of Health is the lead organization in planning for this type of emergency.

The Department of Health, the National Health Service (NHS), Public Health England, and local government authorities[641] are the leading organizations responsible for addressing public health crises and, under the NRCP, infectious diseases. These organizations are responsible for different

[636] Supra note 85

[637] Clare Feikert-Ahalt, February 2015. *England: Legal Responses to Health Emergencies*, Library of Congress, [online] available at; https://www.loc.gov/law/help/health-emergencies/england.php (accessed on May 28th, 2021)

[638] Health and Social Care Act 2012, clause 7 and 11, Laws of England

[639] HM Government, Emergency Response and Recovery: Non Statutory Guidance Accompanying the Civil Contingencies Act 2004, Oct. 2013, para. 3.4.2, [online] available at; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253488/Emergency_Response_and_Recovery_5th_edition_October_2013.pdf (accessed on May 28th, 2021)

[640] Ibid

[641] "Local Authority" is defined in section 1 of the Public Health (Control of Disease) Act 1984, c. 22, as district councils, county councils, county borough councils in Wales, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple, and the Council of the Isles of Scilly; see also UK Resilience, Pandemic Flu, Cabinet Office (Apr. 2008),

aspects of planning for public health crises.[642] Public Health England, an Executive Agency of the Department of Health, is the national public health agency responsible for fulfilling "the Secretary of State's duty to protect the public's health from infectious diseases and other public health hazards."[643]

The Department of Health is involved on an organizational level to prevent and control infectious diseases by developing policies and setting standards. It is the lead government department involved in planning for a human influenza pandemic.[644] Responsibility for the functions of the Department of Health rests with the Chief Medical Officer, the government's principal medical advisor.

Several bodies advise the Department of Health and the NHS on the control and prevention of infectious disease. One of these is Public Health England, an executive agency of the Department of Health. Public Health England's role is to "protect and improve the nation's health and wellbeing, and reduce health inequalities",[645] and its general duty is to fulfil the Secretary of State's statutory duty to protect public health.[646] It works in several areas to discharge these functions, such as providing the government, the NHS, public health professionals, and the public with scientific advice; supporting the local government with advice on how to protect the health, and ensuring that practical local and national arrangements are in place to respond to health protection concerns and emergencies.[647]

Public Health England is responsible for the Secretary of State's duties under the Health and Social Care Act 2012. It replaced the Health Protection Agency as a "category 1" responder[648] under the Civil Contingencies Act 2004 regarding health hazards and emergencies caused by infectious diseases, chemicals, poisons, and radiation.[649] Public Health England operates in several ways to

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[642] Public Health England, Pandemic Influenza Response Plan 2014, paras. 1, 2, 2.3, 3.1, [online] available at; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344695/PI_Response_Plan_13_Aug.pdf (accessed on May 28th, 2021)

[643] Ibid

[644] Ibid. see also Cabinet Office, Departments Responsibilities for Planning, Response, and Recovery from Emergencies, 2011, at 6, [online] available at; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61028/Emergency_Preparedness_chapter5_amends_21112011.pdf (accessed on May 28th, 2021)

[645]Dep't of Health and Public Health England, November 2013. Framework Agreement Between the Department of Health and Public Health England, , at p.1, [online] available at; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677457/Framework_agreement_between_DHSC_and_PHE_2018.pdf (accessed on May 28th, 2021)

[646] Ibid, para. 2.1

[647] Ibid, para. 2.2

[648] Category 1 responders are designated by the Civil Contingencies Act; they are "likely to be at the core of the response to most emergencies [and] are subject to the full range of civil protection duties in the Act." They currently include the police, fire and rescue, health bodies, the Maritime and Coastguard Agency, local authorities and the Environment Agency. HM Government, Emergency Response and Recovery: Non Statutory Guidance Accompanying the Civil Contingencies Act 2004, 2013, para. 3.2 & Glossary at 217,

[649] Ibid. para. 3.2.22.

both respond to and help prevent health emergencies, such as by providing advice to the public on how to remain healthy and avoid hazards, conducting surveillance to detect any threats, and preparing plans to ready the nation for any future threats to its health. Its functions are described as combining "public health and scientific knowledge, research and emergency planning within one organization."

The National Health Service (NHS) is responsible for diagnosing and treating individuals with infectious diseases and improving and protecting the population's health.[650] Regarding the latter two functions, the NHS has a broad array of responsibilities to prevent and control infectious diseases that include implementing health programs, preventing the spread of the disease, surveying the local community, and monitoring any emergence or transmission of infectious disease.

Under the Civil Contingencies Act, the NHS must demonstrate the ability to respond to an emergency, including infectious disease outbreaks, effectively.[651] This type of preparation in England is emergency preparedness, resilience, and response (EPRR).[652] To manage its EPRR responsibilities, the NHS has established commissioning boards and clinical commissioning groups.[653] It has also established local health resilience partnerships to coordinate the work and planning for EPRR across all health bodies.[654]

Argentina

The National Constitution established Argentina's political organization[655], like the Federal Republic consisting of twenty-three provinces and the autonomous city of Buenos Aires. The federal-state is headed by a President, who appoints a cabinet and holds the country's executive power. The legislative power is exercised by a bicameral Congress with a Lower Chamber(Cámara de Diputados) and an Upper Chamber (Cámara de Senadores).[656]

Under the National Constitution, each province has its provincial constitution, legislation, and resolutions. However, provincial legislation may not violate any of the individual rightsprotected under the National Constitution. The provinces have delegated to the federal legislature the power

[650] National Health Services Act 2006, clause 41, 1 and 7, Laws of England
[651] Civil Contingencies Act 2004, clause 36, 2 and schedule 1, Laws of England
[652] NHS England, July 2014. NHS England Core Standards for Emergency Preparedness, Resilience and Response (EPRR), [online] available at; https://www.england.nhs.uk/wp-content/uploads/2015/11/eprr-framework.pdf (accessed on May28th, 2021)
[653] NHS Commissioning Board, NHS Commissioning Board Emergency Preparedness Framework 2013, para. 1.4, [online] available at; https://www.wyccn.org/uploads/6/5/1/9/65199375/nhs_commissioning_board_eprr_framework_march_2013.pdf (accessed on May 28th, 2021)
[654] Supra note 111
[655]Constitución De La Nación Argentina, Dec 15, 1994
[656] The Law Library of Congress, February 2015. Legal Responses to Health Emergencies, Global Legal Research Center, [online] available at; https://www.loc.gov/law/help/health-emergencies/health-emergencies.pdf (accessed on May 28th, 2021)

to enact laws of national scope governing civil, commercial, and other matters.[657]

Although not stated explicitly, the National Constitution guarantees the right to health as a derivative of the right to life.[658] Several provisions also guarantee the right to health, including the right to a healthy environment,[659] the right of consumers to protect their health, and the right to protect collective rights in a broader sense.[660] The constitutional guarantee of health protection may be defined as the right of all individuals to be protected by the state concerning the prevention and treatment of diseases and health maintenance.[661]

The health system has a decentralized structure where many responsibilities have been transferred to the provinces. The Law on Ministries of 1999,[662] as amended by Decree 355/2002,[663]restructured the Ministry of Health (MH), creating two new subdivisions: the Secretariat for Health and Care and the Secretariat for Health Policy and Regulation. The Secretariat for Health and Care has an Undersecretary of Prevention and Promotion Programs office, which comprises the National Directorate of Health Programs and the Directorate of Epidemiology (DE).

Under the Law on Ministries, the MH is assigned the responsibility of assisting the President in all health matters, among other things; intervening in the assignment and control of subsidies to solve health emergencies, either unforeseen or not covered by the system in place; epidemic control and surveillance, including the management of the disease notification system and; planning national vaccination and immunization programs.[664]

In summary, the strengthening of Argentina's Epidemic Surveillance System has been a government priority for the last fifteen years and, although the public health in the country at large has improved, many more resources need to be devoted to reach a higher level of health, especially regarding epidemic prevention and control. In 2002 the declaration of a health emergency required urgent measures to ensure the supply of medicines tithe population. Following the outbreak of swine flu in Mexico in April 2009, the government declared a health emergency, taking immediate action to ensure the supply of medicines to the population. The current alert on the Ebola virus outbreak is under strict surveillance by health authorities in the country, following the World Health Organization's international epidemiology protocols.[665]

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[657] Supra note 114, Article 121-129

[658] Daniel Sabsay& Pablo Manili, 2009. *Constitución de la Nación Argentina y NormasComplementaria, Análisis*Doctrinal y Jurisprudencial 1234

[659]Constitución de la Nación Argentina Article 41, para. 1.

[660] Ibid. Article 43, para. 2.

[661] Supra note 117, at p. 1235.

[662] Law 25233, Law of Ministries, December 10, 1999

[663] Decree 355/2002, amending Law 25,233, Law of Ministries, February 21, 2002

[664] Article 23 Ibid.

[665] Supra note 115

Canada

All levels of government in Canada share legislative competence in public health matters.[666] The Constitution Act, 1867,[667] which defines much of the structure and operations of the Government of Canada, "does not explicitly include 'health' as a legislative power assigned either to Parliament (in section 91) or to the provincial legislatures (in section 92)."[668]

In the 1982 case of ***Schneider v. The Queen,*** the Supreme Court of Canada stated that *"health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic that can be addressed by valid federal or provincial legislation, depending on the circumstances of each case on the nature or scope of the health problem in question.*[669]

Under Section 91 of Canada's Constitution Act, the federal government derives its jurisdiction to directly or indirectly regulate on public health-related issues principally from its powers to legislate on quarantine and the establishment and maintenance of marine hospitals; criminal matters; public debt and property; taxing powers; power to pass laws for the peace, order, and good government of Canada; and census and statistics matters.[670]

Section 92 of the Act assigns responsibility to the provinces and territories for establishing, maintaining, and managing hospitals, asylums, charities, and charitable institutions; matters in their province of a local or private nature; and municipal institutions.[671]

As stated by the Standing Senate Committee on Social Affairs, Science, and Technology, "duet this lack of clarity in the constitutional division of powers concerning health and public health, both levels of government may legislate in these areas."[672]

Canada's public health emergency management system has been described as a "bottom-up system,"[673] where the "initial and ongoing responsibility for investigation and response to public health events, including infectious disease outbreaks, occurs at the local/municipal level."[674]Therefore, "depending on the severity, complexity, extent and nature of the public health issue, provincial, territorial and federal systems may be engaged to provide assistance and

[666] Background, Public Health Agency Of Canada (PHAC), [online] available at; https://www.canada.ca/en/public-health/corporate/mandate/about-agency/background.html (accessed on May 28th, 2021)
[667] Constitution Act, 1867, 30 & 31 Victoria, clause 3 (U.K.), §§ 91, 92,
[668] Martha Butler & Marlisa Tiedemann, Sept. 2011; revised Sept. 2013. Library of Parliament, Legal and Social Affairs Division, *The Federal Role in Health and Health Care § 1*, Pub. No. 2011-91-E)
[669] Schneider v. The Queen, (1982) 2 S.C.R. 112, p. 142.
[670] Constitution Act, 1867, § 91.
[671] Ibid. § 92
[672] Standing Senate Committee On Social Affairs, Science, And Technology, Canada's Response To The 2009 H1n1 Influenza Pandemic (Dec. 2010), [online] available at; https://sencanada.ca/content/sen/Committee/403/soci/rep/rep15dec10-e.pdf (accessed on May 28th, 2021)
[673]*Responding to an Infectious Disease Outbreak: Progress Between SARS and Pandemic Influenza H1N1*, PHAC, [online] available at; https://www.phac-aspc.gc.ca/cpip-pclcpi/assets/pdf/report-rapport-2015-eng.pdf (accessed on May 28th, 2021)
[674] Ibid

resources as requested and required by local authorities and facilities managing the situation."[675] All levels of government have various forms of legislation to protect and manage public health in a time of crisis.

In summary, emergency measures and emergency management at the federal level in Canada are regulated by the Emergency Act and the Emergency Management Act. However, there is a relatively high trigger for the federal government to take the lead in a health emergency. Therefore, most health emergencies or crises are dealt with at the municipal and provincial level in coordination with the federal government. Most provinces and territories have passed various "health acts" that govern the powers and duties of health officials during health emergency.[676]

Kenya

Kenyan officials enjoy the broad legal authority to impose various forms of restrictions during public health crises. The Constitution authorizes the head of state to declare a state of emergency and put in place wide-ranging public security preservation measures, including restrictions on movement and assembly, appropriation of private property and labour, and restrictions on entry into the country. However, for actions under this authority to remain in place for an extended period, they need legislative approval.[677]

Similarly, the Public Health Act (PHA), the primary legislation applicable to matters of public health crises, authorizes public health authorities, particularly the Minister of Health, to take various actions during public health crises, including declaring an infectious disease a "notifiable infectious disease" or a "formidable epidemic, endemic or infectious disease," and taking the necessary prevention and suppression measures to fight the disease. Specific powers accorded to health authorities to prevent and suppress an infectious disease include search, seizure, and detention powers; the power to designate any place as a quarantine area, including ships and aircraft; and restrict or ban immigration into the country.[678]

Kenyan and international laws impose specific transparency requirements on the country's government. Chief among these is the PHA requirement to periodically publish information regarding infectious diseases in Kenya, neighbouring countries, and worldwide, and the obligation is to report any public health emergency to the World Health Organization (WHO).[679]

The emergency measures adopted by the Kenyan government in the wake of Covid 19 are pretty similar to the directives issued by Uganda. Immediately after confirmation of the first case of

[675] Ibid
[676] Supra note 125
[677] Ibid
[678] Ibid
[679] Ibid

COVID-19, the Government of Kenya put in place social distancing measures that included the indefinite suspension of all public gatherings, such as weddings, funerals, and church and mosque congregational meetings. All schools, universities and educational institutes were ordered to close indefinitely, and a nationwide curfew was put in place from 7 p.m. to 5 a.m. daily, effective from 27 March. All international flights were suspended, apart from cargo planes and those arriving to evacuate foreign nationals. The Government of Kenya has also suspended passenger ferries from Tanzania and Somalia, effectively closing its international borders with these countries. Only cargo vehicles are permitted to enter, on condition that drivers submit to mandatory COVID-19 testing and subsequently test negative.[680]

The government has put a Senior Citizens Program to provide aid to the elderly and direct cash grants to vulnerable households. These interventions have also included the provision of food aid. In addition, on 25 April, the President announced measures to cushion citizens against the loss of income as a result of COVID-19. These include reduced income tax for those in formal employment and a reduction in corporate taxes. The government also introduced the National Hygiene Programme, which targets youths and vulnerable households in informal and vulnerable settlements. It aims to raise awareness of COVID-19and facilitate local production of face masks, which have become mandatory in the fight against the virus.[681]

The National Council on Administration of Justice (the judiciary, the police and the Office of the Public Prosecutor), headed by the Chief Justice, released a statement on 15 March on the measures being taken to address the COVID-19 outbreak. All court sittings were suspended except for urgent matters and all foreign travel for justice institution staff and all conferences, workshops, training, or colloquia until further notice. Bringing prisoners to court for remand hearings was also suspended. The Chief Justice directed all courthouses to close to the public and instructed each court station to operate with three members of the judiciary (a judge/magistrate, a court administrator and a court assistant to serve as a customer care service desk contact). The judiciary is increasing its use of ICT to enable judges and magistrates to deal with cases, including e-filing of judgments, video conference remand hearings for prisoners in custody, and the delivery of court judgments through video conferencing and Skype.[682]

Madagascar

In the last five years, the country experienced two major epidemics in two successive years; pneumonic plague in 2017 and measles in 2018. The loss of human life was enormous, reaching

[680] IDLO, July 30, 2020. *Rule Of Law In The Time Of Covid-19: Kenya*, [online] available at; https://www.idlo.int/news/notes-from-the-field/rule-law-time-covid-19-kenya (accessed on May 28th, 2021)
[681] Ibid
[682] Ibid

around 1,400 deaths. The plague outbreak affected the country's economy, especially the tourism and transport sectors. While the country has been able to draw lessons learned and many good practices from the response to these outbreaks, the arrival of the COVID-19 pandemic posed a number of major challenges, as this was not a usual outbreak endemic to the country, but rather a virus imported from abroad.[683]

As soon as the existence of the coronavirus was announced in China, preparations were initiated at country-level, including through: the revision of the national contingency plan; the strengthening of control at all international entry points; and the routing of necessary drugs and supplies to these points. Flights to and from China were suspended starting 10 February 2020, although this was a very difficult decision to take given the importance of trade relations between the two countries. As a result, even though the country had not yet experienced COVID-19 cases, socio-economic consequences were felt since then.[684]

Within a few weeks, all neighbouring countries were affected by the coronavirus, and Madagascar confirmed its first case on 20 March, 2020. Unfortunately, given the structural fragility of the country's health system and the existence of aggravating factors such as very precarious water, hygiene and sanitation conditions, COVID-19 was able to spread rapidly. As of 25 May, 542 COVID-19 cases, including two deaths, have been reported, most of them in Toamasina and Antananarivo cities.

Madagascar has a history of not fancying vaccines and indeed, in 2018 was among the last four countries in the world registering polio cases from its stance on vaccines. Following the outbreak of the pandemic, Madagascar affirmed its decision not to participate in the Covax global initiative for the access to Covid-19 vaccine once they had been approved and licensed. The government spokesperson confirmed that the island would resort to its traditions concoction that its own scientist discovered earlier that year to stem out the virus. He further said that they would wait to see the effectiveness of the vaccine first in the countries that will first use tithe tonic, based on the plant *Artemisia annua* which has anti-malarial properties, was not proven by the World Health Organization but Madagascar put it on sale to several African countries.

Tanzania

Upon the outbreak of the global pandemic, the then president of Tanzania, John Magufuli, declared that the east African country had no Covid-19. Authorities last released data on Covid-19 almost a year ago with data then showing that Tanzania only had 509 cases. For this, the former president

[683] Emergency Appeal for Covid-19: Madagascar, [online] available at; https://reliefweb.int/sites/reliefweb.int/files/resources/MDG_COVID-19_Emergency_Appeal_2020_EN.pdf (accessed on May 28th, 2021)

[684] Ibid

received a lot of criticism.[685]

Since June 2020, when the late President John Magufuli declared the country "Covid-19 free", he, along with other top government officials, mocked the efficacy of masks, doubted if testing works, and teased neighbouring countries which had imposed health measures to curb the virus. Mr. Magufuli has also warned; without providing any evidence - that Covid-19 vaccines could be harmful and instead urged Tanzanians to use steam inhalation and herbal medicines, neither of which have been approved by the World Health Organization (WHO) as treatments. It is unclear why the president expressed such scepticism about the vaccines but he is noted on record to have said that Tanzanians should not be used as "guinea pigs".[686]

Magufuli, who holds a Ph.D. in chemistry, ignored scientific reason; championing religious devotion and natural remedies as cures for the virus. He has urged citizens to attend churches and mosques, reasoning Covid-19 is “satanic” and “cannot live in the body of Christ; it will burn instantly.” He announced three days of national prayer against Covid-19 on April 16. Magufuli also recommended steam inhalation as a “scientific treatment,” claimed his own son overcame the virus by drinking a lemon and ginger tincture, and diverted government funding to the importation of botanical remedies from Madagascar.[687]

This kind of response to the global pandemic has had vast effects on the Republic of Tanzania. There were increased losses of lives of people and a shaking of the international relations. The lack of transparency in the wake of the pandemic put Tanzania in its own class and was looked at as a big risk to other countries in as far as the pandemic was concerned.

The global pandemic has been uniform in its manner of spread, and the different countries have had different mechanisms on how to respond to health emergencies, including global pandemics. Developed countries seem to have better laws that enable easy management of health emergencies than developing countries that seem to have entered turmoil upon the inception of the pandemic.

PLAUSIBLE ADVOCACY

I have noted before that all power belongs to the people according to Article 2 of the Constitution of the Republic of Uganda. This ideally means that every law or decision made by the government must be derived from the state's citizens and well-being. I have realised that it has been taken that having one of the two is sufficient to warrant decision making. I beg to differ. The state must have

[685]Anthony Wesaka, Tuesday March 30 2021. EA lawyers urge new Tanzania regime to contain Covid-19, Daily Monitor, [online] available at https://www.monitor.co.ug/uganda/news/national/ea-lawyers-urge-new-tanzania-regime-to-contain-covid-19-3341840 (accessed on May 28th, 2021)

[686]BBC News, February 2021. Coronavirus in Tanzania: The country that's rejecting the vaccine, [online] available at; https://www.bbc.com/news/world-africa-55900680 (accessed on May 28th, 2021)

[687]Judd D. & Marielle H.,May 26, 2020. Implications of Tanzania’s Bungled Response to Covid-19, Center for Strategic and International Studies, [online] available at; https://www.csis.org/analysis/implications-tanzanias-bungled-response-covid-19 (accessed on May 28th, 2021)

both ingredients before a decision concerning the citizens is made. This is regardless of whether it is a time of emergency or otherwise.

Secondly, the Constitution spells out the body vested with the power to make laws and how the laws ought to be enacted, the different Acts of Parliament further elaborate on how the process should be followed. Exceptional circumstances like health emergencies are also envisaged under Article 110 of the Constitution, and therefore anything done under the same can be argued to be lawful.

However, if and when the state decides to deviate from the known procedure of making the law without necessarily fulfilling the requirements of Article 110, then their actions must be justified under Article 43 of the Constitution. In my research, I have been able to deduce that it is almost impossible for the state to do so without raising questions of constitutionality, given that alternatives to be empowered are usually numerous, and it is hard to choose the most efficient yet least stringent in the shortest time possible given the imminence of the emergency.

Further, the fact that there is sufficient law to warrant specific actions by the government during public emergencies creates little room to justify why such laws have been ignored in taming the emergency. The state should follow the law, especially when fortunate enough to have laws that envisage public health emergencies.

While comparing the response of the Ugandan government to the response of other countries, I discovered that the world's reaction to pandemics is subjective to the prevailing circumstances. For example, even when China had ample laws to legally handle the pandemic, it broke out within its jurisdiction and its urgency overrode the need to follow the law.

The United States of America, which has reasonable laws that envisage health emergencies, received the pandemic at a time when a controversial man was president. Donald Trump believed that the pandemic was a hoax set up by China in their economic war of supremacy. This therefore affected the operation by the law since the fountain of honour was not willing to respect some of these guidelines.

The same can be said for the United Kingdom. Their response was strengthened only after the Prime Minister suffered from the virus and was admitted in dire condition. If this had not occurred, maybe both Donald Trump and Boris Johnson would have burdened the willingness of the two countries.

Other countries in Africa like Madagascar and Tanzania protested the recommendations by the World Health Organisation. This could be attributed to the desire to feel independent from developed countries and this killed the will to fight the pandemic which in turn gave it a footstool to rule the lives of people. Countries like India had done well at first, but as the fight against the

pandemic was near victory, they let down their guard to allow for it to flourish again and the consequences are yet to be healed from.

There are countries that have however been diligent and have tried to follow their laws to keep the pandemic in check. Australia stands out as one of these countries that have been able to fight a good fight thus far. This can be attributed to good governance and the observance of the rule of law.

The international organisations tasked with such responsibilities have also not been left standing. The World Health Organisation has been criticized for making recommendations outside the ambit of the International Health Regulations passed in 2005. Most if the responses issued by the organisation lack legal backing and therefore created laxity in the different member states' reaction to the same.

Uganda has, over the years, been praised for its resilience in curbing and overcoming health crises. She has been successful in curbing HIV/AIDS, the Ebola outbreak, Cholera, Malaria, Polio, Marburg, to mention but a few; however, in as much as the state has received praise for this resilience, little has been said of the legal consequences that come with dealing with these emergencies. This question has been silent until the spread of Covid 19, which called for the most stringent measures to curb the spread.

But also, the entire world can yet learn another lesson from the current pandemic. The pandemic knows no race, no economic standing, and no age. It attacks indiscriminately and as such, can only be combated if such differences are not considered in our fight. The different countries must learn to cooperate through the existing mechanisms like the World Health Organisation to help each other to overcome this battle. The developed countries should help the developing countries to cope because they are more susceptible to suffer than the developed countries.

Long term legislation

Uganda already has a legal framework that would have easily worked in the wake of this pandemic and not attract legal attention. However, this legislation is not elaborate enough. Whereas the constitution provides for a state of emergency, there are no subsidiary laws that elaborate Article 110. Therefore, the state should enact laws specifically to govern health emergencies that can be readily available to the citizens, now that the country realizes the need for such laws.

This will create certainty of the mode of operation should any other pandemic occur and create certainty for the country. Citizens will be more willing to accept the law if it is in place than directives developed to fit the situation. Now that Uganda has experienced the need to have these laws, they should be promulgated with immediate effect.

Transparency and capacity building

One of the significant hit areas of the state has been its health sector and its ability to accommodate the overwhelming numbers of patients. The state should be able to, by law, establish enough funding to develop the health sector. The process should begin with expressly providing for the right to health which is currently just reflected in Article 45 of the Constitution. This inclusion will speed up progressively realising the right to health and create justification for the government to limit certain other rights to promote the public health of its citizens.

When the law has been passed, and the citizens have been made aware of it, the citizens will better comply. This is because the law will be prescribed with its sanctions, if any. This makes implementation easy for the executive and judiciary as well.

The law will also create certainty among the citizens of the state. The ability to know what is expected of each citizen in such health circumstances will encourage a stronger sense of patriotism. It will restore and improve the citizens' confidence in their government, and this will, in the long run, spur faster development and more effective ways of alleviating health emergencies.

International cooperation

In the foregoing, the world must learn to unite for issues that sustain not only the economies of the different countries, but also the very existence of human life. Global health emergencies are capable of wiping the human race off the face of the earth if there is no cooperation, trust and transparency among the countries. The differences that the different countries held against each other in the wake of the pandemic contributed significantly to the spread of the pandemic. This does not have to be the case; the next time the world has to alleviate a pandemic.

The global pandemic that the world faces today is not the first one, and neither is it the last. One thing remains certain; that another pandemic will come. However, the good news is that the level of data collection, storage, and technology that the world 100 years ago has since immensely developed, and therefore we can learn from our past to be ready for the future. I hope that this study can contribute to better prepare for what is bound to return.

CHAPTER SEVEN

EVALUATION OF THE EXECUTIVE IN AS FAR AS EXERCISING THE RULE OF LAW IN UGANDA

This chapter looks at the role of the executive in as far as rule of law in Uganda. It is not only concerned with the requirements of national legislations but also its function as a branch of government requiring independence of the judiciary observance of the doctrine of separation of powers other than it being a myth that uphold the rule of law in line with the various principles of both formal and procedural character.

This chapter is premised on the rule of law in as far as the executive in Uganda. Rule of law refers to restriction of the arbitrary use or exercise of power by subordinating it to a well- defined and established laws. The rule of law is more than a well drafted constitution. There is need for that constitution to be observed accordingly in relation to its sui generis nature. It therefore follows that there are different principles that curtail the exercise of the rule of law. Adherence to the principles of supremacy of law, equality before the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The question remains whether Uganda's rule of law can put the much required democracy in jeopardy as well sustainable development or any other lasting effects.

The form of governance in Uganda that existed was not administrative rather governance and administration originated from customs. Colonialism to modern day today obligations is still vivid that is the overrunning of our societies by European states and the imposition of political institutions from Europe has shaped our modern reality.[688]Until 1894, the sovereign state we now know as Uganda was in Constitutional terms .That year Uganda as an administrative unit was born when The British government declared her a protectorate.

The Magna Carta of 1215 saw to the institutionalism of the rule of law which enshrines the principle that the king was not above the law.[689] The Bill of Rights[690] stated that law could not be made, repealed or suspended without the will of Parliament. The crown could not manipulate the

[688] GW, Kanyeihamba, Constitutional and political History of Uganda (2nd edition law Africa publishing Ltd 2010) Pg.249
[689]In Probitions del Roy (1607, published 1656 (1572-1616 12 Co Rep 63)
[690] 1689

court system, and subjects were now able to bring an action against the Monarch.[691]

Thus administrative law which is a body of general principles that governs the exercise of powers and duties by public authority.[692] This has been at the forefront of the country's governance or management of this country. Chiefly, administrative law is encompassed by a constitutional frame work which guides the management of this country

Throughout the 20th century, the rule of law has become a term of widespread academic debate, court judgments and parliamentary debates**.** ***Lord Bingham*** in 'The rule of Law'[693] argued that;

"The core of the existing principle is.... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."

The Constitution is pervaded by rule of law, since general principles of Constitution are the results of judicial decisions which determine the rights of private citizens.

The rule of law in Uganda is an identified fundamental and operational principle that every democratic state undertakes to observe while attempting to achieve a conducive social, economic and political environment in the county.

The most important impetus for discussing the reality of this doctrine within Ugandan jurisdiction is that though the executive is governed by constitutional frame work and other laws, the president and his cabinet enjoy unnecessary privileges such as exemptions from ordinary laws which reflect a loophole as to the various principles of rule of law. Basing on the various grounds the rule of law in Uganda is vividly provided under **Articles 1** and **2** of the Constitutional frame work. The present situation in Uganda being the preventative arrests of individuals of not only the members of the political opposition but also the citizens portrays how far off the paper the rule of law is.

The rule of law is differently discussed in a number of ways, thus there are different meanings and corollaries. The primary meaning being, everything must be done in accordance to the law. The rule of law is a theory that every person must be subject to the laws within the jurisdiction.

G.W Kanyeihamba in his book [694] comments majorly, that the rule of law is not a rule but a collection of ideas and principles within free-societies to guide law makers, administrators, judges and law-enforcement agencies. Overall, that this, theory is binding to the rulers and those being ruled of which this results to justice which in essence is good governance or democracy. Where by the rule of law precludes arbitrary action on the part of those who run and control the government.

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[691] John Griffiths (1918-2010) *'The political Constitution'* (1979) 42 Modern Law Review, 1, 15

[692] H.W.R Wade and Christopher Forsyth, Administrative law ,9th edition Oxford University Press 2004 Pg.4.

[693] (2007) 66 CLI 67, 79

[694] G.W Kanyeihamba, *TheConstitutional and political history of Uganda*, 2nd edition, Law Africa Publishing (U) ltd YEAR pages 265 to 273

A.V. Dicey[695] ***in,*** wrote that the supremacy of the rule of law has three distinct though related conceptions that is;

No man is punishable or can lawfully be made to suffer in body or in goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.

Every man, whatever is his rank or condition, is subject to the ordinary law of the realm, amenable to the jurisdiction of the ordinary tribunals.

He echoes that the general principles of the (British) constitution are the result of judicial decisions determining rights of private persons in matters brought before court.

Dicey contrasted the rule of law with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraints such as power of detention without trial. It was noted that actions of the state officials such a s ministers which impact on individual should have a clear foundation as noted by Bradley and Ewing that this is a principle of legality.[696]

Thus the exercise of executive powers has to be suppressed or determined by rule of law over rule by law as a yard stick to eliminate the extreme use of power to realize democracy and sustainable development. Thus the need to observe the constitutional mandate by the three arms of government specifically the executive and ordinary citizens.

While rule of law may not be preserve of any given country, it is likely to thrive in a society that allows its citizens to enjoy their right to participate fully in the political affairs of the state, including electing representatives and standing for elections. A country that disenfranchises its citizens because they are suspected to belong to the opposition falls short of the requirements of a proper rule of law.

As ***Cora Hoexter*** argues, the principle of legality, which forms part of the rule of law, is "a wonderfully useful and flexible device …….in a sense that it acts as a kind of safety net, catching exercises of public power that do not qualify as administrative functions".[697] Thus the doctrine of rule of law is a sense is exercise of public power that must comply with standards such as lawfulness, reasonableness and fairness.

Rule of law in Uganda clearly and expressly shows loopholes, not only is it absent in practice, the only semblance of any administration of the country there is, is rule by law which is an abuse to political and social sphere of society hence harming the economy that is suitable development in Uganda.

[695] AV Dicey, *Introduction to the Study of Law of the Constitution* (1885; 10th edition, Macmillan & Co, 1959), pages.187-195

[696] A.W Bradley and K. D Ewing Constitutional and administrative law (15the edition Pearson Edition Ltd 20011) page 92

[697] Cora Hoexter, *The Principle of Legality in South African Administrative law*, 4 MACQUARIE L.J. 165 (2004)

Noble Marara in his book ***Behind the presidential curtain*** echoes that Kagame labeled his colleagues killers or unaccountable people just to get rid of them. For instance Rusesabagina capture by Kagame's government without following proper extradition process when he was forcefully abducted leading to his enforced disappearance.[698] The same is vivid through press in Uganda through several analogies relating to Museveni's government.

Bingham.T.(2001). The Rule of law, Penguin Books, London describes the rule of law as a phrase much used but little examined. The idea of rule of law as the foundation of modern states and civilizations has recently become even more talismanic than that of democracy, but what does it actually consist of? In this book, Bingham examines what the idea actually means. He makes clear that the rule of law is not an arid legal doctrine but is the foundation of a fair and just society, is a guarantee of responsible government, is important contribution to economic growth and offers the best means yet derived for securing peace and co-operation. He briefly examines the historical origins of the rule of law and the advances eight conditions which capture its essence as understood in western democracies today.

Grace Tumwine Mukubwa in "founding of the constitution of Uganda" pages 6-7, writes about the perception of the 1967 constitution, the presidents in Uganda have been vested with dictatorial powers, the is not the case that is through a comparison between the American constitution and the Ugandan constitution proves this as false.

In Uganda, the president wields wide-ranging but unregulated powers practically. These immense powers include appointment of ministers' judges, head of the electoral commission among others. Thus the exercise of these powers is not usually circumscribed, has often been abused to the detriment of judicial independence, fair election. These institutions are confronted with this prowess and maybe inclined to do the bidding of the executive. Unsurprising, may quake in the presence of the president.

The executive functions is carried out by the government administrators of which these carry out the functions, powers and duties stipulated in different legislations thus the executive carries out and implements the laws.[699]

Literature available on executive in as far as rule of law is concerned shows that the executive is not entirely at fault but the legislature is also attributed to its actions. However, there is no balance struck between these two arms of government in order to establish a position at which rule of law is realized.

[698] https;//www.hrw.org/news/2020/09/10/Rwanda-rusesabagina-was-forcibly-disappeared

[699] Mark R and Steve Foster, *Unlocking constitutional and administrative law* .3rd edition.(Routledge-Publishers).pages 71 to 72,

The existing literature points to the centrality of the existence of the rule of law both within the domestic and international level however, there is no distinction of how the rule of can be regarded in the light of a constitutional government. Yet no rule is without substance. Many writers on the rule of law distinguish between “thin” (concerned with the form of law and equal application), and “thick” (fair or just substantive content) rule of law. [700]This is the distinct feature of this research paper, to strike a balance between the parallel rule of law on paper and in practice within the domestic laws since there is need for a tremendous revision of executive exercise of power in terms of rule of law with the need to revive the country's economy. The lack of which is consequential in such a way that it causes severe problems such as brain drain and political instability among others which rob the country of stable development.

The democratic progress of Uganda depends on governance by rule of law rather than individuals. In this proposal it is my argument that observance of rule of law through unconventional means is a crisis which amplifies demands on, and exposes the deficiencies of, our ailing regulatory institutions. As a result, there is inability to halt the type of human behavior that is causing uproar or turmoil in economy due to riots which pushes away investors.

SEPARATION OF POWERS

The term "triaspolitica" or "separation of powers" was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th century French social and political philosopher. His publication, Spirit of the Laws, is considered one of the great works in the history of political theory and jurisprudence, and it inspired the Declaration of the Rights of Man and the Constitution of the United States. Under his model, the political authority of the state is divided into legislative, executive and judicial powers. He asserted that, to most effectively promote liberty, these three powers must be separate and acting independently.

Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.

The traditional characterizations of the powers of the branches of American government are:

- The legislative branch is responsible for enacting the laws of the state and appropriating the money necessary to operate the government.
- The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.

[700]Trebilcock, M.J. and Daniels, R.J., 2008. *Rule of law reform and development: charting the fragile path of progress*. Northampton: Edward Elgar.

- The judicial branch is responsible for interpreting the constitution and laws and applying their interpretations to controversies brought before it.

This old principle of governance is one of the most fundamental aspects to consider for a stable and democratic government. However, many a times, the arms of the government have overstepped their mandate in disregard of this principle. The principle of the political question doctrine has on many occasions if not all, acted as a formidable scapegoat to the executive when brought before the judiciary.

The executive has on various occasions assumed the role of the parliament and the recent act has been the passing of presidential declarations for the country in the wake of the pandemic.

The positions in the legislature have also been predetermined by the ruling party and the voting process has proven to be ceremonial. With a Speaker of parliament pre-appointed, and a Chief justice who has acted for the head of executive in his earlier days, it is impossible to claim that the notion of separation of powers is existent in the country.

RULE OF LAW

Rule of law can be understood as the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government, and more generally prevents the arbitrary use of power. Arbitrariness is typical of various forms of despotism, absolutism, authoritarianism, and totalitarianism. Despotic governments include even highly institutionalized forms of rule in which the entity at the apex of the power structure (such as a king, a junta, or a party committee) is capable of acting without the constraint of law when it wishes to do so.[701]

In general, the rule of law implies that the creation of laws, their enforcement, and the relationships among legal rules are themselves legally regulated, so that no one; including the most highly placed official, is above the law. The legal constraint on rulers means that the government is subject to existing laws as much as its citizens are. Thus, a closely related notion is the idea of equality before the law, which holds that no "legal" person shall enjoy privileges that are not extended to all and that no person shall be immune from legal sanctions. In addition, the application and adjudication of legal rules by various governing officials are to be impartial and consistent across equivalent cases, made blindly without taking into consideration the class, status, or relative power among disputants. In order for those ideas to have any real purchase, moreover, there should be in place some legal apparatus for compelling officials to submit to the law.

[701]Naomi Choi, 2010. Rule of Law: Political Philosophy, SAGE Publications' Encyclopaedia of Political TheoryUniversity of Houston, [online] available at; https://www.britannica.com/topic/rule-of-lawaccessed on 1st July, 2021)

Uganda has recently been recorded as the worst country in the East African Region in respecting the rule of law and dispensing justice. A report by the World Justice Project Rule of Law Index carried out in 2020ranks Uganda at number 117 globally out of 128 countries. The Ugandan government has over the years committed atrocities to justify this position.

The Uganda Law Society has recently developed a mechanism of documenting all the disobediences recently committed by the government and in its first quarterly report of 2020, they note that meetings organized by the people power movement led by Hon. Robert Kyagulanyi (a.k.a Bobi Wine) in Gulu, Wakiso and Lira Districts were blocked by the Uganda Police Force despite getting approval to consult from the Electoral Commission ahead of the 2021 elections. Of particular note was the heavy deployment of the army and police officers at the Da Covenant in Gulu on January 7, 2020; to block the People Power movement from making consultations.[702]

Another consultation meeting was blocked in Lira and two journalists were arrested for taking pictures at the Pacific Grand Hotel where the meeting was going to take place. A consultation meeting was blocked at our lady of Good Counsel Church in Gayaza, Wakiso District and Hon. Kyagulanyi was arrested and taken to Naggalama Police Station. In a similar but separate incident, police blocked the Forum for Democratic Change 15th anniversary celebrations in several districts across the country.

Two police officers, a one Ben Ojiong and one Corporal Alex Opito got into a heated argument on whether to enter a case in the station diary as criminal or civil. As a result of failure to disagree, Ojiong picked his gun and shot Opio several times killing him instantly and then shot himself as well. Two LDU's tried to intervene and one was injured in the process which led to his death bringing the total number of the dead to three.

In another incident a Local Defense Unit (LDU) officer shot and injured a one Saleh Kinaalwa who was working at a butcher located at Matale trading center in Buikwe District. It is alleged that Kinaalwa was suspected of assaulting Richard Ssekitooleko, a fellow vendor on December 31, 2019.

Also, an unidentified civilian in Moyo District grabbed a gun from a police officer and shot him dead. This happened when the police officer was trying to rescue someone who was accused of poisoning two of his farm workers and was being lynched by an angry mob.

In another incident, Lt. Col. Juma Seiko was detained at Kawempe station for allegedly shooting at three people causing bodily injuries. It is stated that he caused an accident and when the two drivers came out to ascertain the incident, a fight ensued; and shots were fired from a gun belonging to Col. Seiko leading to the injury of a one Ali Juuko, Kasirye Zimula, and Joseph Lule.

[702]Jimmy Komakech, "People Power blocked from consulting in Gulu," Eagle Line, January 7, 2020.

And all this is just from one quarterly report! The atrocities are even more and properly spread out over the past years. Government still continues to neglect its mandate to respect the law and adhere to the same which leaves many wondering if Uganda is really a democracy if they do not have regard for rule of law.

RULE OF LAW, ITS DYNAMICS AND THE ASSOCIATED CHALLENGES

The United Nations declaration on 24th September 2012 reaffirmed that rule of law and democracy, are inter-related at the national level and international level. This is associated with democratic principles as well as institutions streamlining with processes to do with equality and accountability. The rule of law is not an instrument rather a rule that requires ordinary individuals plus the government to adhere to it, as fundamental advancement of democracy and sustainable development.

RULE OF LAW AND THE EXECUTIVE

The executive powers are that it implements the laws enacted by the legislature and enforces the will of the state. This is favorably exercised through observance of the rule of law. The administrative organs a case in point the executive is a branch headed by the president deputized by the vice president where need arises of which the prime minister and cabinet minister are members. The executive is the body in the state which is entrusted with the administrative functions of government in accordance with the constitution and laws of the state.

There are three theories of presidential power which includes legalistic, stewardship and prerogative. With legalistic theory the president can only do what is authorised by law or constitution. Stewardship theory the president is the representative or advocate for the people and should do anything to protect the people. Prerogative theory that if necessary in times of crisis the president bends or breaks the law.[703]

The East African court defined the rule of law in ***Katabazi and 21 others v Secretay General of the East African community and another***[704] that rule of law entails that no one is above the law as its basic form. It follows that truth and law is based upon fundamental principles which can be discovered but cannot be created through an act of will.

The rule of law is visible in to two different spheres that is, its formulation towards procedural approach which aims at the formulation and application while the other addresses the protection of

[703] https://quizlet.com/186592643/three-theories-of-presidential-power-flash-cards/
[704] [2007] EA CJ 3

rights and how they are framed.[705]

It is difficult to discuss the rule of law without some normative assumptions or implications about the law's legitimate authority and the law's validity hence the need to revisit this, from where it all started that is the Magna Carta. Economists have also increasingly come to realize the importance of political and legal institutions, especially the presence of the rule of law, in providing the freedom and prosperity in developing countries such as Uganda.

When President Milton Obote justified Uganda's continuing drift towards a one-party system by labeling it a uniquely "African form of democracy. Benedicto Kiwanuka Mugumba scoffed at this claim. Uganda's political system was not the embodiment of some kind of uniquely in cultured, 'African' democracy.[706]

By its nature the rule of law cuts across several policy fields and comprises political, constitutional, legal and human rights issues of which the executive has a direct hand. The executive must as one of its mandates under the constitution, abide, uphold and safeguard the constitution and other laws of Uganda. This means that it should observe all the democratic principles provided for under the constitution and other laws to ensure democracy[707].

Unlike the current constitution, the then independence Constitution was designed to cater for a historical Uganda where power was placed in the hands of the privileged few rather than the will of the people. Of which Kanyeihamba argues that this portrayed a lack of political legitimacy until 1966.

Much as **Article *1*** of the 1967 constitution proclaimed that it was the supreme law, the 1995 constitution went on several steps further. A provision in the instrument directly related to the impact of the doctrine reflected in the decision in ***Ex Parte Matovu case***[708]. On September 27, 1995, the Constituent Assembly adopted the new constitution. The 1995 constitution, establishes a quasi-parliamentary system of government, consisting of a President, Prime Minster, Cabinet, Parliament, Supreme Court and Constitutional Court. The preamble states that the constitution shall be based on the "principles of unity, peace, quality, democracy, social justice and progress."

The supremacy of the law as fundamental principle of any democratic system, which seeks to foster and promote rights, where civil, political or economic, social and cultural. Therefore, there is recourse enabling citizens to defend their rights as well as shaping the structure of the state and the

[705] Paul Craig *Administrative law* pp. 18 to 20, 17th edition, Sweet and Maxwell.
[706] Earle, J and Carney,J.(2021). *Catholic Uganda, and the Gospel of Democracy. In Contesting Catholics: BenedictoKiwanuka and the Birth of Postcolonial Uganda* (pp.23-58); Woodbridge, Suffolk (GB);Rochesteer NY (US): Boydell& Brewer. Doi:2307/j.ctv136bwk1.9
[707] Article 99 of the Constitution of the Republic of Uganda, 1995 as amended.
[708] Uganda v. Commissioner of Prisons, Ex Parte Matovu,[1966] 1 EA 514

prerogatives of various powers, with a view of placing limitation on their power[709].

The substantive part of the constitution specifically **Article 1** place all powers in the exercise of the sovereignty in the hands of the people. **Article 2** of the same not only declares the constitution to be supreme but also have binding force on all authorities and the persons throughout Uganda. This binds all institutions whether the executive or ordinary individuals.[710]

Article 98, the President of the Republic of Uganda is the Head of State, the Head of Government and Commander in Chief of the Armed Forces. **Article 98 (2)** the president is the fountain of honour who takes precedent overall Ugandans per state Hierarchy.

According to Article 99 (1) the executive authority in Uganda is vested in the president, and shall be exercised within the ambits of the constitution.

Article 99[711] provides for the executive authority which is vested in the president and exercised in accordance with the constitution and any other legislation.

The President has precedence over all other persons in Uganda and is obliged to safeguard the constitution as well as "execute and maintain the Constitution and all laws". He has the power to appoint a Vice President after having obtained the approval of the legislature. The vice president is also part can assume the presidency should the need arise.[712] **Article 108** establishes the office of the vice president.

The vice president is appointed by president and approved by a simple majority of parliament. **Article 102** stipulates that the vice must have the same qualifications as the president, with a primary responsibility to deputize the president.

The prime minister under the executive was initially not provided for under the 1995 constitution rather it's a creature of the 2005 amendment thus provided for under Article 108 A of the constitution amendment.

The prime minister is appointed by the president with approval of parliament per Article 108 A (1) with approval of parliament by simple majority.

Article 108A (2) (a) and (b) provides for the roles of the prime minister to include leadership of government business in parliament and be responsible for the coordination and implementation of government policies across ministries, departments and any other institutions. Perform any other such functions as may be assigned to him by the president or confined to him by the constitution or

[709] Conflict Prevention Network, Peace-building and Conflict Prevention in Developing Countries: A Practical Guide (Berlin 2001).

[710] David Hubert in his book *Attenuated Democracy* quoted Benjamin Page and Martin Gilens that; "the essence of democracy is not just having reasonably satisfactory policies: the essence of democracy is popular control of government, with each citizen having an equal voice"

[711] The constitution of the republic of Uganda, 1995 as amended.

[712]OlokaOnyango: Judicial Power and Constitutionalism in Uganda.

law.

Article 99 (4) is to the effect that some functions of the president are only restricted to him or her.

Article 103 of the constitution provides that the president is elected to the office by the people of Uganda through adult suffrage.

Contrary to **Article 107** of the constitution, the president can be removed from office through, an action for "abuse of office" or certain "misconduct or misbehavior" may be enforced by one third of all the members of parliament. After a special tribunal has investigated the case, a majority of two thirds of the members of parliament has then the power to confirm the decision on the removal of the President.

As expounded in ***Brigadier Henry Tumukunde V. Attorney General and Electoral Commission***[713], the majority of four to one, held that the actions of the president of Uganda can be challenged in a court of law though while holding office , the president has immunity from any court proceedings.

The cabinet is a center point that directs the instrument of government, in legislation as well as in administration. Thus, this coordinates the administrative actions of the executive. ***Article 111(1)*** provides for the cabinet and that this shall consist of the president, vice president, prime minister and the ministers.

The ministers are individually appointed by the president with approval of the president and these are individually accountable to the president.

The executive through its officials should provide enough funds to put into political leadership as well as institutions to allow proper conduction of necessary programmes for effective democratic governance in Uganda. The officials that make up the executive branch through their leadership can open opportunities to improve rule of law for instance minister of justice that towards the use of the police force as to political purposes, finance ministry which has interest in gaining control over resources.

The rule of requires legislations or any other bureaucratic regulations affecting any aspects such commercial operation like taxes to be simple, transparent and applied equally to all state actors not withstanding their stature as ministers same applies to anti-corruption regulations

THE RULE OF LAW AND ITS RELATIONSHIP TO CONSTITUTIONAL LAW

The person known as the father of the rule of law is Professor All Dicey reflected in his book the Law of the Constitution which he wrote in 1885 and which was built on the basis and views of

[713]Constitutional Appeal No.2 of 2006; [2008] UGCC 14

natural law scholars e.g. Montesquieu and his basic point was to attempt to remove government from the control of power hungry men and women and to instead impose a rule of principles or a rule of law where people were governed on well-known principles of law. According to Dicey 3 main element make up the rule of law.

First, was the absolute supremacy and dominancy of regular law as opposed to the arbitrary exercise of individual power. The presumption underlying this view is that law possesses an objective quality and that it operates without fear or favour of any individual or authority. In this way, law is opposed to arbitrary power.

Secondly, was the element of equality that is the notion that all people are equal before the law. Natural differentiations such as colour, race, religion and sex should not lead to the differential treatment of people. Before the law all people are equal. Accompanying this is the principle of non-discrimation. The law should not be influenced by race, wealth or ethnicity.

Thirdly, the law must be the instrument of a just government of the rule of law that is a government not built on justice is a clear violation of the rule of law.

These basic principles have always formed the basis of the rule of law for the last 2 centuries and modifications have been made to suit changing circumstances. In 1959, the International Coalition for Jurists [1CJ] met in Geneva and formulated certain general principles for determining circumstances in which the rule of law can be said to be in existence.

i) The first principle according to the 1CJ is the existence of a strong government and this is strong not in the sense of dictatorship but in sense of effectiveness and one in which the obedience of the people is given without necessarily forcing people.
ii) All government actions i.e. actions of the executive, legislative or Judiciary must be backed and conditioned by the law. This means that the law stands above all these. It also means that the government is a trustee or custodian of the law and political power and the role of government is to exercise power to the benefit of the public. The presumption here is that all laws which have been enacted by the Legislature and executive have been done so in the best interests of the people and should these 2 organs fail to meet the interests of the people, then the Judiciary should interfere to ameliorate the situation
iii) Equality of law: There must be a consistency of application of the law to all people.
iv) The Judiciary must be independent and in this way, the Judiciary must not be subject of control of any other arm of government. Secondly it also means that the 2 other arms of government must respect and enforce decisions made by the judicial arm of the state.

How best can independence of the Judiciary be secured?

a) The nature and appointment of judges must be as transparent as possible in order to ensure

that you have a process that is easily sustainable and defendable. The basis of appointment has to be transparent, and based on merit and capacity of the judges.

b) There should be an independent body that sieves potential appointees an
c) There must be security of tenure i.e. judges should not be easily removable and should have resources and facilitation necessary to their life and office.

v) The fifth principle of the 1CJ is that when we talk about human rights we mean both civil and political rights. Civil rights include freedom of association, speech, rights of an economic socio character e.g. right to food, shelter etc. Similarly, apart from simply declaring human rights and having them written in national Constitutions, there should also be an effective machinery of enforcement.

vi) There must be representative government. This means that people should have a way of participating in state affairs either directly or indirectly through their duly elected representatives and the power of election is accompanied by the power of removal. This means the government is based in the people.

vii) There must be a fair process of judicial adjudication and the principles of natural justice should be applied in a fair, consistent and impartial manner [Refer to Article 28 (3) of the 1995 Constitution].

viii) There must be a fair and effective system of administrative law (i.e. law that governs operations of administrative officers). This means that public officers should exercise their duties with diligence and effectiveness and with legal certainty of their actual extent.

ix) There must be respect for international law or the Law of Nations because all countries relate to one another and no one country lives in a vacuum or an island.

x) The state should promote and enhance the social and economic well being of the people. There should not be adverse discrimination in society. The rich should not be allowed to grow unusually richer while the poor grow poorer. The rule of law has a social justice element written therein.

CHALLENGES ASSOCIATED WITH THE RULE OF LAW

Unquestionably, the executive must respect and uphold the rule of law as a way of ensuring democratic governance. The executive arm of government must not at any time interfere with the affairs of the other arms and this is affected by the doctrine of separation of powers which is an essential element of rule of law.

This involves the distribution of tasks among the three arms of government that is the executive the legislature and the judiciary in order to carry out checks and balances so as to promote democracy

and contribute to the rule of law.

Kanyeihamba relying on John Locke, an English philosopher classified the doctrine of separation of powers as to the primary functions of the three arms of government as follows;

- The legislature charged with the formation of laws on which man's rights are judged.
- The executive mandated with the enforcement of laws
- The judiciary charged with the interpretation of the laws

The executive arm of government is supposed to complement the others without in any way, compromising their respective roles in order to achieve the broader objective of the community. It is also worth to note that any active relationship or corporation is bound to face turmoil that is disagreements or disputes and in this instance the rule by law might be the only root cause to lack of sustainable development in Uganda.

In practice, the doctrine of separation of powers has never been envisaged and the same applies to the judicial independence. In March 1st, 2007, Uganda was faced with up veal and looked like the old ghosts had not seceded to leave the country. On this day there was a high court invasion by security personnel contrary to the preamble and provisions of the constitution. This invasion was ordered by persons who hold public offices established under the constitution and parliament enacted laws and thus nothing seems to have changed from time memorial. This clearly portrays absence of rule of law as well as lack of the much needed democracy which can only be exercised in relation to statutory provisions.

Judicial power is where judges administer justice through resolving disputes independently an exercising impartiality. In anticipation of this, judicial organs were created as a forum where any person aggrieved by the act or decision of another within the corporation framework can have recourse hence being the basic institution in this regard though it decision can be questioned if influenced by external factors**.**

Article 2[714] provides that the Constitution is the supreme law of the land. This is not recognized since some of the ministers are above it, through rule by law. Individuals are detained in-communicado coupled with arbitrary arrests.

Referring to the learned Justice Ogoola[715]who typified the feeling of most Ugandans, against the military assault on the High court building by the Black mamba. No apology was made by the executive despite the siege where the executive appointed itself a judge, a threat to the rule of law.

The reviewing of Executive decision or certain actions such as policies is restrained by the political question doctrine hence a vividly defined inter-relationship between the rule of law and it's abuse

[714] The Constitution of the Republic of Uganda 1995 as amended.

[715] J ogoola, "the rape of the temple'' from *songs of paradise*: a harvest of poetry and verse (2009)

by encroaching on judicialism. Directives issued by the executive that prohibit or restrict fundamental rights violate the rule of law. If respect of presidential term is taken as an indicator of adherence to the rule of law, then it follows that the constitutional rules are increasingly taken more seriously

The Ugandan case law on the political question doctrine is expounded by Justice Kanyeihamba in ***Attorney General v. David Tinyefunza*** where he states that;

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

Kanyeihamba reference to the possession of political powers of a sovereign government, the determination of which is based on parliament and the president, whose decisions are conclusive on the courts.

Kasozi echoes that the rule of law emanates from the jurisprudence of the superior courts. He cites the case of ***General David Tinyefunza v Attorney General***[716], where they stated and used the words just and symbolizing the impartiality and independence of the judiciary as noted by Kanyeihamba (JSC).Kasozi notes that not only jurisprudence of courts is where direction is given rule of law but rather the acts or inactions of the other two arms f government specifically the executive and legislature that is referred to as the administration are crucial.[717]

In a system characterisised by rule of law an independent judiciary is critical to the effective functioning of the justice in a state. There has to be legal guarantee and protection of fundamental rights and civil and political liberties, such as freedom of expression, speech, information, or, to assemble peacefully, are essential for rule of law to prevail.

The independence of the judiciary takes three ingredients which include security of tenure of judicial officers, financial security and proper institutional funds allocation to the judiciary and institutional independence where the judicial officers are free to function without any interference or fear to ensure impartiality.

The then chief justice Benjamin Odoki[718] once stated;

"Independence of the judiciary is an indispensible preliquisite for a free society under the rule of

[716] Constitutional Petition No.1 of 1997

[717] George W.K.L Kasozi; *The concept of Rule of law and Protection of Human rights:* The Ugandan Experience: 1986 to the Present. The Living Law journal, law reform Commission, June 2008. Vol.6, No.1

[718] Speech to the bar course students LDC ON 25th July 2007, titled strengthening the independence of the judiciary in Uganda.

law which implies freedom from interference by the executive or legislature, with the exercise of judicial function, but this does not mean that the judge is entitled to act in an arbitrary manner. Provision should be made for adequate remuneration of the judiciary."

The Chief Justice Bart Katurebe commented on the remuneration in his speech at the 18th Annual Judges Conference page 5 and sated that;

"The funding for remuneration of judges and their salaries is not adequate. The salaries of the lower bench need to be attended to and raised so as to financially secure the judicial officers."

Section 6 of the Judicature Act provides for the protection of the judicial officers from civil or criminal action in the process of performing their duties but this is not upheld as more often the police at the command of higher authority is seen to act contrary in defiance of court orders to this while it is supposed to offer support in terms of protection.

In Uganda, there is presence of admirable provisions in the laws as to judicial independence from appointment of judicial officers to their removal however this remains a myth as it is far off the paper with the executive undermining the judicial independence by appointing those ready to act in its favor to the bench.

Problems arise when the executive thwarts the efforts of other institution of the state, prevent those institutions from being adequately resourced in accordance with rule of law. This is because heads of state set the tone and ethical standards for those institutions. Where the executive choses to subvert the electoral process, or engage the armed forces in political activities in order to retain their political position portrays a precedent acceptable whereas if these would condone such and take responsible political discourse the norms and practice of rule of law is reinforced.[719]

Legislative power refers to the task of passing of laws as well as supervising their implementation and this power is derived from the will of the people as provided under ***Article 1*** that all power belongs to the people of which this is expressed through periodic elections. The parliament is required to exercise control over the executive where the latter is to justify itself to parliament in respect of its actions or decisions. However, this can only be possible if the parliament is independent in carrying out, its functions.

The external interference with the Ugandan parliament can be traced way back in 1996 undermining its performance. From the famous handshake that involved the five million dollar Uganda shillings that was a pay out to members of parliament to lift the presidential term limits in 2005 to the most recent occasions which clearly illustrate the unfavorable change of parliament by the ruling party.

[719]Hallward-Driemeier, M., Khun-Jush, G. and Pritchett, L., 2010. "*Deals versus Rules: Policy Implementation Uncertainty and Why Firms Hate It",* NBER Working Paper No. 16001

The presence of the SFC in Parliament to bully the members of parliament vividly shows a threat to the doctrine of separation of powers that is parliament having no control over the government affairs but rather the executive having it in a tight grip to abide unwillingly to its commands hence the executive overreach.

The press is ever awash with stories of Members of parliament passing laws in favour of the government other than the interest of their constituencies in expectation of awards from the president for instance minister positions on the cabinet which are left vacant in a promise to be filled by those that fulfill his bid such as The Public Order Management Act[720] illustrates a twisted justification of the law, the ever changing term limits for the presidency in the constitution.

In Uganda, the NRM seems to use uncouth means in its political path that is it does not operate freely, fairly and democratically. The CEC that is the central executive committee which put Kadaga under pressure to quit the race in honour of alleged tacit agreement made five years prior to the 2021 speakership parliamentary elections for her rival.[721]

The president is seen to have encroached on the legislative exercises take that is for the speakership position in the parliament which should be an epitome of independence of which the parliament in actual sense, is required to censor the actions of the executive but with the president playing a big part its designs that is the election bit renders the process tainted with question marks.

It is considered chess by the master to continue controlling an arm of the state turned-a-regime organ with the president threatening to retaliate negatively where the parliament or any other arm of government, does not answer at the click of his fingers through a referendum.[722]Contrary to the Process referred to under ***Article 260*** of the constitution.

The constitution grants powers to parliament such as approving all executive appointments, making and reviewing laws, a definition of independence to perform its responsibilities. It should therefore, not conform to any party caucusing which undermines its position.

Directive 8 of the national objectives and directive principles of state policy provides that the state and individuals should ensure proper distribution of powers as well as maintaining checks and balances to the various organs.

The collection of essays on local level politics in East African countries such as Uganda, Kenya among others illustrates that these countries were from 1918 until independence bound together by common colonial master and broadly share the same political structure and for a certain period comprised of a political federation.

[720] 2013
[721] https://www.independent.co.ug/Museveni-succession-plot-in-Oulanyah-Kadaga-battle/
[722] https://www.monitor.co.ug/uganda/oped/commentary/of-monolithic-nrm-and-the-deceptive-race-for-speaker-3411242

Towards the end of the 1960s the state of political and ideological orientations began to sharply diverge and the late 1970s saw them embroiled in serious disputes and the case of Uganda and Tanzania, outright war. However, their reform of state structure moved in a fairly different direction. All not only became single-party or non-party regime but continued to allocate an extremely limited role to representative institutions, to remain a four tier system of government dominated by strong central and provincial authorities, separate representative bodies in the lower tiers from any meaningful revenue base.[723]

In more recent years along with many other African counties Uganda, Kenya, Tanzania further shared the experience of central contraction, or rather of central state withdrawal from what were earlier depicted as some of its key responsibilities. The phenomenon of state contraction was vivid in Uganda where government even withdrew from the basic function of providing minimal physical security, but was also evident in Tanzania and to a lesser extent Kenya with regard to provision and maintenance of infrastructure and basic social services[724].

In 1994, Uganda officially remained a non-party state, although political parties including a state party maintain some form of public existence there including publishing their own newspapers. Kenya meanwhile was a multiparty democracy and Tanzania than they were in Uganda. A more significant difference was that Uganda after years of chaos and or civil war had clearly entered a period of comparative political tranquility. This followed in the wake of the victory of a popularly supported guerilla army in the first in Africa to acquire power from an incumbent local regime. Kenya by contrast had been driven into a situation of apparently irreparable ethno-regional division, while Tanzania's traditional unity and stability was threatened by a growing wave of religious antagonism and by separatist trends of various kinds on both Zanzibar and the mainland.[725]

In Kenya, the nullification of the presidential election illustrated the independence of the judiciary much as, the executive targeted the four Supreme Court judges who authored the majority judgment in the 2017 Raila decision in an attempt to induce fear in the rest of the judicial ranks. Thus the nastiness and brutishness of the executive assault towards the judiciary amounts to abuse of rule of law case in point, Uganda, where the executive is ever shunning the decisions of the executive mostly termed as the executive bullying.

In Tanzania both the president and his vice president run on the same ticket at the election. At death

[723]KauitiKayinga, Andrew S.Z Kiondo, *The new Local Level Politics in East Africa* (Studies on Uganda, Tanzania and Kenya) research report.No.95 pp.10.
[724] Ibid .10
[725]KauitiKayinga, Andrew S.Z Kiondo, *The new Local Level Politics in East Africa* (Studies on Uganda, Tanzania and Kenya) research Report No.95 pp.11.

of the president there was a smooth succession female president as successor to avoid constitutional vacuum and uncertainty.

Ugandan's constitution is continuously a ball on the playing field of which the executive can have changes made to it whenever it pleases without regard to the appropriate process such as a constitutional review process or referendum. Therefore, it is argued that the constitutional mandate of the president be reduced just like in Kenya's new constitution that allows more people participation and inclusion.

Noble Marara in his book ***Behind the presidential curtain*** echoes that Kagame labeled his colleagues killers or unaccountable people just to get rid of them. For instance Rusesabagina capture by Kagame's government without following proper extradition process when he was forcefully abducted leading to his enforced disappearance.[726] The same is vivid through press in Uganda through several analogies relating to Museveni's government.

The immense presidential powers by the president are a defining characteristic. This is argued to have attributed to the weeding out of the president's contemporaries and likely opponents. It is further noted that Museveni's government has caused mobilization of military conflicts such Kony's war in Northern Uganda to protect the legitimacy of the NRM government crystallizes presidential power in Uganda to see to the continuity of Museveni's rule.

The questioning of presidential decisions is tantamount to a crime which has seen to the gradual weeding out of the old guard from NRM whose loyalty had become questionable by the president with suspicions of aspiring to take him out his presidential position hence bringing an end to the suspected succession plan within NRM.[727]

The rule of law in international context finds expression in the European convention on human rights. The European Union makes reference to it, in 1997 Treaty of Amsterdam when it states that the European Union is founded on respect for democratic principles, human rights and the rule of law. The preamble of the ***UDHR*** also confirms respect for rule of law. The rule of law being the implementation mechanism for human rights, turning them from a principle into reality. From the third clause of the preamble the rule is noted that;

"whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected"

In the United Kingdom, the queen is a ceremonial figure with most of the powers being yielded by the parliament and the executive. There is no written constitution in the UK of which these rely on conventions and in the 17th century the parliament acquired supremacy over the executive and this

[726] https;//www.hrw.org/news/2020/09/10/Rwanda-rusesabagina-was-forcibly-disappeared
[727] https://africasacountry.com/2018/11/presidential-power-and-the-museveni-state-in-uganda

was known as the rule of law.

Article 2 of the United States constitution creates the executive branch which consists of the president, vice president and other executive officers chosen by the president. This Article expressly provides the unitary executive theory which is the power possessed by the president to control the executive branch. Same applies to the command of the United states army in essence the constitution confers these powers and the US congress checks on these powers such a controlling appropriation for military expenditures.[728]

The United States, the Supreme Court's decision in ***Bush v Gore*** has triggered renewed interest in the nature of the rule of law in the Anglo-American tradition. After decades of neglect interest in the nature and consequences as to how the rule of law has survived in recent years.

In the US conduct of foreign affairs, the court facilitates growth of presidential powers in foreign affairs in three not so different ways that is adhering to the sole-organ doctrine. Secondly, invoking the political question doctrine and other non-judicial grounds. Thirdly, inferring congressional approval of presidential action by virtue of congressional inaction or silence. Thus the author argues that this doing, is an act by the judiciary is an illustration of executive overreach.[729]

The rule of law in even states with well-developed institutions, political motives still affect performance of these institutions such as judicial process which erodes impartiality through overreaching their mandate to acquire short-time gains to political actors or power brokers.

The America democratic system is not entirely based on the majority rule for instance the bill of rights was passed because some matters were deemed important, barring the constitutional amendment, not even majority should change it. It is argued that the rule of law were all persons and institutions are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights principles of which the courts play an integral role as was illustrated in ***Plyer v Doe***[730]where the issue was whether denying undocumented children of illegal immigrants the right to attend public school constitutes based on alienage that violates the Equal Protection clause of the Fourteenth Amendment? The court by a ratio of five to four held that the Texas legislation violated the clause reasoning that the state's exclusion of undocumented children from acquiring education was unlikely to improve the overall quality of education in Texas.

In a dissenting opinion ***Burger C. J*** opinioned that any issues concerning whether or not to admit children of undocumented immigrants in to public schools should be dealt with the legislature as

[728] https://courses.lumenlearning.com/boundless-politicalscience/chapter/the -powers-of-the-presidency/
[729] David G. Adler, *The judicaiary and Presidential Power in Foreign Affairs*: A Critique, 1 RICH.J.L & PUB.INT.1 (1996) https://scholarship.richmond.edu.jolpi/vol1/iss1/3c
[730] 457 U.S.202 (1982)

opposed to the judiciary because it is a policy issue inappropriate for court to undertake hence recognizing legislative powers.[731]

United States constitution has the presidential duties and abilities directly listed and these are referred to as formal powers under ***Article 2*** of the constitution and this includes power to make treaties, command the military and veto legislation.

Executive orders are different from those passed by the congress in such a way that they can only change policies within the executive branch. For instance trump's announced plans to end the constitutional guarantee of birth right citizenship by executive order but could not do so due to limit of presidential powers is a valid example of a democratic state of which his anti-democratic sentiments could not be dismissed.[732]

The informal power that the president has to influence foreign policy is through executive agreements where the president negotiates with foreign leaders in fulfilling his duties as president.

A government of US vests all executive powers are in the hands of one leader and this is termed as single executive by the president.

There is room for growth of presidential powers these powers are subject to limitation in the US the constitution stipulates that the president cannot become overall powerful as was the incidence of George Bush in 2006 where he planned to use military tribunals to prosecute enemy combatants, court found his decision as a violation to the Constitution.[733]

Trump's public statements attacking judges as well as his questioning of judicial authority due to rulings delivered against the Trump administration such as the issuance of green cards.[734] Trumps impeach on basis of abuse of power and obstruction of congress following the first attempted impeachment Trump's phone call to Ukraine president in 2019 for a face-face meeting on condition he investigate the energy company of which Biden's son worked for. The second impeachment in 2021 due to him threatening national security, democracy and the US constitution.

In The United States of America, Presidential decision making is subject to legal constraint, as illustrated in March 2011, the Obama Administration initiated military operations against Libya without congressional authorization, and then continued them past the statutory sixty-day limit set forth in the War Powers Resolution. Critics treated this episode as evidence that the executive branch did not take seriously constitutional and statutory limits on the use of military force.

Different countries have adopted the rule of law and these failures and success stories. These are helpful in finding ways to remedy the loopholes in other jurisdictions. Despite various principles of

[731] https://www.uscourts.gov/eductaional-resources/educational -activities/overview-rule-of-law
[732] https://www.history.com/topics/us-government/executive-order
[733] https://governmentexecutive branch.weebly.com/the-growth-of-presidential-power.html
[734] Justice Sotomayer's dissenting opinion in Wolf v Cook County , No.19-3169 (7th Cir.2020)

the rule of in various jurisdictions, Uganda is short of some principles such accountability among others which are helpful in any democratic society.

Uganda still has a long way to go to achieve rule of. However, doing so requires a collective effort. This involves boosting of political parties, effective social and economic development planning, recognition and acceptance where recommendations are made as well as institutional creation for cooperative promotion of rule of law which this can be best achieved with acknowledgment of the cause.

The inequities and injustices are systematic structural problem. The system to some extent is broken but it can heal. It is up to the people to work for the change, create the change and adopt the change. Not let the arms of government play ball with the system yet what they should be doing is uphold it.

People need people and the law needs people for it is created for the people. In other words, laws are made for the people otherwise, they would exist.

It is also necessary to educate the executive as to their roles and duties under law and of the public as to their rights vis a vis the administration.[735]

Poor and self-centered social, political and economic planning is one of the biggest democratic challenges we have not only in Uganda but also in the entire Africa. Leaders with political powers only give first priority to short-term strategies that would help keep them in political power other than looking at long term development aspects. Therefore, if some aspects of democratic constraints are to be solved, there has to be some kind of strategic planning and separation of powers. Thus the rule of law requires that all state and non-state actors to act and take decisions according to their legally defined responsibilities.

The point is, there should be respect of institutions in order to uphold the rule of law and its limits or the checks and balances in place to better mediate the nation or communities is the only way in which humankind, acting as principal global agents of care, will be able to ensure a sustainable future for human and non- human constituents of the nation. Correspondingly, the economy streamlining with health, security, infrastructural development among others must also come to reflect those imperatives.

Carry out thorough investigations over suspected incidences or allegations over state officials.

Refrain from punishing those that voice or express their opinions such as political ideologies. Through involving its self in judicial decisions.

[735]Corder , supra note 106, at 108

Establish a tribunal or commission to inquire into the systematic threat to the rule of law since there is likelihood that this is structural problem among institutions and entities.

Have both the executive order and legislation subject to an independent judiciary for review to check on their validity constitutionally.

Alexander Hamilton noted that wherever, two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion, and there is personal emulation or animosity and it matters not, whether the officers involved bear the equal dignity and authority. The writer argues that in presence of such, there is always a likelihood loss of respectability, weakened authority hence frustrate the measures of government critical in emergencies of a state.

He further argues that this can cause divisionism in the state and in not at all peaceful factions thus such a state is subject to pending doom such as violate demonstration from protestors as was the case in during Trump's prudential term in USA.[736]

Though the governance in each country may differ to a small or large extent both in contextual or procedural format or on any other basis thus it is difficult to compare success stories from one state to another in order to derive a favorable conclusion as implementation of one policy from one state to work favorably if implemented in another state as to mechanisms and the rule of law principles. However, this is no excuse for the failure to observe the rule of on basis of the legislations in order to create a workable environment between the governed and the officials in Uganda.

The rule of law does exist in Uganda though its abuse by the executive is more pronounced drawing from the absence of separation of powers which is highly recommended among the three arms of government that is the executive, legislature and the judiciary in order to salvage the performance of these institutions and promote the rule of law in Uganda.

Judicial parties should adopt internal democratic structures.

Provide proportional system on the basis of merit for contenders to ensure candidates will be elected including through such mechanisms such as zippard lists and voluntary quotas

In majority systems establish voluntary targets or quotas to ensure a specified minimum number of citizens or nationals put forward as candidates.

Provide support and resources for the daily running of services

Government actors should ensure political party laws and any other legislations relating to elections. Do not indirectly disadvantage the nationals.

[736] https://www.khanacademy.org/humanities/ap-us-governmnet-and-politics/resurces-and-exam-preparation/required-documents-and-cases/a/fedralist-no-70

CHAPTER EIGHT

' All power corrupts. Total power corrupts absolutely '. And the trouble about it is that an official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant.

Lord Denning[737]

EXECUTIVE OVERREACHES.

Properly exercised the new powers of the executive lead to the Welfare State: but abused they lead to the totalitarian State. None such must ever be allowed in this country. We have in our time to deal with changes which are of equal constitutional significance to those which took place years ago. Let us prove ourselves equal to the challenge.

ABUSE AND STANDARD OF PRESIDENTIAL POWERS

In my opinion, abuse of presidential power and the standard of presidential power, the latter illuminates the pathway for the former. That the standard of presidential power is a very determinant factor in the abuse of the same power. This follows mode of acquisition of these powers, limits attached to them and the assumed attachment or popularly, entitlement to the power. Except for president Muteesa II, who by the way had more attachment to the presidency being of the caliber of the Kabaka and whose station had been fronted since the inception of governance in Uganda, didn't cling or arbitrarily enforce his entitlement. The rear of the next presidents in their chronological order held (griped) Uganda in full embrace as their born child '*omwana we ntumbwe', also known as paternal politics:* owing to whatever he is and that which he is to become as a personal chattel. They embraced presidency not the benefit of Ugandans but to a specific interest upheld by a specific faction. Presidential power in other words, was and still is like a pyramid which has only spot for one person (that is) taking precedence over all below, but the dramatic beauty of the Ugandan pyramid, is whoever gets there, holds a long electric stick tipping off from a distance whoever tries to get nearer this power. By this use of direct force presidential power in its very essence has a staleness / stagnation in its exercise. To an extent that whatever is drown from it is either illegal or unreasonable. By virtue of enforcing personal interests at the

[737] Freedom Under The Law, Stevens & Sons Limited, p. 100

extent of the whole. With that William Faulkner rightly stated that *"the past is never dead it is not even past"* [738] . and it moves with our shadow.

The unrestrained power can be a concern and potential threat to the liberty of the people. *"the reigns of good princes have been always most dangerous to the liberties of their people. For when their successors managing the government with different thoughts, would draw the actions of these good rulers into precedent and make from them the standard of their prerogative, as if what had been done only for the good of the people was a right in them to do, for the harm of the people if they so pleased. It has occasioned context and sometimes public disorders before the people would recover their original rights and got that to be declared not to be prerogative which truly was never so"* [739]Thus meaning that the mandate of a president should not be enjoyed at the expense of the people. And even when there is a presidential prerogative, it should be in line with the law.

Enhancing the argument that the foundation of Ugandans political structure and the inked material of the Uganda art piece of the colonial master is strongly erected and to some degree permanently drawn. It also commonly goes that the apple doesn't fall away from the tree. The arbitrariness and entitlement that played out in the 1900s shares table with these 2000s era. Politics and history are a single subject of study, the present-day political life of a nation, its ideology, institutions, social relationships, leadership and uses of power is direct product of its historical experience.[740]

The standard of power in the colonial period was by a superior hand delegated to another superior hand. It was to the whims and discretion of his majesty the king of England. It was based on the bible expression of *'let there be'* and there was. Being a king equated to the supreme capacity, the Establishment of powers were determinant by the king's person. The 1900 BA, the king gave himself all economic and no administrative Powers in Buganda, controlled the economy through Articles 2, 4, 6, 12 and 15. Which in essence granted him power over Buganda's taxes pooled to the protectorate government, having direct control over the activities of the Kabaka of Buganda and controlling land which was an economic tool. [741]So the nature of these powers, their standards which had no limitation per se, one wouldn't be surprised at the nature of their abuse. Under the agreement of Buganda 1900 *"…on the death of a Kabaka, his successor shall be elected by a majority of voters in the Lukiiko or native council."* [742] later in the 1950s when the Kabaka refused to comply with the desire of sir Andrew Cohen formation of a unitary state and or, confederation of east Africa. Though Kabaka

[738] William Cuthbert Faulkner 'requiem for a nun'
[739] John Locke, second treatise on government chapter 14-15: of prerogative and of paternal political, and despotical (treated together)
[740] Stephen F Cohen in his book rethinking the soviet experience, politics and history, 1917.
[741] Art 6 and 15 of the Buganda Agreement 1900
[742] Art 6 Buganda Agreement 1900

not dead, the colonial government moved to replace him. Further still under the same Article, since the Kabaka lived at the mercy of the British government, his powers were stripped away and exiled for not following the British directive leading to the 1953 to 1955 Kabaka crisis in Uganda. With all purposes and intents, the nature and standard of powers in all agreements 1900 and 1955 Buganda Agreements, 1901, 1900, 1933 Ankole, Toro and Bunyoro agreements, 1902 and 1920 OIC enforced and maintained control by his majesty and with this, implicitly, these powers could be abused or simply sidelined to advance colonial rule.

PRESIDENTIAL ABUSES UNDER THE 1962 CONSTITUTION

Section 30(1) of the Constitution of 1962 granted power to the President by proclamation to declare a state of public emergency subject to the approval and extension of Parliament under Subsections 2 and 3 of the same provision. The seizure of Presidential power by the then Prime Minister Apollo Milton Obote as discussed before meant that this discretion naturally fell to him and it was a discretion he exercised so liberally considering the fact that he essentially controlled Parliament as well noting that the Uganda People's Congress held the majority seats in the House and these Members of Parliament were so beholden to him that Uganda was ruled by, in Prof. Kanyeihamba's words, "*a de facto rather than a de jure government*."[743]

Following the suspension of the Constitution of 1962 on the 24th of February 1966, and the enactment of the "new" Constitution, the Constitution of 1966 on the 15th of April 1966 the Obote Government evoked this prerogative and declared a state of emergency in Buganda and with this came the enactment of The Emergency Powers Regulations, 1966 that were premised on the Emergency Powers Act, 1963 which essentially broke the limits of executive power with the broad discretion it granted to the President which he then utilized to the very utmost to curtail dissent and establish compliance.

I wish to break off here and discuss in general the province of the emergency powers of the President in republics. Alexander Hamilton, one of the Founding Fathers of the United States of America and principal drafters of the American Constitution, 1787 logically set out the underpinnings of the principally overly broad discretionary emergency powers of the President in Issue No. XXIII of the Federalist Papers: he remarked, "*This power… is one of those truths, which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms, as simple as they are universal-the means ought to be proportioned to the end; the persons from whose agency the*

[743] Ibid

attainment of any end is expected, ought to possess the means by which it is to be attained."[744] Hamilton in this case was speaking of exceptional circumstances when it would be necessary though undesirable to unshackle the executive branch and permit it to act against an existential threat whether it is that the threat is external or internal. In this respect I the words of Hamilton apply, "*The principal purposes to be answered by union, are these: The common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks*…"[745] and considering that the President embodies the will of the people and that it is his or her responsibility to ensure the wellbeing of his people by the preservation of national security with the guidance of national interests.

Counter arguments might be raised against this notion of a loosely bound executive and in the circumstances they might be right if he narrows our gaze to the potentially pugnacious effect such broad discretion could have on the rights and liberties the individual. To respond to these claims shrouded in skepticism we must look closely at how these circumstances come about. It is to Rousseau that we must look to for an answer. Rousseau, in his great work, The Social Contract, pointed out with fair emphasis that men cannot be said to be ruled unless they themselves give themselves to the king (ruler)[746]; if we speak in contemporary terms, this giving up of oneself and one's will can best be referenced in terms of elections. To Rousseau, before we consider any giving of rights, we must consider the formation of the people first. In any civil cause, what brings men together is an arrangement or agreement of some sort; a contract so to speak and social matters the case does not differ. The general clause of this "social contract" by which all men of the society are bound reads, "*Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole*"[747] and the reason they enter such a contract is that they may be able to overcome those obstacles that exist in nature and impede the existence of men in nature. Upon coming together, the collective body of men ceases to be individual on a personal basis but rather becomes a body politic of the people, a Sovereign; a State. This Sovereign has as its solemn duty to preserve the freedom of the individuals that constitute it and ensure his wellbeing in the state of nature. Should we then presume that men inherently possess herd-like mentality so as to sheepishly follow the will of the Sovereign without reservation? Naturally, we respond in the negative and proceed in Rousseau's words, "*In fact, each individual, as a man, may have a particular will contrary or*

[744] A. Hamilton, J. Jay & J. Madison, The Federalist: A Commentary on the Constitution of the United States (The Independent Journal, 1787) 196
[745] Ibid at pg. 195
[746] J.J. Rousseau, The Social Contract (.M. Dent and Sons, 1923) 10
[747] Ibid at pg. 11

dissimilar to the general will which he has as a citizen. His particular interest may speak to him quite differently from the common interest…In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence."[748]

The subjection of personal impulses, opinions, inclinations, purposes and beliefs of the individual by the State, by the community to which he belongs is something of a fact of life and just as he has rights against the State, he, in equal measure has duties not just to the State. If he consents to give his liberties and rights to a Sovereign, just as all other men have done then the will of the individual must serve the general will of the people and the State knows nothing but that which exists in the contract between men. As I have mentioned before, the purpose of the emergency powers of the President is grant him such power and discretion as would be necessary in the circumstances to deal with an existential threat that would imperil the general welfare of the people. In such a case, where the executive acts in favor of the whole, he must not be unduly hindered by judicial review or congressional authority.[749]

Having justified, at least philosophically, the necessity of holding a constitutional principle that both in intent and in practice has an adverse effect our fundamental rights and liberties I suggest that we return to the key question holding us here. We might be tempted to think why it is that we give the executive such extraordinary power in the first place such that law falls into the realm of the whims and fancies of essentially a single person without setting in place an entity to whom government is effectively accountable.[750] Hamilton replies in response to this in the following terms, "*Whether there ought to be a federal government entrusted with the care of the common defence, is a question, in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that, that government ought to be clothed with all the powers requisite to the complete execution of its trust*."[751]

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[748] Ibid at pages. 13-14

[749] J.L. Friedman, Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose (2009) Journal of Law and Health, Vol. 25:265, 268

[750] If we go by the provisions of the Constitution of 1962, Parliament role in the event that a state of emergency was declared was limited to approving (under Section 30(2)), extending (under Section 30(3)) and revoking the state of emergency (under Section 30(4)); in no place or instance did Parliament have power to inquire into how these executive went about its discretion during the existence of the state of emergency. To a reader considering these provisions within the conditions of the modern times, these powers might seem sufficient enough to enable the National Assembly contain the executive during the time the state of emergency subsists. Such thinking would be erroneous because at the time the ruling Uganda People's Congress held the majority in Parliament so essentially the government was not accountable to anyone whatsoever

[751] Supra [no.19] (196)

Besides, "*Who so likely to make suitable provisions for the public defence, as that body to which the guardianship of the public safety is confided? Which, as the centre of information, will best understand the extent and urgency of the dangers that threaten; as the representative of the WHOLE, will feel itself most deeply interested in the preservation of every part; which, from the responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions; and which, by the extension of its authority throughout the states, can alone establish uniformity and concert in the plans and measures, by which the common safety is to be secured*?"[752]

This mentioned, I wish to state here and now that when we are consider setting limits to the emergency powers of the President then two circumstances must be borne in mind; the President will not legitimately be entitled to the ordinarily broad discretionary power that he customarily possesses during a state of emergency if the present risk or threat can be reduced into determined in definite terms or a definite scale so as to render the grant of absolutely discretionary powers unnecessary in the circumstances. Such determination can naturally solely be made by the Parliament after, as it can be reasonably presumed, the state of emergency is declared by the President.

That mentioned, pray to return to my discussion on the essence of emergency powers. When we speak of emergency powers we can safely conclude, from my discussion on the same above, that this is an expansion of the powers of the executive. But under what circumstances are the powers of the executive expanded legitimately, the constitutional law scholar asks, if we are speaking in terms of a republic? I respond to this query by making reference to the dictum of Justice Felix Frankfurter in Youngstown Sheet & Tube Co. v Sawyer.[753] In that case, the Justice impliedly laid out a three pronged test to determine the legitimacy of the expansion of executive power: he dictated that the exercise of this unique executive power must be, "*a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents...may be treated as a gloss on executive power vested in the President.*"[754] If we break this down into its relevant components relevant to my discussion we will come up with a division no clearer than that given by Joshua L. Friedman; he mentioned, that "*First, the Executive's practice must be systematic, unbroken, and long pursued. Second, Congress must knowingly acquiesce to the practice. Third, the Executive may not violate any unambiguous constitutional commands or statutes*."[755] It is this test that will assiduously follow in my discussion here; at least in as far as Uganda is concerned

[752] Supra [no.19] (198)
[753]343 U.S. 579 (1952)
[754]Youngstown Sheet & Tube Co. v Sawyer343 U.S. 579 (1952)
[755] Supra [no.21] at pg. 279

THE CREATION OF KARAMOJA AND THE KARAMOJA EXTRADITION LAW: BASIS TO EXILE UNDESIRABLES BY THE EXECUTIVE. (THE FRONTIER OF STATE LAW'S EMPIRE)

Shortly after leaving the Nile's source at Lake Victoria, Speke ran headlong into a war raging across the river. He made a long detour westward before meeting up with the river further downstream. Had he gone far to the east instead, Speke might have come to the edge of a dry savannah stretching towards the Great Rift Valley. Instead, his map shows a large empty space east of the "Asua" (Achwa) river with the “Galla tribes" beyond. Later British explorers would name this empty space on map Karamoja, after its most populous people, the Karamojong.[756]The only hints of other outsiders were muskets traded with Arabs for ivory and hides.[757]

In "tribal" regions outside the four kingdoms, the British ruled indirectly through Tamukedde was more concerned about soldiers from neighbouring Zaire who raided across the western border in violation of "Uganda territorial integrity." These soldiers, however, were chasing Bakonzo relations rebelling against President Mobutu's regime far to the west. Tamukedde and Mobutu's soldiers were both chasing the rebels that lived in the Ruwenzori range bifurcated by the Uganda-Zaire international border.

European administrative officers supervising a native court that applied customary law.[758] But Karamojong was an exception to even this decentralized system of governance. Uganda's first Governor, Sir Hesketh Bell, described the Karamojong in 1910 as, "so 'primitive' that they would provide more interest to the anthropologist than to the administrator"[759] and another official feared he could "do little to stop [their] Ancient Customs".[760] And indeed the British largely ignored the desiccated lands northeast of Kampala until they set up a bare-bones military administration in 1911. The District Commissioner's main duty was to protect the Karamojong from raids by neighbouring Turkana and Ethiopians, and prevent internal fighting. To accomplish this, he had a small detachment of King's African Rifles and a few European officers. The Commissioner appointed chiefs among the various groups he happened across in Karamoja. Chiefs were given limited tasks, mainly collecting firearms and maintaining a ready pool of labour for government

[756]The"Karamojong"inactuallyacatch-all for the various communities living in the Karamoja plains. While this brief analysis treats them as a single people, theyarein factaconstantly adapting collective: see Ben Knighton, *The Vitality of Karamojong Religion:Dying TraditionorLivingFaith?*(Burlington:Ashgate,2005) at25.

[757] Ben Knighton,"The State as Raider among the Karamojong: 'Where There AreNo Guns,They Use the Threat of Guns'"(2003)73Africa: J.Int'lAfr.Institute427.

[758].F. Morris,"TwoEarlySurveysofNativeCourtsinUganda"(1967)11J.Afr.L.159.

[759]Cited in Sathya murthy, *supra* at270.

[760]Cited in Sathya murthy, *supra* at270.

projects like road or fort building.[761]

When the colonial government introduced the Buganda model, the Karamojong resisted by ignoring it and ostracizing its co-opted chiefs. This model failed completely in 1918 and three years later the British decided to reintroduce a civilian administration in Karamoja. Chiefs now had expanded powers to collect taxes, keep public records, hold regular meetings, arrest offenders and impose punishments in new native courts, and control cattle movements.[762] These new chiefly powers, however, rested not on any pre- existing Karamojong social relations, "but on the strength of the alien government".[763] This foreign system backed by force would prove a most unstable compound.

At the onset of the dry season in 1923, the elders of a Karamojong settlement decided that it was time to move the cattle herds to dry season pastures. [764] This decision directly contradicted a government order that no more than half the men may leave at any time-thus ensuring a year-round labour pool. Achia, a local chief, heard people were driving their cattle out onto the plain and rushed to intervene. He and his policemen intercepted some herds and drove them back to his compound. At least two elders then called for his death so that "everyone can herd his stock where he likes."[765]

Shortly after this meeting, Achia ran headlong into an armed group gathered to recapture their cattle and was speared to death by young men.

The government quickly captured and executed three alleged murderers and also seized cattle from their settlement as a collective punishment. But the lesson was not lost on Sir Geoffrey Archer, then Governor, who decided to leave the Karamojong "to their own customs, as far as possible, and under their own chiefs." And so an uneasy status quo developed with the government-appointed chiefs limited to collecting firearms and arresting murder suspects for trial in native (and later magistrates and High) courts. In all other matters, the Karamojong governed themselves.[766]

Karamoja is the only district in Uganda where the hierarchical Buganda model failed completely. This is due to two interrelated reasons: the acephalous nature of Karamojong society, and widespread, deliberate illiteracy. In the 1920s elders buried pens and paper in a ceremonial rejection of colonial and missionary education.[767] By the late 1950s, a paltry three per cent of

[761] Knighton2003, *supra.*
[762] James Barber, Imperial Frontier: A Stutfy of&lations Between the British and the Pastoral Tribes of North East Uganda (Nairobi: East African Publishing House, 1968) at 143-45.
[763] Id.
[764] Id.
[765] *Id*
[766] Sathyamurthy, *supra* at 345.
[767] MustafaMirzeler&CrawfordYoung,"Pastoral Politics in the North east Periphery in Uganda: AK-47as Agent of Change"(2000)38]. Modern Afr.Studies407at414.

children attended school because elders "continued to fear and loath" an education that threatened their society's continuity and security.[768] Only 1 of 281 students at Makerere University in 1959-60 was Karamoja.[769] Those few who completed their studies were invariably employed as chiefs, clerks or police for the government. The mission educated were spoken of as "no longer Karamojong" and generally distrusted. While they retained some grazing rights, they chose to enforce those rights in native courts rather than have elders hear the dispute. [770]Literacy entailed exclusion from the politics, if not the benefits, of Karamojong society. By so insulating themselves against written commands, their orality was able to deflect (total) penetration by the literary bureaucratic state".[771]

Karamojong society was patriarchal, but not hierarchical like other groups discussed above. Instead there were age-groups to which each male member belonged (or potentially belonged) and which dominated social relations.[772] Senior age-groups initiated boys into an age-group with their peers in an elaborate ceremony that, among other things, reinforced their subordinate position to the elder age-groups. As each new age-group was created every five or seven years, the older age-groups retired or died off. The eldest age-group retained certain privileges and directed their community's policies. It was the younger age-groups who implemented the elders' decisions against individual Karamojong or outsiders like Achia's spearing. Thus Karamojong society was not "tribal" in the sense of a blood-related, or genetically closed, group. Age-group names were common to all Karamojong. So when strangers met up on their long wanderings in search of fresh pasture, their age-group membership provided a ready-made set of social relations to prevent disputes. In such nomadic groups, the members of the eldest age- group present had unquestioned authority to organize relative strangers for a common purpose, like raiding a nearby foreigner for cattle.

This authority was created and recreated in the performance of prayer led by elder age-group members. In the akiriket, a politico-religious assembly, elders in the senior age-group often led a series of call-and-answer prayers for rains to water the dusty plains.[773]Elders also cursed enemies - both within and without- who threatened them or, more importantly, their cattle. Thus members of senior age-groups might settle disputes and uphold rights, but only if the parties chose to make it a public dispute (ebura).[774] But elders had no "traditional" right to settle disputes similar to those of a Baganda chiefs like Tamukedde.

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[768] Sathyamurthy, *supra*at487-88.
[769]Mirzeler&Crawford, *supra at*414.
[770]Mirzeler&Crawford, *supra* at414.
[771] Neville Dyson-Hudson, *Karimojong Politics* (Oxford:ClarendonPress,1966)at208.
[772]Knighton 2003, *supra* at149.
[773] For anextendedexpositionofthiscomplexage-based system, seeDyson-Hudson, *supra at*155-206.
[774] Dyson-Hudson, *supra*at217.

If an ebura came forward, the guilty party beseeched elders in a stylized act in front of the akiriket. Instead of relying on written legal texts, mnemonic devices captured just relations and sanctions for their violation.[775] He offered beer or a slaughtered animal to an individual elder or sacrificed an ox for many elders to amend for more serious offences.[776] In the ebura, all males listened to the disputants and anyone else who wished to ask questions or offer an opinion.[777] But it was the elders' job to "cut the matter" and decide the punishment. If this decision was ignored, the elders may ask some young men to gather up the requisite cattle from, or even beat, the offender. Unlike with the Ruwenzururu, it is (male) elders, not (male and female) children, whose oral performance maintains their society's norms. For the Karamojong, orality is an exoskeleton of performance that both forms a unified society of individuals and protects them from outside incursions of violence or written laws.

Despite their Laissez faire approach, the British government made sure native courts tried all serious criminal offences, especially homicide. Magistrates' courts had taken over this burden by the late 1950s, although not much changed in practice.[778] Government-appointed chiefs arrested suspects in violent crimes for trial in the courts and punished guilty men with jail or hanging. Before government interventions, a blood (not age-group) relative of the deceased often either killed the supposed murderer or seized his cattle as compensation. [779] Wherever and whenever chiefs could be avoided, Karamojong continued this practice. Elders in the senior age-groups again played an important role in deciding how much cattle was enough to satisfy the original wrong.

Colonial criminal law banned cattle payment determined by elders as compensation for murder, and thus attacked the elders' central role in arbitrating disputes. This slowly eroded the elders' hold over the younger age-groups and hardened their resolve to resist it and other corrosive influences, like a missionary education. [780] Indeed, unlike elsewhere in Uganda, the Protestant and Catholic missionaries had made little headway into Karamojong by 1960s.[781] The resilient bonds of orality held Karamojong society together despite colonial attempts to "settle" these cattle-loving people.

From the perspective of Kampala in the 1960s, the Karamoja plain was still the frontier of state law's empire. Two reports from 1961 captured the perspectives of the departing British and arriving

[775]Walter J. Ong, *Orality and Literary: The Technologing of the Word,*2nded. (New York: Routledge,2002) at 34.
[776] Dyson-Hudson, *supra*at182-3.
[777]*Id.*
[778]*Id*
[779]Cattle as compensation does not reflecton the worth of human life, as many British administrators thought. Tamukede, for example, found"men had no respect for human own tribes or clans."This is not quite accurate, however, since it fails to recognize the centrality of cattlein*everything.* As one Karimojong put it,"[a]Karimojongloveshis cattle above all other things, and forthese cattle he will give his life."SeeTamukedde, *supraat*65; Dyson-Hudson, *supra* at102.
[780]Knighton2006, *supra at*149.
[781] Sathya murthy, *supra* at487

Ugandan elite. Lord Munster chaired a commission that found "[t]here can be no more vivid contrast in Uganda than that between the lives of ... people in Karamoja and those ... in the rest of the country." Karamoja, it concluded, "has still to be pacified.[782]

The Bataringaya Commission, composed exclusively of Africans, came to the even harsher conclusion that the new Ugandan government should make, a general 'showing of the flag' in order to recover the lost prestige of the Government ... The aim should be to strike a 'holy terror' among the people and show them that the Government has enough 'warriors' to combat with their own and that they can reach any part of the district if and when the need arises.

A Karamojong is a warrior and respects only a warrior of equal or superior prowess.[783] A half-century after Britain's failed military rule over Karamoja, the Bataringaya Commission recommended a return to "a miniature governor and commander-in-chief" to enforce law through violence. The Karamojong's resilient orality was again taken for sullen savagery by the state.

Invoking "holy terror" was a sign of the weakened laws radiating from Obote's capital in Kampala. His government responded with the Administration (Karamoja) Act, 1963, which created the military administrator recommended in the Bataringaya report.[784]Tamukedde, the gombolola chief, was appointed and immediately set out to control what he saw as a "most backward area.[785] First, he applied his newly acquired sociological and anthropological training from the East African Institute of Social Research at Makerere University in Kampala. Responsible for 10,000 square miles of "semi-desert full of wild animals," Tamukedde meticulously considered "the traditions and customs of the people concerned, the approach to implement the new policies and the reactions of the people.[786] Like the co-opted Karamojong chiefs before him, he found it "very difficult, if not impossible" to convict murderers despite their celebratory scarifications. Even when he had a special act passed suspending cumbersome English criminal procedure, he could not convict since "no-one ever gave evidence against his tribesmen." Tamukedde overcame his procedural dilemmas by waging a charm offensive against elders and withholding food that some Karamojong had come to rely on during the dry season. While the government did build schools, hospitals, water supplies and better roads, the threat of withheld food and armed force were the ever-present shadow of his policies.

Tamukedde's position as military administrator imposed alien written rules on a resistant people

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[782]Uganda Government, *Report of the Uganda Relationship (Munster)Commission* (Entebbe: Government Press, 1961) at157, cited in Barber, *supra* at 214 & 218.

[783]Uganda Government, *fu port of the Karamoja(Bataringqya) Commission* (Entebbe: Government Press,1961)at16,cited in Barber,*supra* at 220

[784]No.17of1963.

[785]Tamukedde, supra.

[786]*Id.*

united in orality. Karamojong oral laws were incorruptibly egocentric and proved more resistant than any other laws surveyed above to the bureaucratic and often violent spread of state law from Kampala. For the Karamojong, written rules were literally alien. They even called government servants arisen (meaning "people to avoid") because wherever they appeared cattle were destroyed.[787]Government servants were thus those people who "eat cattle" since they did not grasp, nor had sympathy for, their cattle-centric pastoral society. Even Tamukedde, despite a methodical study of his charges, insisted on imposing a Buganda-style system relying on a hierarchy of chiefs that failed so dramatically when tried for a second time in 1923.[788] Yet his actions exacerbated a bloody maelstrom of raid, counter-raid and army punitive raid in Karamoja: in 1966 alone there were 740 raids![789]In Karamoja, state law had again become no more than a commissioner's command, backed by the King's African Rifles, uttered into the desert.

The writ of law emanating from Kampala failed to penetrate the Karamojong orality so unlike any other law analysed above. This extreme pitted the "deeply interiorised literacy" of Kampalan administrators and the "oral states of consciousness" of the Karamojong. [790] In a geocentric projection, the vast dry lands northeast of the capital were lawless and invited rules and ordering by the state. But switching the map to an egocentric projection revealed a thick orality weaving its many communities together as a coherent collective. The Karamojong were the best example of how mutual incomprehensibility in rule-following behaviour bubbles up from the bedrock of forms of life. It seemed that understanding was only reached between the cattle-loving people and the state at the spear-point or rifle muzzle.

THE KARAMOJA QUESTION

After his coup an ebullient Amin decided to literally clothe the Karamojong in modesty and decreed that all Karamojong must wear clothes in public. To press home his point, he gathered together people near Moroto, an eastern district capital, and divided them into two groups-clothed and unclothed. He then ordered his soldiers to gun down the naked. Amin's arbitrary massacre was a horrific, if not altogether new, reaction by the government to Karamojong stubbornness. Yet neither Bataringaya's plan to dispense "holy terror," nor Amin's actual terror had a lasting impact on these people. As Amin's regime deteriorated into a civil war, the government in distant Kampala forgot Karamoja.

While the government's gaze was distracted, major changes overtook orality in Karamojong

[787]SeeDyson-Hudson, *supra* at 228&236.
[788]Tamukedde, *supra* at 67
[789] Dyson-Hudson, *supra* at 434.
[790] Dyson-Hudson, *supra* at 434.

communities. Since the late 1980s, guns flooded the Great Lakes. When Museveni's NRA defeated the UPDA in 1986-7, Karamojong raided the latter's abandoned outposts for weapons. Yet more guns came on the black market as Mengistu's regime collapsed in Ethiopia, the Sudanese government started arming the Lord's Resistance Army, and chaos engulfed the region during the Rwandan and Congolese wars in the mid-1990s. By 1998 the Ugandan government estimated the Karamajong had between 30- and 40,000 AK-47s for less than a million people. This deluge of cheap, deadly firearms succeeded where the government had failed in undermining the Karamojong's oral society.

With the NRM firmly in place in Kampala, Museveni turned his attention to Karamoja in 1994. A first, the government tried to make up for the region's "underdevelopment" after a long period of neglect. Government administrators introduced new crops and paid people a yearly reward for licensing their firearms. They also tried to curb cattle grazing to avoid the periodic droughts exacerbated by overgrazing. But drought did come and the Karamojong responded, as in the past, by raiding their neighbours for cattle. Their favourite target was their neighbours, the Acholi, who saw their cattle herds reduced from 300,000 in 1985 to 5,000 in 1997.359 In response, the government began a twin campaign to rebuild its governance infrastructure and disarm a people flush with guns.

The central government based their development plan on the five-level local government system (re)introduced in the 1997 Local Governments Act. But like their predecessors, the LCs only had a "phantomal presence" in Karamoja. Government agriculture and cattle schemes have also had little success. Moreover, there was barely any judicial infrastructure in the region. Karamoja has no High Court, and some district UPDF claims that this is not a problem since the Karamojong had lost faith in civilian, courts and prefer military tribunals. Given the persistent resistance to the army, this claim is dubious. But the LCs failure was hardly surprising given the history of imported governance structures in Karamoja. If the government's failed governance was predictable, so was its violent response.

In 2001 and again in 2004, the UPDF staged major disarmament campaigns to dredge Karamoja of AK-47s. The projects worked well initially, as people exchanged guns for plows, rice and a certificate of thanks. But in 2001 when only 10,000 guns were collected, the army turned to more aggressive search-and-seizures. A Human Rights Watch report cited evidence of extra-judicial killings, torture, rape, pillage and arbitrary arrest by the UPDF. The Uganda Human Rights Commission also reported on serious atrocities by soldiers searching for guns. By 2007, the UPDF were the "major perpetrator of violence among the Karamojong."364 The violence reached such a pitch that one small group, the Jie, emigrated across the border into Kenya to escape

Museveni's troops.

The UPDF in Karamoja, like in Acholi land, was limited only by the provisions of the UPDF Act. Yet these legal limits on the army's power were ephemeral. In a letter in the government newspaper, he admitted that many "cattle rustlers" were killed by the army, but warned the "days of playing with the UPDF and the security of the country are over. Bring back the guns and live a peaceful life; otherwise, you will go to jail or, even, die." 366 This was not an appeal to law and order by an elected leader, but a direct command of a sovereign backed by the threat of violence.

In the past, the Karamojong have weathered intrusions by the colonial and later Ugandan governments by an outward shell of illiteracy protecting their communities'

Their appeal to tradition revealed how far their authority had eroded. Karamojong had never had qualms about using muskets and rifles, but the elders seemed to reinvent the spear as an ideal weapon of old when confronted with the raw power available to young men with the countless AK-47s.

A few defeated elders resigned themselves to the new order and dug up the pens and paper buried decades past. In the 1990s, the first generation of children were sent to school to read and write. Cattle, the ultimate Karamojong prize, were now bartered for AK-47s. Even the institution of bride-price was not immune. Instead of cattle, money or beer, it became not uncommon to pay a girl's father in guns! The social repercussions were devastating. Beer, once the privilege of elders, was drunk by all, often, including children. Some have abandoned cattle-herding and settled in slums around administrative towns. And the violence continued unabated by young men and the UPDF.

Karamojong orality proved resilient however. By 2006 only 10 of the 22 per cent of Karamojong children enrolled in primary school would finish the year-Old taboos against writing still dominate. Boys in school were branded "cowards who were being "indoctrinated" against Karamojong orality. Girls attending school were also seen as tainted and commanded a lower bride price. The collapse of the Karamojong predicted by recent government and nongovernmental organizations seems premature. since the King's African Rifles marched in and set up a small fort in 1911, the government in Kampala has oscillated between imposing a hierarchical chieftainship under central control and outright violent repression. Over the last century neither succeeded. It is not surprising that no Karamojong challenged these alleged violations in court. The High Court does not stop here on its circuit and there is only a single magistrates' court for the entire region. Even if the courts were accessible, no Karamojong could develop the literary skills required without forsaking membership in orality. While the central government dismisses the Karamojong's practices as backwards savagery, their orality represents the ultimate challenge to the positivist writ emanating from the capital in Kampala.

THE RAPE OF THE TEMPLE OF JUSTICE

The first case to reach the High Court was a bail application by 14 of the PRA suspects on 16 November 2005. Justice Lugayizi declared before an open court that bail was a constitutional right and judges only had discretion over its conditions. At this point, heavily armed soldiers of the secret Joint Anti-Terrorism Team (a.k.a. "Black Mambas Urban Hit Squad") surrounded the court house to arrest the suspects if they were released on bail. After a tense standoff, the accused were sent back to the infamous Luzira prison. The next morning, they were charged with treason under the UPDF Act and transferred to the General Court Martial Justice Lugayizi then withdrew from the case, refusing to give any reasons for doing so. Judges, the Uganda Law Society, the Inspector General of Government and the Human Rights Commission all protested the storming of the court. That same day the Law Society immediately lodged a petition with the Constitutional Court on the constitutionality of the General Court Martial

On 23 November, the scheduled day of his bail hearing, Besigye was transferred to the General Court Martial on terrorism and weapons charges. Justice Ogoola granted him "interim bail" the next day in the High Court pending the Law Society's Constitutional Court petition. Prison officials refused to release Besigye, though, so his lawyers filled another Constitutional Court petition requesting bail from the GCM. On 2 December Justice Kasule ordered the Court Martial to stop hearing Besigye's case and then referred the matter to the Constitutional Court, but did not go so far as to order his release. Prison authorities also refused to let Besigye sign nomination papers until Dr. Rugunda, the Minister of Internal Affairs, intervened directly a few days before the deadline.

That same day Justice Kasule again declined to release Besigye on bail to campaign for the elections. But a week later the judge ordered the Commissioner General of Prisoners to appear to answer why Besigye had not been released on bail from the GCM. Besigye was finally released on bail on 2 January after an exasperated Justice Katutsi ordered his release yet again, saying he had been "in illegal detention [by the GCM). If sanity is to be regained the applicant must be given his freedom to be on bail". He then challenged the military court by writing "that the continued detention of the applicant at Luzira is illegal and unlawful. In the meantime, his co-accused, the PRA suspects went on trial at the High Court.

The Constitutional Court finally decided the Law Society's petition against the Black Mambas' court siege and the General Court Martial on 31 January 2006.350 In a three-to-two split ruling, the majority upheld the petitioners' central claim that trying the PRA suspects under civilian and military laws was unconstitutional. However, the Court did not agree that the military tribunals were themselves unconstitutional, nor was trying civilians in them necessarily a violation of their

rights. Thus, although the majority ordered an end to the court martial case, it did not challenge the parallel military legal order in principle.

The decision infuriated Museveni, who replied that, "[t]he ruling of the Constitutional Court that the army can't try civilians with guns is something we can't agree with. He managed to stall the petitioners' appeal to the Supreme Court on other issues, as well as appeals from Tumushabe and other political cases by refusing to appoint new justices to the court that lacked a quorum since one justice died and another retired Besigye was free on bail, but early the next year the PRA suspects' trial started again at the General Court Martial. In March 2007 a judge ordered their release on bail and, in an exact repeat of the raid in November 2005, militiamen stormed the court. This time all judges and lawyers went on strike in protest. Museveni eventually apologized[791] and the judges went back to work, but the PRA suspects languish on in Luzira prison.[792]

Since Museveni came to power in 1986, the army has ruled much of northern Uganda. The NRA and then UPDF policed, arrested and tried civilians under the General Court Martial. In fact, constitutional challenges to this regime only began when it crept back from the peripheral northern districts to the capital in Kampala. As pressure for multiparty elections grew too strong, the NRM government tried to neutralize Besigye and the Forum for Democratic Change by branding them terrorists. This move was similar to Obote's arrest of Matovu and his Ganda chiefs under colonial laws originally established to quell budding Ugandan nationalists. Some judges, however, resisted the encroachment of a parallel military court structure by reinterpreting the constitutional right to bail. The continued ideology that defers to the executive explains part of the judges' reluctance to contradict the government.

The entire Besigye saga took place within the Kampala city limits and it was not until he challenged Museveni's hold on power that the courts looked at the constitutionality of the General Court Martial. For northerners in Acholi land and beyond, military rule continues as it hardens into a parallel state legal system outside the most basic human rights codified in the 1995 Constitutions. During the High Court's annual circuit to hear appeals throughout the country, it stops in seven cities: Maraca, Fort Portal, Masaka, Jinja, Mbale, Gulu and Nakawa. Half of these cities are in Buganda and all but one is in southern Uganda. Even if the court could overcome its ideological baggage and challenge the military courts trying civilians in a parallel legal system, its effective reach is limited to the capital and occasional forays into the southern hinterland. The relative strength opposition parties can muster against the government in the capital, Kampala, simply do

[791]'judges on Strike Over Court Siege "*The Monitor* (4March2007),online:allAfrica.com <http://allafrica.com/stories/200703040027.html>

[792]judgesAgreetoRe-openCourts–Museveni"*TheMonitor*(6March2007),online:allAfrica.com <http://allafrica.com/stories/200703060264.html>

not exist in the impoverished north under military rule. By not stepping beyond the black ink on the Uganda People's Defence Forces Act, the judiciary is complicit in legitimising a military dictatorship over half the Ugandan territory.

RAPE OF THE TEMPLE (A POEM BY PRINCIPAL JUDGE JAMES OGOOLA)

I. From thin air they came, bedecked chameleon in black camouflage. Like a swarm of angry wasps, the Praetorian Guard descended on holy ground. Their ferocious gangs unfurled, their vicious sting darting-ready to strike warlike, they came: wearing the bellicose face of terror, the malevolent mask of horror.

Wild like, they charged: wielding awesome weapons of war: AK-17s cocked, ready to discharge the crackling cartridge: Uzi guns waving ominously in the air, ready to vomit their lethal venom.

II. With wrath and fury they came: their hapless prey to snatch. They laid siege to the fortress of justice. Like warmongers, they darted here and they darted there; their prey to seized and abduct. They turned the temple of serenity into a theatre of war.

They transformed the shrine of refuge, into a treacherous den of vipers! The prisoner on trial

Seeking justice from the temple, they sought to pick and pluck from the very arms of the goddess of the temple.

III. The goddess, blindfolded and balancing the scales of justices in her hands stood still, holding her breath: stunned, horrified.

Gripped in grief and disbelief at the invaders' heretical effrontery.

The goddess is heard to lament in torment:

"It is abominable! This is sacrilege! To strip me this before my own family, To expose my nakedness before my own family;

To expose my nakedness before my own flock!

IV *Like mystic monks in mourning, dressed in black gowns,*

The temples scribes stand, distressed.

Their heads, begarted in grey wigs, they shake in anguish. From their numbed lips, a gasp of moaning issues forth;

Bewailing the disgrace! Bemoaning the debauchery!

Be crying the desecration!

V In the after math of the vile defilement of the goddess, the voice of one, a sage and a knight brave, from high priesthood of the temple, broke froth, shattering the still silence, in anguished rumination, in righteous rage, the shrill voice rang out; "The rape of the temple! What a day! a fateful day of woe! A day of infamy"!

VI *Abruptly, the prophetic voice of poetic knight stirred up a torrent of popular protest, Fellow knights, the temple scribes, the zealots, the Pharisees, and the elders all from the learned fraternity and all kindred souls at home and abroad: joined and swelled the public protest.*

They rose as one. As one they spoke in unity and in solidarity.

They demanded: Independence for temple, and for the shrine: Virginity the true bedrock and lynchpin of the divine trinity on which rests the vulnerable virtue of:

The reign of justice: the rule of justice: the rule of reason: and under the law, Equality.

VII Oblivious to the sanctity of the temple, Blind to the congregation's reverence for the purity of the temple, the serpentine reptiles plunge into a frenzied rampage. Obstinate, the swaggering warlords trample unholy boots on holy ground. With guns ready to rumble, they go on the Rambo.

VIII Straight for goddess they dash, into the inner sanctum of the shine, discarding all discretion to the four winds, they charge: menacingly, disgracefully they strip her like a harlot in a harem; Un shamefacedly, unfeelingly, they prostrate her like a common prostitute

IX There, in broad day light: there under the wide open skies with high heaven looking on the Black Mambas commit abominable iniquity, with abnormal impunity. There, in spite of the congregation of august assembly of visiting Ambassadors: learned Advocates; the accused: their Accomplices: the temple's own administrator; and the elect Members of the tribe's supreme council of meditation there, under the very eye of the high priest himself, duly seated on the Judgment seat, the black Mambas commit the vile deed: the abomination of desolation!

X Such unutterable trespass, such unrequited transgression had not been seen before not since the sacrilegious execution of the chief priest, Kiwanuka. He was snatched, hauled and carted away from this very shrine. Like a common thief, the infidels of the military ilk dragged him from the sanctum of the shrine, to the place of the skull, they led him. There, in the slaughter house, in the hall of the holocaust, they butchered and quartered him: A martyr for judicial independence!

XI In no other shrine: anywhere anytime was ever so callous a calamity committed? Not on this side of the equator; nor on the other. Not in the times: nor in earlier ones indeed, not since the Age of Enlightment the more the pity, to see horrifichistory repeated!

RELATIONSHIP BETWEEN EXECUTIVE AND JUDICIARY TESTED

The relationship between the Judiciary and the Executive was put to a litmus test in the case of Uganda V. Kiiza Besigye and others, in which a key opposition politician and a presidential candidate95 and others were charged inter alia with treason and misprision of treason. On 16th November, 2005 during the bail application and consideration of the suspects, the Executive deployed heavily armed military personnel at the High Court in anticipation of the release of the

suspects on bail by the High Court. This was intended to re-arrest the suspects in the event of being lawfully released on bail, apparently in order to charge the same suspects in the General Court Martial.

This act of besieging the High Court did not augur well with the Judiciary. The chief Justice Benjamin Odoki and the Principal Judge James Ogoola condemned the act on separate occasion. The Principal Judge James Ogoola, called the act a "naked rape" defilement", desecration" and a horrendous on slaughter" on the Judiciary constituting "the most naked grotesque violation of the twin doctrines of the Rule of Law and the Independence of the Judiciary. He rightly construed that without doubt the "Rape of the Temple of Justice" is one such event in the judicial history of this country. To put it briefly, it is human to remember, purchase to block a repetition. In that regard Principal Judge composed some verses-poetry-to put on record the terrible events that befell the judiciary on that inauspicious day of November 16, 2005 and to commemorate the said Tragedy99. The "Poem" summarizes the events of the tragedy and the embarrassment and pain inflicted on the judiciary. It further indicates that such a tragedy has never occurred at any given time anywhere in the world since the Age of Enlighten and that was a total thunder to the concept of the rule of law.

The judges of the Supreme Court, the Court of Appeal and the High Court of Uganda held an extra-ordinary meeting on 16th December, 2005, under the chairmanship of His Lordship the Honorable Mr. Justice Benjamin Odoki, the Chief Justice of Uganda, during which they reviewed a number of events that threatened to undermine the independence of the judiciary and the Rule of Law in this Country. In particular, the judges considered circumstances and the impact of the 16th November, 2005, military siege of the High Court.

In their deliberations, the judges perceived the siege of the High Court to be the fiercest act of intimidation to the Ugandan judiciary since 1972, when the then Chief Justice Benedict Kiwanuka was abducted by armed men from his chambers at the High Court and satisfaction, the prompt and public statements that their Lordships, the Chief Justice of Uganda and the Principle Judge, made condemning the siege. They (Judges) unanimously endorsed and supported both statements and reiterated that the Rule of Law and Judicial Independence, which violation had a chilling impact on the administration of justice and ought to be unreservedly condemned by all.

The judges viewed the events in the context of the constitutional mandate of the Judiciary which is described in Article 126(1) of 1995 Constitution of the Republic of Uganda and the doctrine of separation of powers of the Executive, Legislative and Judicial arms of Government which is enshrined in the Constitution, and the principle of Judicial Independence entrenched under Article 128 of the Further, the judges, recalled that the Ugandan Judiciary has at all time faithfully executed its constitutional mandate to uphold the said principle without fear or favor, despite

intermittent acts of interference and intimidation particularly from the Executive arm of Government. Those acts of interference and intimidation have intensified since 2001, so the judge's perceived the 16th November siege of the High Court not as an isolated incident but as a culmination of a trend that threatened to whittle away judicial independence unless every effort was made to arrest the trend and uphold the concept of the rule of law.

In that connection the judges appreciated and commended the reactions of the Uganda Law Society, the East Africa Law Society, the Ugandan Judicial Offices Association, the Uganda Christian Joint Council, the International Commission of Jurists, and the other diverse organizations and institutions in Uganda, the United Kingdom and the United States of America, and above all the many individuals, all of whom has spoken out firmly in defense of Judicial Independence and condemned intimidation against the judiciary, and all forms of interference by the Executive arm and its organs and agencies in the administration of justice.

In conclusion, the judges resolved: -

To strongly condemn the deployment of military and other security personnel within court premises for interfering with judicial process and to resist all past present acts and conduct calculated to intimidate the Courts or otherwise to interfere with the proper administration of justice.

To call upon the Executive arm of Government to abide by its Constitutional obligation to uphold and promote principles of the Rule of Law and judicial independence and to accord to the Judiciary the assistance required for ensuring the effectiveness of the Courts and to restrain its organs and agencies. Interference with judicial process and harassment against the Court and perceiving the concept.

1) To urge Ugandan public to cherish and vigilantly defend the Independence of the judiciary, recognizing that it is a fundamental element of the Rule of Law and that the principle is not a privilege to or for the benefit of judicial personnel, but rather the guarantee of the people's right to have an impartial judiciary that ensures equality of all before the law and protects the human rights and fundamental freedoms enshrined in the Constitution.
2) To assure the Ugandan public that notwithstanding the past and present interference and intimidation, the judges will individually and collectively continue to adhere to and collectively continue to adhere to and uphold the principle of Judicial Independence and to administer justice impartially without fear or favor in accordance with the judicial oath and uphold the rule of law.

The statement by the Judiciary highlighted hereinabove drove the Executive into a paroxysm of rage, to the extent of accusing judges of supporting the opposition politician Dr. Kizzy Besigye and taking an antagonistic action against the Executive. This clearly manifested itself in the words of

the Government Spokesman Dr. James Nsaba Buturo during a press briefing at president's office Nakasero.

"By supporting the position and actions of the Law societies the Judiciary is upholding its legal position on the case. These organizations have expressed political support for Dr. Besigye against the government ... The statement of the Judiciary is unprecedented. There is a case between government and the Uganda Law Society before the Courts of Law. The public advertisement is an antagonistic action. It is a commentary that reveals the Judiciary has taken ideas... In this case who will make a judgment?

It should be noted that earlier, the 800- strong Uganda Law Society (ULS) members had on the 28th November 2007 held a demonstration outside the High Court protesting against what they called the "deterioration of the Rule of Law" in the country and in condemnation of the 16th November Military siege of the High Court.

The Uganda Law Society petitioned the Constitutional Court, challenging inter alia, the invasion of the High Court military personnel. The petitioners, contended that the acts of the Anti-Terrorism Task Force (the infamous Black Mambas) were calculated to intimidate and inculcate fear in the minds of the judges and other judicial officers to induce them to be partial in their judgment and to feel dependent on the state (Executive) for their positions and as a warning that if they did not enter into judgment in their favor, they would be in danger and that the acts, were to compromise the Independence of the Judiciary in contravention of the Constitution of the Republic of Uganda. Wherefore, the petitioners prayed to Court to make a declaration which will in effect restrain any further occurrence of these acts.

The constitutional Court held that the invasion of the High Court was illegal Justice Byamugisha J. A, held:

"It was in my view a threatening scenario that interfered with the normal operation of Court .... The military had no right whatsoever to interfere with the Independence of the Judiciary."

DCJ Leticia-Kikonyongo held that "…the execution of the surprise' deployment was not the best method. It appears it fostered fear and anxiety especially as the security personnel even went beyond their security intentioned limits and they entered the criminal registry and cells where it's alleged they interrupted the course of the court's normal duty of processing bail of the accused persons ... I find that on the 16th November 2005, the acts of the security agents at the High Court premises constituted, acts of security interference that contravened Articles 23(1) (2) and (3) of Constitution. This glaringly points to the political interference by the state in the exercise of the discretion by courts and thereby undermines their functions and this instituted a residue in the trend and passage for the concept of the rule of law to thrive in the pearl of Africa.

It follows therefore that the PRA suspects who were being detained then were being held illegally in contravention of their constitutional right to bail as granted by the court which went to depict the continued failure of the state to heed to the judiciary's sobriety on constitution and in promoting judicial independence in Uganda.

According to Justice Engwawu J.A in the same case, "the manner of invasion was deplorable and prejudicial to the independence of the judiciary"

In the same vein, the Constitutional Court declared the trial of Dr. Kiiza Besigye and 22 others before the Military General Court Martial unconstitutional and therefore illegal. It held thus:

" The General Court martial was established by an act of Parliament as a disciplinary organ to deal with the Uganda Peoples Defence Forces (UPDF) but not civilians103 who have committed offences of terrorism and illegal possession of fire arms".

Nevertheless, the military general court marital defied the constitutional court ruling and continued with the trail of the civilian's suspects. This came in the wake outburst by army general against the judiciary in reference to the ruling of the constitutional court. The coordinators of security services, General David Tinyefuza accused the judge of siding with wrong does instead of helping the state get rid of terrorism.

'why don't they want to help the state; why don't they see the problem of terrorism. Why are they always siding with offenders?

General Tinyefuza who is also a senior presidential advisor was on Wednesday, February 1st 2006 appearing on a live Radio talk show tonight with Andrew Mwenda live on 93.3 KFM, to discuss the implication of the constitution court ruling. The general who kept on referring to judge angrily as these fellows said the army respect the ruling of the court but that judge have no power to order the army. That the army will not accept "this business of being ordered by the judges". He further dismissed claims by the Principal judge, Justice James Ogoola that the army raped and defiled the Temple of Justice, calling it rubbish.

The defiance of the constitutional court by the General Court Martial prompted the media. "the Fourth Arm of the state" - to implore the Chief Justice to act swiftly to salvage the tattered image of the Judiciary that "was being continually pierced by an impudent Army Court at the behest of a belligerent Executive" Indeed, Justice John Bosco Katutsi withdrew from hearing the case of Uganda V Col (Rtd) Dr. Kiiza (supra), citing pressure and irresponsible talk' that he was favoring the FDC president. His lordship stated, it is my sincere wish that I step down from this case. The withdrawal came ten days after the coordinator of security agencies; General David Tinyefuza accused the judiciary of siding with 'terrorists' instead of helping the state to fight terror.

Before justice Katutsi's withdrawal, Justice Edmond Ssempa Lugayizi had withdrawn from the trial

of the rape and treason cases involving Dr. Kiiza Besigye following the siege of the High Court by the 'Black mambasl06. This shows not only interference with the exercise and performance of judicial functions as well as judicial independence, but also entails an attempt by the security organ (of course under the control and direction of the executive) to direct how the judiciary should perform its functions. That is, they should heed to their whims and when they reach different conclusions, it means that they are not promoting justice.

This is an unfortunate state of affairs and greatly undermines the very purpose of having he judicial arm of government and its independence and this a total prophecy of doom in regard to concept of the rule of law in Uganda.

The interference of the executive in the affairs of the judiciary through the Military resurfaced on march, 20, 2007 when the High Court was in the process of ruling on the bail application of the suspects in the case of IGIZA Besigye and Others (supra). "Police" developed heavily at the High Court long before Eldad Mwangusha ruled on the matter. With ambiguity looming large and policemen getting on the ready outside Court, the state was set for scenes that almost replicated the events of November 16, 2005 High Court siege by a shadow Para-military group, the "Black Mambas" when 14 PRA suspects were granted bail only to be returned to prison because the siege made it impossible for them to walk to freedom.

This time round the Court ordered the release of the suspects on bail 1n accordance with the Court's earlier order of November, 16, 2005 and m obedience to the Constitutional Court decision ordering the release of the suspects on bail. As the Registrar was processing the documents, security personnel surrounded the Criminal Registry insisting that they had orders to return the suspects to prisons under any circumstances. Fights ensued between the security personnel and members of the public and in the process doors and other Court property were damaged.

Eventually six out of the nine suspects fulfilled bail conditions while three did not and were surrendered to prison authority by their counsel. However, the six were prevented from leaving on account of the heavy military deployment in the High court premises. In meantime, the Acting Chief Justice, Honorable Lady Justice Leticia Mukasa Kikonyogo, convened the top managers in the Judiciary in a crisis meeting, which was also attended by the DPP, the Regional Police Commander and Prisons personnel, to consider the developments. The meeting was informed by the officer in charge of eh Prisons that they had been directed by the Commissioner General of Prisons to take back the suspects.

As the situation deteriorated the Judiciary directed the security officer to remove all security personnel including their dogs from the Court premises. This directive was disobeyed and instead reinforcement was intensified with the apparent intention of storming the Registry to arrest the

suspects. Violence escalated to the extent that a defense counsel was assaulted and sustained an open wound in the face.

The protracted negotiations continued with the Judiciary, security personnel and defense counsel with the agreement that security personnel and the public evacuate the High Court premises to enable the peaceful release of the suspects. Later at around 8:30pm (at night!!!) The suspects were finally handed over to their respective counsel in the middle of precincts of the High Court and counsel received them, threw them on the back of a police pick up and drove them while they yelled to unknown destination.

These extra-ordinary events prompted the Judiciary to convene an extra ordinary session of all judges of all courts of Judicature to consider the matter and resolved. To issue a comprehensive statement on this atrocious incident and unprecedented event; The executive gives assurances of the non-repetition of these repeated incidents of affront to the integrity and independence of the Judiciary. That all judicial offices of the rank of Chief Magistrates and above be convened at the High Court, Kampala to chart the way forward. It was further resolved that the above actions taken had nothing to do with the re-arrest or re-charging of the PRA suspects but because of the following: -

1) The repeated violation of the sanctity of the Court premise.
2) Disobedience of Court orders with impunity (by the Executive)
3) The constant threats and attacks on the safety and independence of the judiciary and judicial officers.
4) The savage violence exhibited by security personnel within the Court premises.
5) The total failure by all organs and agencies of the state to accord to Court assistance as required to ensure effectiveness of Courts under Article 128(3) of the 1995 Constitution of the Republic of Uganda; The recognition that judicial power is derived from the people, to be exercised by the Courts on behalf of the people in conformity with the law, the values, norms and aspirations of the people of Uganda.

Subsequently for the first time in 44 years since Uganda's attainment of independence, the Judiciary laid down its tools over gross infringement on its independence by the Executive. During the course of the Judicial strike, the Honorable Justice Benjamin Odoki, the Deputy Chief Justice. The Honorable Lady Justice Leticia Kikonyogo and the Principle Judge the Honorable Justice James Ogoola met President Museveni on March, 6, 2007 in an attempt to resolve the standoff.

The Chief Justice also wrote a letter to the President dated 2, March, 2007 forwarding to him a copy of the resolutions of the Courts of Judicature. On 6th March, 2007, the Minister of Internal Affairs and the Attorney General regarding the matter 109. It was indicated that it was not the

intention of the government (the Executive) to disrespect or defy the Court orders. Wherefore the government regretted the incident that occurred at the High Court on March, 1, 2007/

Further the government promised to carry out more investigations of the events to determine if there were any breaches of the law or procedure and to take appropriate action. The statement also added that the leadership of the three arms of government have met and agreed on what to do to prevent the recurrence of similar incidents in future.

Global human rights organizations also condemned the March, 1, 2007, armed siege of the High Court, saying the act was a blatant interference with the independence of the administration of the Judiciary. In a statement issued on 6th March by the office of the United Nations High Commissioner for Human Rights, it was pointed out that the government has a responsibility to fully respect and observe the independence of the Judiciary and to respect its obligations under the International Covenant on Civil and Political Rights (ICCPR) to which Uganda is a state party.

"The office of the United Nations High Commissioner for Human Rights unequivocally condemns the interference by armed security forces with the independence of the Judiciary contrary to the Constitution and International. Human Rights Principles which undermines the rule of law and administration of Justice in Uganda", the statement said.

In a related development, the US based Human Rights Watch (HRW) also called upon the government to stop intimidating the civilian courts saying the siege was a blatant violation of Article 128 of the 1995 Ugandan Constitution that provides for the independence of judiciary, Georgette Gagan, Deputy Director of Human Rights Watch (HRW) is reported to have said

"The Museveni government's attempt to intimidate the Courts shows its profound lack of respect of the law"

In the same vein, the International Commission of Jurists (ICJ) issued a statement on March 4th 2007 in which it called upon Ugandan authorities to respect the independence of judiciary by ceasing the intimidation of judges and Lawyers. The ICJ expressed deep concerns over the military deployment at the High Court, saying that this episode seriously undermines the rule of law and Constitutional Independence of the Judiciary.

It re-stated the ICCPR which obliges state parties to ensure that criminal trial is fair and to take place before independent and impartial courts, and that the UN Basic Principles on the Independence of the Judiciary affirm this principle by emphasizing that there shall be no inappropriate interference with a Court Legal authority by the Executive branch and that judgments of Courts are not subject to revision by the Executive. Similarly, the Uganda Journalists Safety committee (UJSC) expressed concern over the High Court siege saying that what Uganda faced then was a breakdown of Constitutional order against state institutions which are supposed to safe

guard the observance of human rights and people's freedom. The USJC supported the decision of the Judiciary to suspend judicial business, saying that it was in the right direction to fight for its independence as provided for in the Constitution of Uganda.

The Judiciary ended their week-long suspension of Court business (strike) on 9, March, 2007, after getting firm assurance from President Yoweri Museveni that the institution would remain independent. The decision was taken at a meeting attended by all judges, Registrars and Chief Magistrates at the High Court at Kampala. This followed a letter 115 written by the President to the Chief Justice of Uganda which was read out at the meeting. The letter was in response to the concerns expressed in the resolutions by the Judiciary. In that letter the President reiterated that' the Government was concerned and regretted the unfortunate events, which took place on 1st March 2007, the government assured that no repetition of such incident will take place.

The government re-affirmed its adherence to the safety and Independence of the Judiciary as an institution and of individual judicial officers, and to uphold the rule of law all organs and agencies of state will always accord the Courts such assistance as may be required to ensure the effectiveness of the Court as provided by Article 128 (3) of the Constitution; the legal and transparent modus operandi for re-arresting suspects released by Courts will be formulated and agreed on by the agencies involved in the administration of justice.

After calling off the "judicial strike" the Acting Chief Registrar issued the Judiciary's statement dated 9th March, 2007, in which it was categorically stated that the action of the strike was not intended to be a confrontational but a statement to reaffirm the values the judiciary stands for, that is, the independence of the Judiciary and the rule of law, and that the Judiciary's action was not concerned with the unchallenged rights of the Executive to arrest or charge any accused person, rather the concern was with non-compliance and violation of accepted procedures for re-arresting accused persons for any offence.

Finally, the Judiciary apologized to the public for the inconvenience caused by the suspension of judicial business and regretted the negative impact that this action might have caused to the public.

However, the judiciary had to act as it did not protect the Independence of the Judiciary, which is the foundation for the public's enjoyment of their fundamental rights, and further to remind the state agencies to accord the Judiciary the necessary assistance as provided in Article 128(3) of the Constitution.

The Judiciary strike was followed by a three-day strike by the legal fraternity organized by the Uganda Law Society following their emergency meeting of March, 6, 2007 that condemned the Court siege calling it government interference on judicial independence. The Lawyer's strike was perceived as a "symbolic way by the Lawyers to condemn the interference with the independence

of Courts.

The lawyers strike was marked with a "cleansing ceremony" of the High Court which was held by the lawyers who were clad in their professional black gowns, some to them in wigs marched around the High Court to symbolically cleanse it of the government raid. The lawyers made defiant speeches vowing to defend the independence of the Judiciary. The Honorable Chief Justice Benjamin Odoki who addressed the gathering commended the Uganda Law society for their struggle to defend the independence of the Judiciary

Moreover, there is a misconception by the executive to be above the law and cannot be found guilty by the courts. This was outrightly manifested in 2007, where a magistrate in the judiciary was threatened with administrative investigation by a motley band of government Ministers for having dared find a Minister guilty of embarrassing criminal charge and giving passed sentence in the behalf, inter alia, the payment of fine. This is a clear manifest of interfering with the judicial independence and violates not only the principle of judicial independence by the executive but also the Constitutional provisions.

While the principle of judicial independence has been encapsulated in the Constitution, which is the supreme law of the country, there has been great interference by the executive arm of government in the independence of the judiciary directly and indirectly. This has partially affected the performance of the judiciary directly and indirectly. This has partially affected the performance of the judiciary in performance of its functions especially dispensing justice and therefore a bottleneck and a constraint to the concept of the Rule of Law in Uganda.

CHAPTER NINE

THE ARMY AT THE CENTRE OF THE EXECUTIVE

Amin's lasting legacy was placing the army at the centre of Ugandan politics. After a Tanzanian army chased him into exile in 1979, a series of men claimed the Presidency for a few weeks or months until they were in turn deposed. In 1980 Milton Obote returned and was sworn in as President for a stormy five years. He too was deposed in yet another military coup after a contested election that sparked the "bush war" between Obote's Uganda National Liberation Army (UNLA), dominated by soldiers from the north, and Museveni's guerrilla forces, the National Resistance Army (NRA). Museveni's victory in 1986 shattered the UNLA and scattered its soldiers back to their northern homelands.

As the NRA moved north into Acholi land on the Sudanese border, one UNLA splinter group, the Uganda People's Democratic Army (UPDA), crossed the international border and began to fight back against the NRA. The UNLA was immensely popular with fellow Acholis under NRA occupation, yet months of guerrilla raids led to nothing but escalating brutality against the population. Into this dire situation was born the Holy Spirit Movement, a chiliastic rebel splinter from the UPDA Its spirit-channelling leader, Alice Auma, led them south in several pitched battles against the NRA until they were decisively crushed in the summer of 1987.

Among the survivors was Joseph Kony, a former alter boy and Alice-inspired spirit medium, who reformed a small group that he would later rename the Lord's Resistance Army (LRA). The last two decades of LRA and NRA brutality in Acholi land have followed a path similar to that of the earlier Ruwenzururu rebellion. In 1998, Museveni made Betty Bigombe the "Minister of State for Pacification of Northern Uganda" with similar mandate and powers to crush the LRA as those Tamukedde had to end the Ruwenzururu rebellion in the 1960s. The NRA fulfilled its "pacification" role by deploying brute force against the LRA in their aptly named "Operation North" of 1991 and "Operation Iron Fist" of 2002.

Amazingly, in between these two assaults, the Ugandan Constitutional Commission managed to visit every parish in Acholi land to solicit input for the draft Constitution. Article 208(2) of the 1995 Constitution created a Uganda Peoples' Defence Forces (UPDF) that is "non-partisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established in the Constitution." This provision was seen as crucial to prevent past national armies dominated by soldiers from a particular region. The Constitution also provided for military

tribunals "subordinate" to the appellate courts.

The Uganda Peoples' Defence Forces Act of 2005 clarified the murky goings-on of military tribunals first documented in late 2002 by creating the General Court Martial with jurisdiction over crimes by members of the military. However, the tribunals also claimed jurisdiction in "treason cases and over "every person found in unlawful possession of arms, ammunition or equipment ordinarily being the monopoly of the [UPDF]". This law was used to legitimise the UPDF's de facto role as police and judge in occupied Acholi land, where hundreds of civilians were reportedly arrested and prosecuted in the General Court Martial. As violence rose in Acholi land to meet the millennium, the army had effectively isolated the north under military law.

The military courts outside the capital largely escaped the scrutiny of the appellate courts until 25 UPDF members petitioned the High Court in 2004 to declare the General Court Martial's bail practices unconstitutional. In Tumushabe v. Attorney General the Constitutional Court heard their appeal and held that bail "is a fundamental right guaranteed under Article 23(6)" of the Constitution "since a person is presumed innocent and has a right to a speedy trial in an independent and impartial court created by law." The Court then went on to decide whether the GCM was a court of the judicature according to Articles 129 and of the 1995 Constitution. A majority agreed, despite its concurrent jurisdiction with the High Court. But the military tribunals were "subordinate courts", and Justice Twinomujuni thus concluded that "the accused persons were entitled to be released on bail after 120 days from the date they were remanded in court by the General Court Martial. By keeping them jailed, the government acted unconstitutionally. The Court's decision placed the military tribunals firmly under appellate review and so extended at least some civil rights in the 1995 Constitution to those soldiers and civilians prosecuted under this formerly opaque court system.

For Ugandans outside the occupied north, a more worrying trend developed when the National Resistance Movement (NRM) government started using the General Court Martial to harass its political opponents in the capital. Museveni had personally intervened to have the military prosecute Tumushabe, not for any military misconduct, but for his vocal denunciation of NRM policies. The prosecution of political enemies was a similar tactic to the detention order against Matovu and earlier deportations by the colonial government. This situation came to a head in a series of court cases and orders leading up to the 2006 presidential elections. Dr. Kizza Besigye, the Forum for Democratic Change candidate, returned from self-exile in South Africa in October 2005, two months before the registration deadline. The government promptly arrested him for an alleged 1997 rape, as well as treason charges with 22 others ("PRA suspects") for membership in the mysterious People's Redemption Army supposedly linked to the FDC. If the Tumushabe precedent

was followed, Besigye could be held for 180 days and would miss the presidential elections.

MILITARIZATION OF GOVERNMENT

The scope of abuses has taken root from periods of his military inception. He is invested heavily in the Army to an extent of personalizing in contrary to Art 208(1) & (2) which is to the effect that the UPDF shall be non-partisan in nature. This however proves nothing more than the fact that the militarization of activities in Uganda, suppresses the general will of the people and the law[793] to be a separate entity from the army but the new normal dictates for militarization of the police. The president has continuously appointed army personnel to top police positions, the IGP, AIGP and others where he can easily control activities of opposition polices

In the time leading up the 1996 election, Museveni promised a complete reform to civilian rule (just like many do) by swapping the other combat for a Kanzu. But as time elapses, he rather is consolidating the army in by state affairs and therefore in years leading up to the 2021 general elections, Uganda has militarized rather than civilized its state affairs and the army is officers in charge. The interpretation of Art 209 of the 1995 that spells out the Army's mandate.

The army now has overt and covert presence in various ministries, departments and agencies of government where they do more than fester harmony are either in charge or keep a different sector, including command, intelligence and operation. The police have been under army control since the appointment of Gen Katumba Wamala in 2001

In state affairs, at least 35 senior cabinet ministers have served in the military including Katumba Wamala, Elly Tumwiine, Gen Moses Ali (Deputy Prime minister) General Jeje Odongo (Internal Affairs) Maj Gen Kahinda Otafiire (Justice & Constitutional Affairs) Col. Tom Butiime (Local.G) Capt. Janat Balunzi Mukwaya (Labour, Genda& Social Development) Capt. Abdul Nadduli (Minister without Portfolio)

Lientenant General Proscivia Nalweyiso as the highest security military officer (female) has been working closely with Museveni and openly in engages in partisan activities.

To the high-ranking police posts Museveni sends senior army officials. Dept IGP Maj Gen Muzeyi for example looks at the strategic appointment of Col. Serunjoji Ddamulira who has been director counter terrorism under military intelligence as new director of police crime intelligence. Brig Geofrey Golloba, who has been in Moscow as military attaché, is the new police director of human resource development and training

Kayihura is out and free after even being charged with aiding and abetting of kidnapping and repatriation of Rwanda soldiers in 2012 and 2016. Former police crime intelligence boss, Col. Atwooki Ndahura is also out after being charged of interference with the process of law contrary to

[793] Act 211-14

S-166 of UPDF Act 2005. The president has also recently appointed army officials to the department of citizenships and Immigration. It fair the appointment of Brig. Gowa Kasiita as Director Immigration and Citizenship. Col Geofrey Kambare as the Commissioner of immigration with Col. Johnson Namanya as commissioner for citizenship and passport control

Soldiers, are in control of operation wealth creation which is an initiative designed to enhance household incomes. They are in same manner attached to the URA to curb smuggling. All this is followed by attempts by parliament to which directed though in vain that police officers replace soldiers in these agencies, they are actively involved in National Enterprise corporation which takes them straight into Kira motors corporation (KMC)

The ISO formerly of Kaka Bagyenda and (ESO) of Joseph Okello Ocwet are by and large staffed and run by military. These have born fruitful results because the army given the power in possession are enshrouding on people's rights. It continues to try civilians in military courts despite condemnation from local and international Human Rights agencies[794]. To this a report from the Uganda Human Rights commission (UHRC) and the UN office of the High commission for Human Rights (OHCHR) questioned traits in military courts as "Fraught with substantial and procedural irregulates that render the attainment of a free and fair trail structures and procedurally unachievable"

The administration of justice in court martials is subject of great debate and discussion. Most recently the LDUs ability to relate with civilian has come under scrutiny and sharp focus. The deployment of military police to quell civilian unrest is over deployment which I guess serves to intimidate the general public of what awaits and how ready it they dare misbehave.[795]

The man handling was employed to quell strikes from medical workers which paralyzed health service. The same excessive force was applied in 2016 during tensions between government and Rwenzururu kingdom which saw over 100 people die

Dr. Kabumba, constitution law expert at Makerere university said there is need to look past the military resolving Uganda's governance issues. He says *"As we point out in our 2017 book, this thread is historically being rooted in the very foundation of the colonial Ugandan state. Unfortunately, Uganda's independent leaders have been unable to look beyond military solution for resolution of critical governance question… and the deep tensions they engender will remain pending and potentially explosive"*.

I would not agree any better on the ultimate result of the militarization of Uganda. But my worry is to what extent will this go? Museveni defies the purpose of the creation of the state house Anti-

[794]Bobi wines case of 2017 and Kiiza Besigye case 2005/ 2006
[795] Period prior 2021 election

corruption unity which is also infested with military personnel, that too handled by the army.[796]
There is no sleeping on this and a legal framework is needed to restrict, reliance on the army for strictly law enforcement tasks. we need to redefine the relationship between police and military during the law enforcement.
JR. Thackrah, a scholar of joint police and military operation in counter terrorism notes,
"an army may kill in the execution of its normal function, but the function of the police is fulfilled by apprehending and bringing to account"
which is to this end, unfortunate of Uganda because the distinction is not always apparent. The army, if it is to be used must first be in accordance with the law and second, be oriented through training, from enemy combat roles to peace time roles. This all however is a tincture to cement Musevenism in the country.

POLITICIZATION OF THE FORCES.

The genesis of the troubling times, started with the politicization of the army which made it a clear and present danger to democracy. The military and police involvement in politics remained the first and sole cause of the change in the fulcrum of security. Perhaps the police and army forgot their role in democracy.
After President Yoweri Museveni's re-election, the seventh parliament voted to maintain the provision for the ten nominated army members of parliament, entrenching the military further in Uganda's political psyche.[797] This made it more risky and many questions arose as to why the army would indulge in politics to such an extent. This was not different from the turbulent history of Uganda that saw soldiers interviewing to disrupt civilian rule in 1971 when Idi Amin overthrew Obote. The issue was not dealt with and its impacts were to be reaped soon by innocent citizens.
In 2017, during the age limit debate, the presidential guard (SFC) combined with police attacked Parliament during session to arrest the opposition leaders that opposed the age limit. This move paralleled to the 11966-67 crisis when the executive prime minister, Apollo Milton Obote ordered an army siege of Parliament and stampeded MPs into passing the Pigeon-hole Constitution.[798]
This exposed how the army was deeply entrenched in politics. The result of this has been the rise in insecurity and human rights violations by security forces in the bid to protect their interests in politics. Guidance can be sought form the February 2021 beating of journalists by the military officers which saw many of them getting fatal injuries. These were covering the delivery of a

[796] Army officers take over key state affairs standard July 06 2019. (monitor). Co.ug
[797] Casper Henderson, "Ugandas hidden war." Feb 2004.
[798] The Observer. Chaos, SFC mar age limit debate. Dec 20th 2017. By Joseph KImbowa.

petition about human rights violation by Museveni's strong political opponent Kyagulanyi Robert Ssentamu Aka Bobi wine. [799]

Besides some army and top police officials have been hard making political statements or going political but surprisingly no action has been taken against them.

Brig Deus Sande, the commander of the UPDF Mechanized Brigade in Masaka while speaking at a function organized by the ruling NRM party mobilisers in Masaka city stated that the army was not to hand over power if elections went against president Museveni. In a mixture of Luganda and English, he remarked that;

"as long as we are still existing, we are not here to give out power…. I have heard the other on telling you that don't say this, but if you say this, we are not ready to give out power to people who are ideologically bankrupt…. Do you think we are planning a handover? We are not planning a handover, actually we are consolidating…. Where Uganda is today is not where it was years back. It's up to you to decide if Uganda is to become Somalia, which is in anarchy, or not."[800]

This was before the 2021 general elections and perhaps its results were the brutality and shooting of civilians by security forces in November strikes following the arrest of top opposition leader Robert Kyagulanyi Ssentamu when police together with the army fired tear gas and bullets to the demonstrating youth killing many and others getting grievously hurt.[801]

AGE LIMIT BILL

Being cheer led by the successful elimination of presidential term limits 2005 the age limit bill was also fabricated to courts where the age of 75 limit for, president in Uganda was strapped off. Passed on Dec 27th 2017 resolution to eliminate this aspect of Uganda democracy. The age and term limits were the two values acting in the interests of the people of Uganda. But their dismissal has seen an over flaw as our democratic being bleeds.

It should be noted that there is always need to consolidate the democratic principles and democratic governance, but when leaders trip off the trail after an eminent effort in the. Installation of democracy, what does it have to speak of the seed long watered? However, *"this law will remain largely inconsequential because it was passed against the wishes of majority of Ugandans"* Crispy Kaheru of CCEDU

In the case of male Mabirizi and other V Attorney general (constitutional Appeal No 2 of 2018) Justice Kenneth Kakuru commented, that

[799] Daily Monitor. "Uganda Security personel beat journalists covering petition on rights abuses." Elias Biryabarema.
[800] Daily Monitor, "Army on the spot again over partisan politics." Oct 31st 2020. Derrick Kiyonga.
[801] Abdi Latif Dahir. The New York Times. Deadly Protests Erupt in Uganda After Arrest of Opposition Leader. Nov 19th 2020.

"There is always danger that if the constitution is not strictly complied with our harder earned democracy shall degenerate into authoritarianism which leads to totalitarianism and dictatorship"

He continued bravely, that *"the entire constitutional amendment Act…… is unconstitutional and therefore null and void, and all its provisions ought to be expunged from the constitution of Uganda"*

Kenneth Kakuru in his argument enforced that the aspect of consultation of the citizens was left out. To which Attorney general said that the views of Ugandans were represented by their respective members of parliament. The lack of public participation by law invalidates the amendment. Moreover, at the inception of the bill speaker Kadaga raised caution[802] when Raphael Magezi first tabled a motion before sending it to legal and parliamentary affairs committee for scrutiny, on the need to seek public views.

In her words;

"Honorable members, the bill is sent to the legal and parliamentary affairs. However, I would like to remind you honorable members that this matter touches Art 1 & 2 of the constitution, people must be involved in this deliberation"

In his continued blame to parliament, he said they carried out consultations for only two months which was a short period to take account of the 15 million registered voters (then) of 290 constituencies, 1112 districts, 1403 545 counties and 57842 villages in the country. The list of stake holders that were able to be consulted were, 22 individuals and 8 government ministries, commission or agencies including RT Hon Prime minister in official capacity. The rest were obscure groups of FRONASA Veterans, Uganda Association of uneducated persons et al

Kenneth observed,

"With due respect to the members of the committee, for them to suggest that the above persons in groups are the stakeholders representing the whole group of Uganda, as envisaged in Art 1 of the constitution, in view of our past history, is unfortunate to say the least...."

He stretched that the 22 people consulted meant 0.0001375 percent of the registered voters who were to be consulted.

With the arguments of majority justices as not recognizing term and age limit as core constitutional values[803] underlines the legal identity crisis today.

[802] Oct, 3rd 2018

[803] Kiwanuka Legacy. Dr Busingye Kabumba 3rd Benedicts Kiwanuka Memorial lecturer

MILITARIZATION OF THE POLICE

Democratic accountable policing is one of the hallmarks of democracy. In a healthy democracy, a police service exists to protect and support the rights of its community not to repress or curtail freedom and ensure power for the governing regime. Holding the police to account for their plan, actions and decisions provides the necessary balance to the exercise of professional discretion by police officers. Accountability also provides a means by which the relationship between the police and the state can be kept under scrutiny a way of providing insulation against internal and external interference with the proper function of the police.

Uganda does not have a democratic, accountable police service, instead it has a heavily militarized colonial style regime police force that is firmly under the control of the ruling government. The police and army are separate bodies with separate mandates, cultures and hierarchies. In Uganda the lines are blurred. Successive army appointees have held the most senior police post while joint operations, auxiliary forces and army involvement in police work have militarized the police. This has led the police being undermined, violent and brutal policing taking place without the benefit of police accountability measures the erosion of police jurisdiction and guilt by association. It has also furthered the culture of impunity within the police by allowing actions done under the guise of special joint operations to go unchallenged where they would not be permissible under the civilian policing regime.

Army involvement in the police starts at the top with appointments of army men to senior police posts. Maj General Katumba Wamala was appointed as Inspector General of the police in April 2001.The president is the head of the Army and as a result the army is under his direct control. Wamala's appointment followed the scathing indictment of the police and is senior hierarchy by the Sebutinde Commission. Considering the context in which the appointment was made, it went virtually unquestioned. Following an army reshuffle, Wamala was replaced by another army man, Maj General Kayihura in October 2005. Beyond the concerns of continued militarisation of the police, the argument that only an outsider can solve the problems faced by the police has serious implications for the morale and independent functioning of the police.

JOINT OPERATIONS

The police are clearly mandated with directing and preventing crime in Uganda. (Article 212 (2) constitution of the Republic of Uganda) and (Section 5(1) (e) of the Police Act) However, Article 212(d)(iv) also requires the police to co-operate with the civilian authority and other security organs established under this constitution and with the population generally. This clause allows the

government to deploy the army or other special units on law and under duties blurring the line between the police, the military and security agencies.

A basic requirement for domestic policing is that the military and the police remain separate as they go about their work. In Uganda during joint operations, the line between the military and the police is not clear, leaving the police marginalized and compromised. A police force subject to military involvement in policing loses its authority to deal with mothers that fall within its jurisdiction. This marginalization has accrued because the army has always received a high level of support and patronage from the Government. The Government has consistently neglected the police and promoted the army. Museveni has openly expressed his contempt for the police.

The Uganda police Force (UPF) under the jurisdiction of the Ministry of internal Affairs is the main security force responsible for law enforcement in Uganda. According to the world encyclopedia of police forces and correctional systems in addition to regular police work the UPF is also involved in carrying out paramilitary functions providing security for visiting dignitaries and assisting public prosecutors during criminal proceedings.

The UPDF is headed by the Inspector General of Police of Uganda and world Encyclopedia of police forces and correctional systems,2006,920) The IGP is appointed by the President on the Public service commission recommendation and reports directly to the president and to the minister of Internal Affairs. A deputy Inspector General of Police reports to the IGP.

According to the UPF website the police force is divided into five directorates .Administration, operations criminal investigations, special Branch and local administration police (LAP).The administration directorate is responsible for finances, resources(including human resources) and police medical services the operations ,directorate works in the area of crime prevention, safety assurances and incident responses the criminal investigations directorate is responsible for detecting preventing and investigating crime, compiling information on criminals and gathering evidence for use in criminal prosecutions ,the special branch collects ,analyses and disseminates information on security and the local administration police (LAP) composed of locally recruited officers who have knowledge of local languages and customs is responsible for the enforcement of local bylaws and ordinances. Each of the five directorates is commanded by an assistant inspector General of Government (AIGP) who reports to the DGIP.

Between 2006 and 2007, the Uganda Police Force reportedly expanded from approximately 27,000 to 48,000 police officers. According to official figures the ratio of police officers to population in Uganda us approximately one officer per 1,880 in habitants. However, there are significant variations in the ratio of police officers to population by district which according to one source, ranges from one (1) office per 100 inhabitants in the Capital city of Kampala to one (1) officer per

8000 inhabitants in certain outlying districts (world Encyclopedia of police forces and correctional systems 2006,920)

In 2007, Uganda was reportedly undergoing a restructuring of its police force. However, information on what structural changes have been implemented could not be found among the sources consulted by the Research Directorate within the time constraints of this response. Several sources consulted by the research Directorate indicate that there has been a trend towards increased miltarisation at the Uganda Police Force as shown by the appointment of military officers to senior positions including the Inspector General of Government. The UPDF has also created such militaristic units as the Rapid response unit (formerly known as the violent crimes crack units, the Black Mamba, the Joint Anti Terrorist Task force, members of the Kalangala Action Plan and the Presidential Protection Unit. Several sources describe for instance at a public function, he stated that the police is rotten. He also remarked that the police hated him and would rather vote for a cow than him. Statements like these coming from the highest offices in the land weakened police morale and reinforce the negative image that the public have of their police force.

The army often justifies its interference in Police work on the basis that suspects possess military hardware. Under the National Resistance Army act, the army is empowered to detain or arrest a civilian who is in possession of military equipment. This same law was used to give soldiers arrest powers as part of their JATF duties or during operation Wembley and to run court martial duties. For example, on 23rd August 2002, the Government used the Act to run an army tribunal to try 450 suspects as part of operation wembley. Charges included terrorism, aggravated robbery and desertion. Detainees challenged the legality of the tribunal but the Director of public Prosecutions rules that the Act legitimized the process.

The involvement of the army in police work and use of police work and use of police powers by the military caused concern to the Sebutinde Commission during its inquiry into policing. Many police officers testified before the commission that the army and other security agencies arrested suspects without consulting the police and then dumped them in police cells. The police were afraid to release such detainees for fear of the army or security agency reaction. This meant that detainees were held in custody for long periods without being charged.

The army and police have different functions and the training they receive is geared toward these different mandates and rides. The two have different command structures, dissimilar codes of conduct and are subject to distinct obligations and procedures for example unlike police, the military are not subject to the rules regarding to arrest, detention and other constraints of working within the criminal justice system. The military are also not subject to the same external complain mechanisms and are not readily liable to civil action, leaving them unaccountable to the public even

when they are involved in civilian policing matters. One result of launching combined operations was that the lines of responsibility and eventual accountability for wrong doing were blurred. Police army and other security forces all operated in the same jurisdiction under different leadership and without clearly drawn mandate when violations and abuses occurred none of the agencies were held responsible.

JOINT ANTI TERRORIST TASK FORCE

The Joint Anti Terrorist Task force was created by the Anti Terrorism Act 2002.The main focus of the JAFF is the eradication of the Lord's Resistance Army, a rebel group that operates in Northern Uganda. JAFT is formed from a mixture of army, police and auxiliary force members. The chieftancy of military intelligence, an army intelligence unit leads JAFT. Along with the CMI, JAFT has drawn international criticism following claims of Torture and illegal detention. For example, in August 2003, Human Rights watch reported that JATF officers executed four men suspected of links with a rebel group. Human rights watch also reported that a further ten men had been detained in a secret location without charge.

The Director of CMI explained the involvement of the army in JAFT by saying that terrorism present a new challenge to the country's which existing laws institutions and procedures could not address. He argued that JATF's mandate was beyond the capability of the police.

The distinction between Military and the civilian police force as blurred. This militarization of the police force has led to allegations of brutal police tactics and Human Rights violations. According to Human Rights Watch in August 2007, the Rapid Response Unit detained forty-one individuals in overcrowded cells and reportedly tortured at least three of them. The militarization of the police force has reportedly enabled police misconduct to go encountered by police accountability mechanisms.

In addition, by appointing Army officers to head police directorates, President Museveni is encouraging militarization of the police as the army leaders in the police force have focused their energies on suppressing the opposition than adequately fulfilling the mandate of the police which in turn could be disastrous for the country.

ABUSE OF HUMAN RIGHTS BY MILITARISED POLICE

Human rights are the basic rights and freedoms that belong to every person in the world. The international human rights system in the twenty-first century has, however, been confronted with challenges that tend to offset its achievements. In spite of the remarkable normative and institutional developments since its inception, the world remains mired in widespread violations of

human rights and freedoms such as freedom of expression and association. While democratic governance has been on the rise in Africa over the last five decades, civil liberties for millions of people still seem to be constrained[804] most critical, is militarization of states and use of state militaries to violate human rights of people in many Africa states. Meanwhile, little research has been done on effects of shifting civil–military dynamics in African which call for further studies which gap this study seeks to fill. [805]

The militaries' increasing role in state affairs and the violence it tends to unleash against civilians to suppress opposing political views and to assert itself in power has rapidly grown in many African countries. Government of Uganda (GoU) under the National Resistance Movement (NRM) government has equally been accused of increased involvement of her military in the roles of the Police force. This coupled with the numerous paramilitary outfits in policing the state seems to account for gross human rights violations in Uganda (US Department of State (USDS), 2017; Oba, 2005). This could amount to militarization of the Police force which this study seeks to examine in relation to Uganda's Human rights record.

Historically, Uganda has been considered one of the biggest human rights violators on the African continent. This viewed arose from the human rights perspective where by security operatives of oppressive regimes carried out arbitrary arrests, detentions and torture as instruments of political repression some of which led to deaths (Oba, 2005). These were experienced under repressive governments of Milton Obote (1963-71 and 1980-85) and military dictator Idi Amin (1971-79) (Amnesty International, 2004). In 1986 the current President Yoweri Museveni, assumed power through a military coup. In 1995, a democratic Constitution was promulgated under which Museveni became the elected President in 1996; He was re-elected in 2001 in a controversial election. In 2004, he retired from the army but remained President. He was initially commended for improvement of human rights situation in Uganda but his regime soon came under criticisms for human rights abuses which worsened after the 2001 elections. The increased role of the military in the institution of Police force and civil duties and operation of various para-military groups in the name of security has drawn criticisms on account of human rights abuses.[806]

Social Conflict theory asserts that a privileged segments of society tends to disproportionately benefit from established social and economic arrangements[807] This could lead to employment of a state's coercive force to deter opposition in order to maintain the inequality. The theory links to this study in that militarization of the Police force and the violence it wrecks on political groups

[804] (Donoho, 2006)
[805] (Scott, 2018; Chuter&Gaub, 2016)
[806] (Kabumba, 2018).
[807] (Chevigny 1995; Randall, 1975).

opposed to the status quo could be viewed as a means that privileged societal elites use to suppress and control any potential or perceived threats to their hegemony. The theory has however been criticized for its failure to explain how consensus has been imposed on societies, and why they have been generally accepted sometimes for long periods while conflict in a large modern society is rarely bipolarized as assumed.[808] Nonetheless, it is still useful in explaining conflicts between social groupings and will thus be adopted in this study.

Conceptually, human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They can never be taken away, although they can sometimes be restricted, for example if a person breaks the law, or in the interests of national security. These basic rights are based on shared values like dignity, fairness, equality, respect and independence which values are defined and protected by the Constitution.[809] Militarization is considered a step-by-step process by which a person or a thing gradually comes to be controlled by the military or depends for its well-being on militaristic ideas.[810] It is a practice where problem solving approaches, institutions, or ideologies are infused with or depend on militaristic ideas, ideals or military's institution. It is the degree to which a society's institutions, policies, behaviors, thoughts and values are devoted to military power and an attempt to establish hegemony through promotion of military values and fear when in practice it is not entirely successful [811]

In the Ugandan context, the seemingly appalling human rights situation does not appear to arise from want of human rights legislation but from constitutional limitations placed on rights and to the disrespect for law by security agencies. The 1995 Ugandan Constitution provides for protection of human rights.[812]The increased role of the military however seems to suggest that the country has adopted an approach towards militarization of its key public institutions like the Police force while the leadership in the country content that military needed to be engaged in order to fast-track the country's ambitious development goals which other institutions has failed to deliver[813]

The increased role of the military in state institutions in Uganda has been prioritized as the best way to resolve most of the country's challenges.[814] This suggests that the military is superior and better equipped than other institutions to deliver public services. This is perhaps manifested in

[808] (Wieviorka, 2013)
[809]Constitution of the Republic of Uganda, 1995, Chapter four.
[810] (Enloe, 2000).
[811] (Bickford, 2011).
[812]Chapter four of the Constitution provides for protection of human rights. Art. 44 (a) gives special some rights: "…Notwithstanding anything in this Constitution, there shall be no derogation from enjoyment of the following rights and freedoms: (a) freedom from torture, cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; (d) the right to an order of habeas corpus…"
[813] (Nampewo, 2018).
[814] (Kabumba, 2018)

appointment of high ranking serving military officers to head the Uganda Police Force.[815]Such continuous appointments tend to suggest militarization of the force which could have serious impacts on Uganda's human rights record. Uganda Police Force was, for example, rated top violator of human rights in 2018.[816] This is perhaps the reason Uganda fell in "not free category" in Freedom House Ranking in 2016 (Jobbins et al, 2017). The apparent militarization of the Police Force and continuous appointment of military officers to serve in top positions in the force, involvement of para-military in police roles and police-military joint interventions and its likely effect on freedom of assembly and association under multiparty politics in Uganda has motivated this study.

The purpose of this chapter is to examine militarization of the Police Force and Uganda's human rights record taking the case of freedom of political assembly and association.

In doing so I examine the effect of service of military officers in top positions in Police force on freedom of assembly and association in Uganda? I also analyze the effect of involvement of para-military outfits in the roles of Police force on the freedom of assembly and association in Uganda? And I examine the effect of police-military joint interventions on freedom of political assembly and association in Uganda?

Some of the issues that the reader would like to address would be to find out the effect of service of military officers in top positions in Police force on freedom of assembly and association in Uganda? What is the effect of involvement of para-military outfits in the roles of Police force on the freedom of assembly and association in Uganda? And how does police - military joint interventions affect freedom of assembly and association in Uganda?

I will highlight the extent of militarization of the Ugandan Police Force. It will also conceptualize militarization of Ugandan police and its effects on human rights observance in Uganda particularly freedom of assembly and association under multi-party political dispensation, to militarization of the Ugandan Police Force (in terms of military officers serving in top positions in the police force, para-military involved in police roles and joint police-military interventions) on freedom of assembly and association under multi-party political dispensation in Uganda, from 2005 when multi-party political system succeeded the movement system of governance in Uganda up to present.

Police militarization is defined by scholars as the process whereby civilian police increasingly draw from and pattern themselves around, the tenets of militarism and the military model. This process

[815]Maj. Generals KatumbaWamala and Kale Kayihura as Inspector General of Police (IGP) in 2001 and 2005 respectively and recently, Brigadier SabiitiMuzeyi in 2018 as Deputy IGP.

[816] (Uganda Human Rights Commission Report, 2019).

tangibly occurs when a civilian police force adopts the equipment, operational tactics, mindsets, or culture of the military.

It is law enforcement's role to guard the public against criminal wrong doers and restore order, but officers should avoid the use of excessive force, ensure individual due process protections, and respect the moral dignity of every person. In recent years, law enforcement agencies across the country have increasingly adopted tactics, equipment and culture that is more akin to those seen in the branches of our military. This current trend has resulted in a clear decrease in legitimacy and trust between communities and law enforcement. When a community does not trust those tasked with protecting their public safety, this negatively impacts law enforcement's ability to achieve its goals. Proper policing practices require that law enforcement build positive relationships with their community, respect civil liberties, and avoid tactics which encourage the use of excessive force against citizens.

MILITARIZATION OF THE POLICE

The Uganda police Force (UPF) under the jurisdiction of the Ministry of internal Affairs is the main security force responsible for law enforcement in Uganda. According to the world encyclopedia of police forces and correctional systems in addition to regular police work the UPF is also involved in carrying out paramilitary functions providing security for visiting dignitaries and assisting public prosecutors during criminal proceedings.

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A number of joint operations are outlined below

a) Joint Anti Terrorist Task force

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In addition, by appointing Army officers to head police directorates, President Museveni is encouraging militarization of the police as the army leaders in the police force have focused their energies on suppressing the opposition than adequately fulfilling the mandate of the police which in turn could be disastrous for the country.

On Wednesday 13th January 2021, the eve of Uganda's General elections, Uganda's

communications regulator UCC ordered telecoms operators and internet service providers in the country to suspend all internet gateways until further notice. According to Reuters Ugandans reported difficulties accessing the internet via mobile devices and wireless connections on Wednesday evening and internet monitor Netblocks said on twitter that the country was experiencing a nationwide blackout from 7:00pm (1600GMT).

The presidents Justification for the Internet shutdown was in retaliation for face book taking down some pro government accounts which is really frivolous and vexatious. Any internet shutdown should be grounded in the international human Rights principles of proportionality, necessity and legality internet shutdowns should not be used as an emotional retaliation tool.42% of Ugandans are internet users and 2.5million Ugandans are active on social media via mobile tool devices.

Necessity means that only restriction of internet access must be limited to members that are strictly and demonstrably necessary to achieve a legitimate aim. It should be demonstrated that no other measure would achieve similar effects with more efficiency and less collateral damages.

Necessity also implies an assessment of the proportionality of the measures. Any restriction of internet access must also be proportional. A proportionality assessment should ensure that the restriction is the least intrusive instrument amongst those which might achieve the desired results. The limitation must target a specific objective and not unduly intrude upon other rights of targeted persons.

The internet has been ingrained into the tasks that Ugandans perform each day and the internet shutdown has caused detrimental effects to Uganda's economy and livelihoods at large. According to Net blocks an internet freedom monitor such a blackout could have already cost the Ugandan economy around USD 10million.

On 12th January, UMEME Uganda’s main electricity distribution company posted notice on its Twitter page asking its clients to purchase adequate amounts of electricity units as its service was being interrupted by the internet speed. During the five-day lockdown while the internet was fully shutdown, MEME customers were not able to access the prepaid service because the network was not available. The other services that were not available because of the shutdown were the Uganda Revenue Authority, National Social Security fund, banking services, medical emergency services like Rocket Health and E-commerce services in the form online transport services like Safeboda, Uber and Jumia.

If internet shutdowns are used as a blunt force means of blocking access locally to a specific service or application, access to other unrelated services may also be impacted as collateral damages. For example, shutting down the internet also directly disrupted access to internet based ride sharing and taxi hailing applications, likely creating a major disruption for transportation services.

Uganda has got a cumulative figure of over 39,000 cases of covid 19 and from the start of the pandemic, the internet has been a safe space offering the best platform that doubled as a social distance tool without the internet Ugandans who have been transacting online and communicating online had to switch and get things done physically. An example is the seven App that simplifies health care by bridging a gap between a patient and a doctor virtually in the comfort of one's home or office. With the internet shutdown one had to walk to the hospital physically. During the prevailing COVID 19 pandemic, Ugandan need the internet space more than ever before.

Mobile money services come to a standstill on 14th January2021, Election Day as a result of lack of internet availability and poor network conditions. Media companies that facilitate journalists while in the field rely on mobile money. Journalists that were already in the field to cover the 14-16th January elections couldn't be facilitated so they resorted to borrowing money from friends within the areas designated to them. Mobile money is a service used by almost every mobile phone user in Uganda. Uganda has about 26million active mobile subscriptions that resonate with mobile money usage.

People routinely depend on the internet to stay in touch with family and friends, create local communities of interest, report public information, hold institutions accountable and access and share knowledge. To that end, it can be argued that internet access cannot be distinguished from the exercise of freedom of expression and opinion.

When a complete internet shutdown occurs in a given country, the technical impact can extend beyond the country's borders to the rest of the global internet. Being part of an interconnected network means having a responsibility towards the network as a whole and shutdowns hold the potential to generate systemic risks. An internet shutdown has a ripple effect on the country's economy and persists beyond the days on which the shutdown occurs.

THE UNSUBSTANTIATED ARGUMENT FOR POLICE MILITARIZATION

Proponents of police militarization typically argue that the rise of gangs and cartels has resulted in the use of more sophisticated and deadly weapons by criminals, necessitating more heavily armed forces. While research clearly shows that gang membership and activity have both increased, the evidence does not support the assertion that more dangerous weapons are being used during criminal activity.

Almost 75 percent of homicides that occurred in in 2016 involved either a hand gun or a non-firearm weapon other than explosives. The FBIs uniform crime reporting program shows that the number of homicides committed with a firearm between 1994 and 2016 decreased by more than 32 percent. The number of robberies and aggravated assaults involving a firearm, declined by more

than 40 percent over the same time period, Assault weapons or semi- automatic weapons with military style features are used in only a few crimes. One study from 2017 found that they account for as little as 2 percent of the guns used in a crime. While we all want our law enforcement officers to come home safely each night, it is not the case that those committing crimes are using more dangerous weapons during the commission of those criminal acts

POTENTIAL DANGERS OF POLICE MILITARIZATION

The increased militarization of police has occurred alongside a significant decline in public trust for law enforcement agencies. While the public continues to respect their own community's law enforcement agencies, public confidence and trust in law enforcement as an institution have decreased since the early 2000s. In a national survey from 2016, a majority of Americans stated that they believe the use of military equipment by police is "going too far". This same study also found that most Americans believe that police should be required to receive a warrant before conducting a search of homes and vehicles or monitoring phone calls. This erosion of public confidence in law enforcement and low support for militarization impedes law enforcement's ability to effectively secure public safety.

POSSE COMITATUS DOCTRINE

The Posse Comitatus principle is derived from a long tradition of antimilitarism in English common law, represents the tradition and strong resistance of Americans to any military intrusion into civilian affairs.

The term posse comitatus translates to power of the country derived from the Roman practice of allowing an entourage of citizens to escort proconsult as they travelled to their places of duty. (Major H.W.C furnman, Restrictions upon use of the Army imposed by the Posse Comitatus Act, 7 MiL.L REV 85, 87 (1960). In the Anglo American Legal tradition this principle stretches back to the thirteenth century English antimilitary sentiment. At the time, sherriffs and Magistrates uphold the civil peace with the assistance of the Jurata ad arma, a pool of free men on whom they relied upon for help.

Founded in the twelfth century under the Assize of Arms the jurata ad arma composed of every able bodied male over the age of fifteen and served primarily as a civilian military reserve until the fourteenth century. The transition of its role from military to law enforcement came as a response to the increasing reliance of English monarchs to enforce the law by force under a declaration of martial law under such a declaration, the King would assert his authority on the grounds of necessary and suspend civil authority while employing the military to maintain order.

Under Kings James 1 and Charles I, troops were quartered in private homes courts staged summary trials and brutal military force suppressed civil unrest. In 1628, Parliament's Petition of right protested the use of military tribunals to my civilians by the Tudar and Sturat monarchs, arguing it was improper under the Magna Carto's provision that no man would be taken, imprisoned or killed except by the law of the land. The Crown's continued use of martial law, however sparked the English civil war in 1642.The military tyranny of the cromwell regime further ingrained upon the English public the dangers of a standing army.

By the Restoration, the public feared the military so much that no standing army became the watchword of all parties. In Response, the parliament drafted the bill of rights in 1689 declaring that the raising or keeping a standing army within the Kingdom in times of peace, unless it be with the consent of parliament, is against law. The Bill echoed the terms of the Magna Carta and petition of Right, stating that the use of the Military to enforce order is not due process of law. It also struck new ground by placing the army under the strict control of the legislative.

The Riot Act's passage in 1714 further blastered these safeguards against military intervention. The Riot Act required the sheriff to order a crowd to disperse before employing force against it. Only after this requirement was satisfied could the sheriff call the posse comitatus consisting of all is Majesty's subject of age and ability to restore the peace. (John D. Gares, Dont call out the Marines: An Assessment of the Posse Comitatus Act, 13 Tex: TECH L.REV 1467, 1470(1982). In contrast, the Riot Act strictly forbade employing the army in this same role as the military force was solely reserved for suppressing open rebellion.

The military is currently prohibited by federal statute from participating in domestic law enforcement. The Posse Comitatus Act of 1878 establishes criminal penalties for people who willingly use members of the Army or the Air force to execute the laws. Although a product of the Reconstruction Era, this law reflects a strong American tradition against the domestic use of the military that stretches back before the founding of the nation.

Over the last several decades, however there has been a growing trend to increase the role of the military in traditional law enforcement. Civilian law enforcement officials however have continued to adopt military tactics to carry out their mission with potentially significant consequences. Although the carts consider the impact that domestic military involvement has on individual liberty what often goes unnoticed are the subtle changes in the methods and priorities of civilian law enforcement authorities that flow from military or law enforcement cooperation. The training and equipment shared through joint task forces, critics argue have caused police departments to become increasingly authoritarian, centralized and autonomous bureaucracies that are isolated from the

public. The result is the spawning of a culture of paramilitarism in Uganda police departments.
The increased cooperation between the police and the military has blurred the line between the two traditionally distinct organizations whereas soldiers must attack and defeat an enemy, police officers are charged with not only protecting the community from law breakers but also protecting the constitutional rights of these alleged law breakers that they arrest. Whereas soldiers are trained to inflict maximum damage to use minimum force, and only when reasonably justified in accomplishing their mission.

Ultimately by allowing so much training and equipment interchange between the police and military, the military cooperation has created a dangerous exception to the PCA forcing the military involvement into a law enforcement role makes me less like soldiers but not quite police officers and conversely using police officers in a paramilitary role make them resemble soldiers in appearance and actions. As the line between the police and military becomes blurred there are bound to be negative long term effects on the military civilian police organisations and the population as a whole.
Although presidents have used troops domestically, Congress passed the Posse Comitatus Act to bar federal troops from participating in domestic law enforcement activities absent an express authorization by the congress.
The Constitution permits Parliament to authorize the use of the militia to execute the laws of the country, suppress insurrections and repel invasions. And it guarantees the states protection against invasion on unsurpation that their republican form of Government and upon the request of the state legislature against domestic violence.
The posse comitatus theory has its origins in Chapter 263.It outlaws the willful use of any part of Army or Air force to execute the law unless expressly authorized by the constitution or an Act of parliament .History supplies the grist for an agreement that the constitution prohibits military involvement in civilian affairs subject to only limited alterations by congress or the President but the courts do not appear to have ever accepted the argument unless violation of more explicit constitutional command could also be shown. The express statutory exceptions include the legislation that allows the president to use military force to suppress insurrection or to enforce federal authority.
Case law indicates that execution of the law in violation of the Posse Comitatus Act occur when the Armed forces perform tasks assigned to an organ of civil government or when the Armed forces perform tasks assigned to them solely for purposes of civilian government .Questions concerning the acts application arise most often in the context, the courts have held that ,absent a

recognized exception ,the Posse Comitatus Act is violated when civilian law enforcement officials make directive active use of military investigators or the use of the military pervades the activities of the civilian officials or the military is used so as to subject citizens to the exercise of military power which was regularly prescriptive or compulsory in nature. The act is not violated when the Armed forces conduct activities for a military purpose.

With the groundswell of public support for the war against terrorism the decay of posse comitatus has accelerated dramatically. Some politicians and media sources now suggest that Parliament amend or even repeal the PCA to allow a degree of domestic military involvement that would have been unthinkable. Although there is undoubtedly certain pragmatism in levying the immense resources of the Uganda Military against the threat of domestic terrorism.This strategy ignores the consequences of using soldiers as a substitute for civilian law enforcement. The military is not a police force. It is trained to engage and destroy the enemy not to protect constitutional rights. The founding fathers feared the involvement of the Army in the nation's affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of the people.

POSSE COMITATUS ADVOCACY FOR UGANDA'S JURISPRUDENCE

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PROSECUTION OF CIVILIANS IN MILITARY COURT

Since 2002, military courts in Uganda have prosecuted well over 1000 civilians for offenses under the criminal code, such as murder and armed robbery.[817] In 2006, Uganda's Constitutional Court ruled that military prosecutions of civilians were unlawful.[818]In 2005, the Ugandan Law Society, a professional association of lawyers, challenged the exercise of military jurisdiction over civilians for common criminal offenses. The Constitutional Court ruled that such prosecutions of civilians were unconstitutional. The court's finding was in keeping with Uganda's obligations under international law, which prohibits the peacetime prosecution of civilians before military courts.[819] This ruling, upheld on appeal by the Supreme Court in January 2009, was consistent with international law, which unambiguously holds that military tribunals are not competent courts to try civilians accused of peacetime criminal offenses. Despite this, Uganda's military courts continue to prosecute civilians. Military and police officials have disregarded the Constitutional Court's ruling since it was issued.

WHAT DOES THE KABAZIGURUKA V ATTORNEY GENERAL[820] CASE MEAN?

BACKGROUND

In 2016, Michael Kabaziguruka, a civilian, and then member of Parliament of Nakawa was arrested and detained on treachery charges and arraigned before the General Court Martial. Kabaziguruka petitioned court challenging the jurisdiction of the army court to try him. The High Court judge Patricia Wasswa Basaza ruled that Michael Kabaziguruka is subject to military law and should be tried by the General Court Martial for offences relating to security and treachery. The judge based her ruling on Section 119 of the UPDF Act, which gives unlimited jurisdiction and powers to the Army Court to try civilians such as MP Kabaziguruka. Judge Wasswa found that unless repealed or

[817] Especially during disarmament operations that the Ugandan military has conducted in the Karamoja region of northeastern Uganda. The second is arrest by an ad-hoc law enforcement unit, established by presidential directive in 2002, first known as "Operation Wembley," then as the Violent Crime Crack Unit. It is currently named the Rapid Response Unit (RRU).
[818]Uganda Law Society v Attorney General of the Republic of Uganda (Constitutional Petition-2005/18)
[819]Ibid
[820] Constitutional Petition No. 45 of 2016

invalidated by the Constitutional Court, the Act makes civilian suspects subject to military law over charges of aiding and abetting serving UPDF officers to commit service offences. Mr. Kabaziguruka petitioned the Constitutional Court objecting the jurisdiction of the General Court Martial trying him as he was a civilian.

H O L D I N G S O F C O U R T

1. The General Court Martial established under the Section 197 of the UPDF Act is a competent quasi-judicial military Court established under the UPDF Act whose jurisdiction is limited to the enforcement of military discipline.
2. The General Court Martial's jurisdiction is only limited to trying service 15 offences specified under the UPDF Act, only in respect of persons subject to military law.
3. Military law under the UPDF Act must be construed to exclude laws that are the preserve of Civil Courts of judicature established under Chapter Eight of the Constitution.
4. Persons subject to military law under UPDF Act must exclude all those persons who have not voluntarily placed themselves under the jurisdiction of that Act excerpt as provided for under Section 119(1)(g).
5. Section 119(1)(h) and 179(1)(a) of the UPDF Act are unconstitutional as they are inconsistent with Article 28(1) of the Constitution.
6. Section 119(1) (g) of the UPDF Act is not unconstitutional. Provided the person not otherwise subject to military law is tried as an accomplice together with a person who is subject to military law as the principle offender on the same charge sheet.
7. The petitioner is not a person subject to military law and his trial under the UPDF Act is unconstitutional. The charges brought against him under the UPDF Act are unconstitutional null and void and of no effect.
8. Section 197 of UPDF Act is <u>NOT</u> unconstitutional.

O R D E R S

1. All those persons not subjected to military law and are currently being tried before any military Court, we order that their cases be transferred to Civil Courts under the direction of the Director of Public Prosecutions within 14 (fourteen) days from date hereof.
2. All those persons not subject to military law who are currently serving sentences imposed by the authority of military Courts contrary to the Constitution as set out in this Judgment, should have their case files transferred to the High Court Criminal Division for re-trial or to be dealt with as that Court may direct within 14 (fourteen) days of this Judgment.

ANALYSIS OF UGANDAS MILITARY COURT STRUCTURE

Justice Kakuru in his ruling held that ***the Court Martial clearly is not part of the Judiciary but rather part of the executive arm of government***. He further stated that the General Court Martial is a specialised Court, setup by Parliament for the purpose of dealing with military discipline within the UPDF. Accordingly, it lacks all the tenets of an ordinary Court of law established under Chapter Eight of the Constitution. They are established under Chapter Twelve of the Constitution which provides for the County's Defence and National Security.

According to **Article 126 (1)** of the Constitution of the Republic of Uganda, "...judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people." In **Article 129 (1)**[821], the Constitution further provides that the judicial power shall be exercised by the courts of judicature which shall consist of: The Supreme Court of Uganda; the Court of Appeal of Uganda; the High Court of Uganda; and such subordinate courts as Parliament may by law establish. It is further provided that "...the Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court."

The military court is established pursuant to **Article 210** of the Constitution. Article 210 of the Constitution mandates Parliament to make laws regulating the UPDF. Pursuant to this provision; Parliament enacted the UPDF Act as the major legal framework governing the UPDF. **Part VIII** of the UPDF Act deals with the establishment and operation of military courts in Uganda. From the structural point of view, military courts in Uganda comprise of the Summary Trial Authority, Unit Disciplinary Committees and Courts Martial. Under "Courts Martial", the UPDF Act provides for a four tier military court system i.e., Field Courts Martial; Division Courts Martial; the General Court Martial; and the Court Martial Appeal Court.

To this extent, Justice Kakuru held that the **General Court Martial is not an independent impartial court as envisaged under Article 28** of the Constitution. Article 28[822] requires that in 'the determination of any criminal charge' an accused 'shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

In **Lt. Ambrose Ogwang v Uganda**,[823] The Court of Appeal observed and held as follows; "No doubt the Division Court Martial is established by law, the Uganda People Defence Forces Act, 2005. The question is whether it is independent. Independent in the above Article 28 (1) can only

[821]The Constitution of the Republic of Uganda, 1995 (As amended)
[822]The Constitution of the Republic of Uganda, 1995 (As amended)
[823]Court of Appeal Criminal Appeal No. 107 of 2013 delivered on 8th November 2018.

be understood in the general constitutional architecture of separation of powers."

Article 128 (1)[824] of the Constitution provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. This requires that a court must be independent of the authority that brings the charges or trial. The judges of an independent court cannot be under the administrative control of the authority that brings the charges. In order to secure the independence of the courts the courts are placed under a different arm of the state known as the Judiciary with security of tenure and insulation from control of the Executive which originate criminal charges with the exception of private prosecutions which are brought by private individuals.

THE PURPOSE OF MILITARY LAW AND MILITARY COURTS

Military law can be described as that specialised area of law that governs military personnel and other persons subject to military law. The major objective of military law is to ensure discipline in the armed forces which acceptably is considered to be key in ensuring military effectiveness.[825]In **Attorney General v Major General David Tinyefuza**,[826] Justice Mulenga stressed that military law is "a special package of laws designed to ensure proper command and administration of, and discipline in the army..."[827]In the **Uganda Law Society v The Attorney General of the Republic of Uganda**,[828]Justice Mukasa-Kikonyogo expressed the view that one of the major purposes of military law is to ensure peace and security. This is the end result of the military effectiveness which is largely achieved by ensuring discipline in the army.

Military courts/courts martial are the main mechanism for enforcement of military law. In **Joseph Tumushabe case V Attorney General**,[829] Court while interpreting Article 126 (1)[830] of the Constitution in the context of the relationship between military courts and civil courts, Justice Mulenga who delivered the unanimous decision of the Supreme Court emphasised that "...court martial are a specialised system to administer justice in accordance with military law..." An important question to pose here is: Why should the military have a specialised kind of law and enforcement mechanism. In **Joseph Tumushabe case** (supra) the Constitutional Court adeptly summarised the justification for existence of military courts alongside civil courts. In the words of Justice Twinomujuni, "The only justification for the creation of special tribunals is that our

[824]The Constitution of the Republic of Uganda, 1995 (As amended)
[825]Attorney General v Major General David Tinyefuza Const. Appeal No. 1 of 1997 (SC) at 39
[826]Constitutional Appeal No. 1 of 1997
[827] Ibid
[828]Constitutional Petition No. 18 of 2005 (CC)
[829]Const. Petition No. 6 of 2004.
[830]The Constitution of the Republic of Uganda, 1995 (As amended)

ordinary Courts of Law tend to be very slow and are not suitable for certain category of professions and occupations." He stressed that "Courts Martial are justified by the fact that they are more suited to try military service offences than ordinary courts but more importantly they are expected to dispose of cases expeditiously."

In summary, the major purpose of military law and military courts as discerned from the jurisprudence of Uganda's civil courts is to ensure proper command and discipline in the army to guarantee its efficiency in maintaining national peace and security. Ensuring proper command and discipline in the army requires military courts to expeditiously handle and dispose of cases involving infraction of military law.

JURISDICTION OF THE COURT MARTIAL TO TRY CIVILIANS

It is trite law that any competent tribunal must have jurisdiction over both the subject matter (jurisdiction ratione materiae) and the person(s) it tries (jurisdiction ratione personae). Jurisdiction of a tribunal is a matter determined by law. Justice Mukasa-Kikonyongo in the case of **Uganda law Society V Attorney General**[831]rightly emphasised that a court be it civil or military, can only try the accused for an offence where it is seized with jurisdiction. In principle, the jurisdiction of military courts should be limited to serving military personnel accused of committing military offence. Justice Kakuru in the **Kabaziguruka case** held that The General Court Martial's jurisdiction is only limited to trying service offences specified under the UPDF Act, only in respect of persons subject to military law. He defined the term Service offence to relate only to those offences that are "purely military in nature" or offences under military law which are not offences under ordinary criminal law. Ordinarily members of the military in this Country are tried by civilian Courts for non-service offences. Assumption of risk by an individual in the military is only limited to military discipline under military law.

The jurisdiction of military courts over civilians is supposed to be exceptional. Uganda's military law gives the military courts jurisdiction over many categories of civilians. According to **Section 119** of the UPDF Act, persons subject to military law/ jurisdiction of military courts include: civilians who serve in the position of an officer or militant in any force raised and maintained outside Uganda and commanded by an officer of the defence forces;[832]civilians who voluntarily accompany any unit or other element of the defence forces which is on service in any place;[833]and civilians who serve in the defence forces under engagements by which they agree to be subject to

[831]Constitutional Petition No. 18 of 2005
[832]S 119 (1) (d), The Uganda Peoples' Defence Forces Act, 2005.
[833]Section 119 (1) (e), The Uganda Peoples' Defence Forces Act, 2005.

military law.[834]Civilians who aid or abet a person subject to military law in commission of a service offence and civilians found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed, are also subjected to the jurisdiction of military courts.[835]

In the **Uganda Law Society Constitutional petition of 2005,**Justice Mukasa-Kikonyogo in addressing the issue whether sections 119 (1) (g) and (h) of the UPDF Act which subject certain categories of civilians to military law were inconsistent with particular provisions of the Constitution, she stressed that "...it is a tenable argument that the inclusion of the provisions above [in the UPDF Act] were intended to safeguard national security where such civilians find themselves in conflict with the military law."43"This is well intentioned for purposes of the wider realm of the State's constitutional mandate to control the nation's defence and national security", she further argued.

Justice Kakuru in the case of **Hon.Michael Kabaziguruka v Attorney General**[836]held that persons subject to military law under UPDF Act must exclude all those persons who have not voluntarily placed themselves under the jurisdiction of that Act excerpt as provided for under **Section 119(1)(g)** of the UPDF Act. He reasoned that all persons recruited into the Armed forces do so voluntarily. Each individual voluntarily seeks to enlist, it must be presumed, is well aware of the risks such enlistment entails. He or she contracts to voluntary limit some of his or her fundamental rights and freedoms to the extent that he/she is exposed to the risk of being a member of the Armed forces. Persons who have not voluntarily subjected themselves to military law cannot be tried by the General Court Martial.

Section 119(1) (g)[837] stipulates that every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service offence is subject to the Military court jurisdiction. Justice Obura JCC in **Hon.Michael Kabaziguruka v Attorney General**[838]held that, for such person to be tried by General Court Martial there must be a principle offender who is subject to military law named in the charge sheet as such. The civilian can only be charged as an accomplice together with the principle offender. This was the same position that had earlier been taken in the **Uganda Law Society v Attorney General**,[839] where the Constitutional Court also clarified that to validly charge someone under section 119 (1) (g) of the UPDF Act, there must be a principal offender to aid or abet who must be subject to military law.

[834] Sec 119 (1) (f), The Uganda Peoples' Defence Forces Act, 2005.
[835]Section 119 (1) (g) & (h) of the Uganda Peoples' Defence Forces Act, 2005 respectively.
[836] Constitutional Petition No.45 of 2016
[837]The Uganda Peoples' Defence Forces Act, 2005.
[838]Constitutional Petition No.45 of 2016
[839]Constitutional Petition No.18 of 2005

Justice Kakuru further held that **Section 119(1)(h)** which provides civilians found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed, are also subjected to the jurisdiction of military courts is unconstitutional as they are inconsistent with Article 28(1) of the Constitution. He reasoned that the provisions extend the jurisdiction of the General Court Martial to include power to try persons who have not voluntarily brought themselves under the ambit of military law.

Similarly, the majority of the Constitutional Court in the Kabaziguruka case held that **Section 179(1)(a)**[840] of the UPDF Act which gives military court jurisdiction to try civilians who does or omits to do an act in Uganda, which constitutes an offence under the Penal Code Act or any other enactment are unconstitutional as they are inconsistent with Article 28(1) of the Constitution. Military law under the UPDF Act must be construed to exclude laws that are the preserve of Civil Courts of judicature established under Chapter Eight of the Constitution.[841] This was in tandem with the holding of the Supreme Court in **Attorney General v Uganda Law Society**[842], where Court addressed the issue of the competency of military courts to try civilians charged with offences under legislation other than the UPDF Act. Justice Mulenga approved the Constitutional Court's decision where it was held by a majority of four to one that the General Court Martial did not have jurisdiction over this offence because section 6 of the Anti-Terrorism Act conferred exclusive jurisdiction over it in the High Court. He pointed out that there can be no trial at all where the court is not competent. He emphasised that a trial by an incompetent court is by that fact alone a nullity ab initio."[843]

Uganda is responsible for the unlawful prosecution and detention of all civilians currently in custody as the result of the exercise of the military jurisdiction, which includes those who have been convicted or are undergoing trials before military court martial. The Constitutional Court has clearly held the exercise of military jurisdiction over civilians to be unlawful. As indicated above, since no military court had the competency to try a civilian, as a matter of domestic and international law all convictions and detentions based on the wrongful exercise of jurisdiction are a violation of the right to a fair trial and a violation of the prohibition on arbitrary detention. The state therefore has a duty to identify all cases of civilians prosecuted or facing prosecution before court martial cases be transferred to Civil Courts under the direction of the Director of Public Prosecutions. The decision to proceed with any retrial would need to take into account time that an accused has already spent in detention, and whether a retrial would further violate the rights of an

[840]The Uganda Peoples' Defence Forces Act, 2005.
[841] Justice Kakuru ruling.
[842]Constitutional Appeal No. 1/2006 (SC).
[843] Attorney General v Uganda Law Society at 9

accused to a fair hearing.

They were set after continues abuse of rights like military persons, however, they are also obliged to adhere to the rule of law and uphold the fundamental rights and freedoms of persons. Abide by the contrail standards of administering justice. However, the extent of adherence is the subject of this extension

After loving the 2001 election, Besigye was trailed whenever he went and that led to some fear that his life was in danger. He filled the matter with the Uganda Human Rights commission (UHRC) alleging the danger in which his life was.[844]

The government later alleged that Besigye was associated with rebels of the (PRA) peoples Redemption Army. He was arrested and jointly charged of treason and misprision under the penal code Act.[845] He was then a caused separately with the offence of rape allegedly committed in 1997 well as 14 of the accused were granted bail, through the hearing proceedings security personnel in Black raided the court premises and surrounded the holding cells where bail applicants awaited release. Therefore, the bail papers could not be processed. The 'Black mamba' as dubbed by the media interrupted the process of bail and the accused were returned to prison

Because of these acts, Justice Edward Legalize resigned from gearing the case and justice Bosco Katutsi who also after hearing the rape charges to which he acquitted Besigye, declined to hear the treason and misprision changes. In the condemnation of this attack, Justice James Ogoola[846] Coined the famous expression that a naked rape, defilement and desecration of the temple of justice, he confirmed that not since the abduction of CJ Ben Kiwanuka from the premises of court in the diabolical time of Amin had court been subjected to such a horrendous sight. This undermined the principles of judicial independence

Major Felix Kulaigye in the aftermath, in justification of this action said Black mamba was there to rearrests the suspects for other charges brought by the GCM.[847]It also undermined the provision in Article 28 of the constitution granting of bail as a right. Besigye and other were committed to the GCM in Makindye as tried for the same case facts as treason and misprision however under the guise of terrorism and possession of fire arms.[848]Until the high court application for an order of stay the proceeding of the military court, the constitutional court decision on legality of the trial which led to the subsequent suit of the ULS V AG Constitutional Petition No.1 2006 for a declaration of whether the GCM had jurisdiction to try Besigye.

[844] See UHRC. 177/2001, Rtd.Col. Kiza Besigye V.AG (Chieftaincy of military Intelligence)
[845] Cap 120, Vol V laws of Uganda 2000
[846] Principle judge of high court
[847] See G Sseruyange, Black Mamba intended to rearrests PRA suspects. Daily monitor, thru Nov 17 2005
[848] See. Fire arms Act cap 299. Vol XII laws of Ug. 2000

The heart-breaking part was when the chairperson of GCM Elly Tumwine asserted that the military courts were independent from the jurisdiction of the high court.[849]None the less Elly Tumwiine continues with the trial even when the high court has pronounced its self that the GCM did not have jurisdiction pursuance of which contravened Arts 22(1), 28(1), 20(1), 3 b a c, 126(1) and 210 of the constitution. The action hence went down to Museveni's vows to fight the constitutional court ruling legally and politically.[850]This defined the extent the president would go to protect his sit and his government

INSECURITY AND ASSASINATIONS THE GUN WIELDED MEN AND THE BLOOD STAINED HANDS"

Any individual, any group or person who threatens the security of our people must be smashed without mercy. The people of Uganda should only die from natural causes which are not under our control but not from fellow human beings."[851]

Security was a second substantive issue in the ten point's programme of the National Resistance Army. This was much emphasized since insecurity was on increase in the various parts of Uganda. This could be solved through instituting a professional army and police to protect the nation, people and their property.

To prove their word, when the 1995 Constitution was promulgated, the National Resistance Army's identity was changed to Uganda Peoples Defence Forces (UPDF). Article 208(1) provided that; there shall be armed forces to be known as the Uganda Peoples Defence Forces.[852] The army was to be nonpartisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority.

The army was born in a challenging period. There was an insurgency in northern Uganda with the Lord's Resistance Army (LRA) and less than a year later, a new rebel group, the Allied Democratic Forces (ADF) attacked parts of Kasese and Bundibugyo in western Uganda.

Another rebel group, the National Democratic Army (NDA) led by Herbert Itongwa also surfaced in the central region. Meanwhile, the South Sudan question was also yet to be solved. According to the situation by then, defeating such all such rebel groups was a big achievement of the army young at the moment. It was a promising army in terms of security to the nation.

After its formation out of NRA, steps were taken to turn it into a professional army. The Defence Review Commission was set up and in early 2000, a white paper done set in motion the progression

[849] S Mruita& S. Lubwama, court now defined high court. The daily monitor wed Jan 18th 2006
[850] See. H Mukasa, museveniraprculing on court martials. The New vision, Tue Feb 7th 2001
[851] President Yoweri Museveni during his speech on the steps of Parliament 1986.
[852] The 1995 Constitution of the Republic of Uganda.

of the Uganda army from a mere regular force to a professional army. This saw a professionalization phase inform of professional recruitment, training, capacity and modernization of the force equipment has been key.

The army spokesperson once remarked that, "if one looks at the army that walked into Kampala in 1986 and at the UPDF today there are improvements and re-alignments that have made it a better force."[853] He further remarked that, we are not just a professional force but a people's army too."

Indeed, no one could under estimate the role of the army and Uganda police Force in maintaining security and promoting human rights during the first decade of their legal institution.

MOTORBIKE KILLINGS (THE GUN WIELDED MEN)

The theorem of such killings has never been known by the natives of the land. No reports have ever been brought to people's attention about such deaths. These continued execution style killings without any arrests led the public to conclude that the police force and other security apparatus in general are incompetent and riddled with corruption.[854]

When such killings escalated, many others Ugandans diverted to another ideology of the conspiracy theory by those in government and others politicized the matter. The assailants always use giant and first moving bikes, dressed in black and loaded with guns ready to complete their mission.

Since 2012, a total of about 10 Muslim clerics have been fatally shot by these assailants. In its investigations, the police always blamed this to the Allied Democratic Forces (ADF).[855]

On April 20, 2012, Sheikh Abdul Karim Ssentamu a prominent Muslim scholar was gunned down on William Street, Kampala shortly after prayers when he had just left the mosque. Investigations commenced but still no report was released for such death. As the community was still aggrieved, another senior Muslim Abubaker Kiweewa was shot dead on June 22 the same year. The assailants took his life at about 9pm on Friday within the premises of prime supermarket in Kyanja a city suburb.

The country was shocked and many heads were still puzzled about such deaths when the weakness in security that the president boosted about was again manifested in two years' time.

On December 28th 2014, Sheikh Mustafa Bahiga who was at Bwebajja mosque on Entebbe road was shot five times. Three bullets were shot on his left limb, one on the head and the other in the stomach as he was going for Ishae prayers. One year later in March 2015, the situation changed this time round, a senior government prosecutor who was the prosecutor in the 2010 bombing of Lugogo was shot dead. Joan Kagezi was gunned down by assailants riding a motorcycle in

[853] Felix .Kulayigye former army spokesperson during an interview with New Vision.
[854] The Independent. Unsolved Killings by Motorcycle hitmen. June 6th 2021.
[855] Daily Monitor. Muslim Clerics who have been killed. Nov 26th 2016.

Kiwatule Najjera when she had stopped to purchase fruits.

Two months later, Sheikh Abdulrashid Wafula, the Imam of Bilal mosque in Mbale town also topped the list. He was gunned down at around 9pm at the gate of his home in Kireka village in Mbale district. Surprisingly, with all these shootings, the security had nothing to tell. In all those deaths, security had no one in its cells. Insecurity increased leaving many Muslims and the nation at large in thoughts about the intention for these killings.

A month later, the country was to face another shock. Sheik Ibrahim Hassan Kirya was shot dead by unknown assailants on a boda motorcycle in Bweyogerere. Sheikh Ibrahim was on his way home and had crossed to buy some passion fruits when the incident happened.

On 26th November 2016, the attackers would escalate, this time targeting a sheikh who also was a serving military officer. These assailants on a motorbike attacked in a diplomatic format and shot dead Major Mohammed Kigundu and his driver/bodyguard. Sergeant Steven Mukasa.[856]His death was linked by security operatives to ADF having been a commander in the past and having survived two previous assassinations.

On the 17th March 2017 the country was to be left in shock for another time. AIGP Andrew Felix Kaweesi was gunned down a few meters from his home alongside his body guard sergeant Kenneth Erau and driver constable Godfrey Wambewo.[857] Otin says this particular killing would perplex investigations even more. Kaweesi vehicle seemed to have come to a controlled stop on the road and did not present any indications of aversive driving.[858]

The assailants parked their bike in the road claiming it to be broken. When Kaweesi and his colleagues drew close to it, they reduced speed unknown to them other assailants were moving from behind and completed their lives. The killing occurred towards the anniversary of Jamil Mukulu's arrest. A report from Uganda police showed that those assailants after finishing their mission left the scene in motorbikes without license plates.[859]

Following a similar sequence and pattern, other killings commenced in which the former MP for Arua and staunch NRM carder Ibrahim Muhammad Abiriga was shot dead along with his brother Saidi Kongo.[860] The two were heading home at around 7pm. The brother had just returned from Somalia and was at a time working as his body guard. Next would be a District Police Commander and Assistant Superintendent of Police for Buyende Muhammad Kirumira.

Muhammad Kirumira was killed alongside a female friend in his private vehicle as he drove close

[856] Daily Monitor 2016. Also see Andrew Otine. Unsolved: Killings by Motorcycle Hitmen and serial murder of women in Uganda. 20 Nov 2018
[857] New Vision 2017.
[858] Supra.
[859] Uganda Police Report 2017, p.6.
[860] Obbo. 2018; The Observer: 2018.

to his home. The assailants had the same modus operendi, spraying bullets into a vehicle, confirming the death and then leave the scene.[861] The police through its spokesperson Fred Enanga informed the nation that the prime suspect Abdul Kateregga was shot dead by the chieftaincy of military intelligence (CMI) before releasing details of the gun that was used to end Kirumira.[862]

The death of Kirumira left many people aggrieved, most of them asserting that he had been eliminated by those in police following his continuous release of information about the top weevils in police and their criminal conduct at the pinnacle Gen Kayihura's time leadership in Uganda police force and amidst subjugation of civil rights, Kirumira criticized brutality, corruption and abuse of power.

Kirumira confronted his rogue colleagues head-on and never minced his words knowing that he was risking his life once said, ""I am Muhammad Kirumira mwoyo gwa gwanga…. I am around until God says dont be around… Iam around and my virtues and values havent changed.""[863]

Kirumira in a short video clip declared that "expose the mafia to save the state. When you speak you die. When you keep quiet you die. Better speak and die when the message has reached people." After his death, it became evident that the officer had been assassinated by the big fish in police something that they covered up to date.

The president continued to say that police was full of Mafias that he was to eliminate and promised Ugandans that they will be safe. On June 1st 2021, the gunmen attacked and wounded Ugandas transport minister and former army commander Gen Katumba Wamala killing his daughter and driver.[864]

After this attack, it seemed the promise by the president of security was a shame. For all the previous killings, no official public report and no assailants had been caught. The president blamed the insecurity on police and continued to promise the arrest of the assailants. This time round he termed them as pigs. It's not clear as to the intentions of these bloods stained men but seems the killings were to continue until the truth is brought to light.

THE MOTORBIKE ASSASSINS AND MURDER OF WOMEN ENTEBBE AND NANSANA"

The wave of unexplained and puzzling killings opened its gates in 2012 when the Hollywood execution style ride by shootings and serial murders of high profile personnel and Muslim sheikhs made headline in Uganda. This left part of the population in fear and speculation as to the reasons

[861] New Vision. Muhammad Kirumira shot dead near his home. Sept 8th, 2018.
[862] The Independent. Suspect in Kirumira murder died before releasing killer gun. Sept 10, 2019.
[863] The Standard. The fearless Uganda Police man who fore saw his death. Japheth Ogira. Sept 10th 2018.
[864] Katumba Wamala shooting: Uganda ministers daughter killed. BBC NEWS. June 1st 2021

for such acts as well as the individuals behind them.

These shootings targeted a section of Muslim leaders in the initial stages though later the lens changed from 2015 when the attacks escalated to senior government officials.[865]

THE MURDER OF WOMEN IN ENTEBBE AND NANSANA

In 2017, a separate type of killing commenced in Uganda. This fashion mainly focused and targeted women between the ages of 18- 36 years in the areas of Kasenyi, Katabi town council, Impala and Nansana municipality.[866]The killed commenced on 3rd May to 4th September 2017 and a total of about 21 women were killed. All the bodies according to postmortem reports had signs of strangulation which depicts the murders to be the same.

The bodies recovered in Nansana seemed to be a bit different. Most of them were found having sticks inserted in their genitals. This was a shocking period and a state of blood to many young and teenage girls. According to Uganda Human Rights, at least two bodies had missing parts namely a face, a leg and breast. [867]

The whole thing was filled with kidnaps that would be followed by murder. A one Suzan Magara was kidnapped and a ransom of 700 million UGX was demanded from the relatives. This dragged the president into investigations and nearly the country's entire intelligence and security community but nothing was to avail. The kidnappers would exhibit a high level of operational sophistication, using up to 17 different simcards to elude tracking for 20 days to collect the ransom, kill the captive and drop or dump their bodies.[868] The murders had a striking resemblance with the bodies bearing signs of manual strangulation while others having sticks inserted in the private parts.

In Nansana municipality, a total of 9 women were killed. On 3rd May 2017, a body of unidentified female adult was found in Nansana West zone. On 28th day of the same month, another identified as Nampijja Juliet alias Natabazi was found behind Kenjoy supermarket. On the same date, unidentified female adult was found in Nansana East 1 Zone. Two others were found dumped near Kenjoy supermarket in Nansana West 1.

The killings continued in Nansana and on 5th July 2017, Birungi Maria was found dead at Nansana East Zone II with signs of manual strangulation. In a few days another body of Nakacwa Teddy, Kyandali Juliet and the other unidentified body were discovered.

In Katabi town council, a sum of 10 was killed in a similar tandem by the murderers. These included Nansubuga Gorreti, Komugisha Faith, Dona Zakanya, Norah Wanyama, Rose Nakimuli,

[865] Andrew Otine. Unsolved: Killings by Motorcycle Hitmen and Serial Murder of Women in Uganda. 20th Nov, 2018.
[866] Uganda Human Rights Commission, 2017 p 48.
[867] Uganda Human Rights Commission 2017, pp48-49.
[868] Daily Monitor 2018.

Nakajjo Sarah, Nakasinde Aisha, Nalule Jalia, Nabilanda Mary and the other was unidentified. The other killings took place in Bulaga town and Bwaise where Zawedde Regina and Namuwonge Jennifer were murdered in cold blood. [869]

While talking to parliament about the matter, the Minister for Internal Affairs, Jeje Odong said the deaths were ritualistic, blaming it on the illuminant.[870]

The absence of convincing explanations, by matter creating a public perception that the police force and the security apparatus in general are inept at their duties

The public concern drove the president into anger and unleashed a vehement tirade on the police force, publicly dressing them down as incompetent and infiltrated by "bean weevils" or wrong elements. His words were later followed by changes in police but seem the changes were a mere change of guards and not a fundamental change.

HUMAN RIGHTS VIOLATIONS

The wide spread atrocities that were committed during Obotes regime and Idi Amin represented traumatic past which the leaders of NRM and Uganda at large wished to avoid repeating which influenced the government to adopt Institutional reforms that were majorly fostered towards the observance of human rights. In May 1986 after he had taken an oath of allegiance, the NRM government established a commission of inquiry into human rights violations that was charged with investigating the human rights record of all governments that it had replaced since independence until the seizure of power by NRM government.

The commission was to make recommendations on the clear observance of human rights. Although it lacked adequate funding, it was able to carry out extensive hearings throughout Uganda and increased on the rate of human right rights awareness in Uganda. Among its recommendations was the appropriate punishments for human rights violators, the inclusion of human rights culture and education in the general curriculum and the training of army and security forces as well as the establishment of permanent human rights commission.[871]

Following it recommendations, the Uganda Human rights Commission was to be established. Its establishment was amplified by Odoki Constitutional

Commission that defined the proposed functions and powers in significant detail,[872] its recommendations were later adopted in the 1995 Constitution of Uganda and implemented through

[869] The Observer. Women murders: Government releases list of 21 victims. September 7th 2017.
[870] Adude, 2017; Lacobini de Fazio 2017
[871] Commission of inquiry into violation of Human Rights Final Report. Entebbe UPPC. 1993.
[872] Uganda Constitutional Commission. Report of the Uganda Constitutional Commission (Entebbe: UPPC, 1993. PP185-188)

the Uganda Human Rights Act of 1997.[873] The next question was on the appropriate administration the Commission. This question was answered by the NRM government through its chairman and president Yoweri Kaguta who appointed Margret Ssekagya and seven members to chair and head as well as overseeing the effective observance of Human rights in Uganda to break away from the previous government as a gear towards achieving the fundamental change a promise by the incumbent to the citizens.

Unknown to many. This was to be overturned by the regime it's self in trying to pursue its interests. Indeed, the Human rights were observed in the initial administration of NRM government.

No one can easily understand what went wrong with NRM administration but perhaps emphasis can be placed on the increased interests by Museveni and his men to lead the country.

The pivotal role played by the unconditional observance of the rule of law and respect to fundamental human rights and freedoms has been the fulcrum in Uganda. A lot of human rights violations, wanton killings, partisan policing, and freezing of accounts of several NGOs emerged in rule of law initiatives, incommunicado detention of human rights defenders and political opponents, trumped up criminal charges against advocates of rule of law.[874]

Uganda is part of the East African community which means it has an obligation under the Constitution of Uganda and the Treaty establishing the East African Community to adhere to good governance standards, rule of law, human rights to all and democratic governance. These are also under Article 7 of the statute of the International criminal court.

The human rights were a point of observance to the framers in the Constitution and hence put under chapter 4. This was to check on the violation of human rights by the regime following recommendations made by the Commission of inquiry in human rights violation.

But despite their provision in the supreme law, the violation of these human rights has been on increase in Uganda. The freedoms of speech, assembly, movement and economic rights all have undermined by the military regime.

In 2019, the government undermined the freedom of expression by imposing new regulations on bloggers and websites by introducing new regulations requiring online operators to apply for authorization to host blogs and websites or risk being shut down. The government continued to censure media outlets and detained outspoken critics of the president.

On top of that, the government continued through UCC to direct 13 radio and television stations to suspend their staff accusing them of airing programs that were unbalanced, sensational and often gave undue prominence to specific individuals. Freedom of speech was silenced by government to

[873] The 1995 Constitution , Articles 51-88. See also Uganda Human Rights Commission Act 1997.
[874] Public Statement on the State of The Rule of Law and Human Rights in the Republic of Uganda. Dec 31, 2020

cover the president from all the atrocities committed by his government.[875]

On February 2021, Ugandan military and police officers beat and seriously injured journalists that were covering the delivery of a petition about human rights violation by Musevenis strong opponent Robert Kyagulanyi alias Bobi Wine. This saw over 20 journalists hurt in the attack with at least four sustaining deep cuts on the head that bled profusely. [876]Ideally no one can clearly tell when the human rights violation shall end.

Recently, during the trial of the Peoples Redemption Army suspects in 2005 in the High Court, a group of men dressed in black T shirts known as the Black Mambas attacked the court in Kampala. This was a total failure of the court system and a violation of the right to fair hearing. The principle judge described it as an undespicable act and rape of the High Court and compared it to Amins rule.[877]

Arrest and torture of citizens has also been on a spot light in this regime. Yasin Kawoya was brutarilly tortured by gun wielded men and butted. He was then taken to unknown destination. Although the police denied connection to these men, many people including the human rights lawyer Nicholas Opiyo point to the security forces to be behind all such atrocities. But important to note is that though the human rights violation has always been blamed on the security forces, its roots are fixed in the highest echelons of government.

WHAT WENT WRONG IN THE FORCES

The insecurity that commenced in few years can be greatly attributed to politicization of the security forces and the increased appointment of soldiers in the police force. Important to note is that this insecurity was internal.

ARMY APPOINTMENTS IN POLICE.

This can as well be attributed to appointment of soldiers in the police force following the many soldiers that don police uniforms. This has rised concern among many people but no answers are given. It saw the civil society, the Uganda Law Society and opposition figures alleging that such appointments of the army officers to positions in the police amounts to militarization of the police force.

Mr. Musevenis sentiments against the police became more pronounced in 2001, after he performed poorly in that years hotly contested election at most polling stations in police barracks. The

[875] Report from the Human Rights Watch in 2019.
[876] Elias Biryabarema. Uganda Security personnel beat journalists covering petition on rights abuses. Retrieved 16th, Jun 2021.
[877] Strike Halts Ugandan High Court. BBC NEWS. 28TH Nov 2005.

president complained that he would lose if he stood against a cow at a police barracks. This was followed by his appointment of Maj Gen Katumba Wamala as the Inspector General of Police. Katumba was replaced later by Gen Kale Kayihura in 2015.[878] Others like Maj Sabiti Muzeeyi and Paul Lockech a veteran of Somalia were to be deployed in the police force.

Uganda was to reap the fruits of such a mistake in form of murders of women in Kampala, Nansana and Entebbe. The ruthless groups of boda boda 2010, the gross violation of human rights by security, assassinations by gun wielded men, kidnaps and others as shall be analysed later.

BODA BODA 2010 (ABDULLAH KITATTA-POLICE AND NRM)

The vigilant-cum-militia outfit commissioned by the Inspector General of Police in 2010 became to be known as the Boda Boda 2010 under the leadership of NRM chairperson for Lubaga Abdullah Kitatta.

THE BIRTH OF BODA BODA 2020

The alleged persecution, crime and intolerance in the motorcycle transport business is believed to have provided the environment for Boda boda 2010 to emerge. This group was to emerge for barely 7 years. It all started from May 2006, when the commissioner of Police Community Affairs, Mr. Assan Kasingye commissioned hundreds of traffic wardens under the Kampala Union Boda Boda Cyclists Association (Kuboca) led by Mr. Abdu Masokoyi. These were tasked to fight crime and also regulate traffic among boda boda cyclists.[879]

Long after its institution, the Kuboca wardens who were not earning a salary turned to soliciting bribes and making illegal arrests to earn a living which mad it unpopular among riders. This left many of them disgruntled and unsatisfied with the groups conduct.

The harassment of these Kuboca wardens, forced the late Tom Julungu (a former Forum for Democratic Change supporter who was shot dead by the police on June 6th, 2009) with his colleagues to block President Musevenis Convoy asking him to intervene and halt the work of Kuboca due to harassment. They accused the Kuboca of connivance with police and the KCC (Kampala City Council) to collect illegal fines that the officers of the two institutions would alternatively share.

In his move to inquire about this, the president immediately summoned Kale Kayihura who eventually denied the allegations of harassment of cyclists in the bid to obtain funds. As usual the

[878] Jonathan Kamoga. More military men don police uniforms as Uganda polls loom. The East African. July 14th 2019
[879] Daily Monitor. How Boda 2010 emerged. January 21st , 2018.

Inspector General denied the allegations and this marked the end of the Kuboca warden's operations.

In March 7th, 2010, the Inspector General of Police called for a meeting with the cyclists basically to discuss boda boda management in Kampala and the surrounding areas. It seems this was hidden in the move to obtain NRM support in Kampala. It's really challenging how NRM wanted to use police to suppress opposition in Kampala.

After the meeting, the then Town Clerk for Kampala City Council Ms. Ruth Kijjambu announced the election of new leaders for cyclists in Kampala. These were to be conducted on 28th May 2010. But important to note is that all former leaders of boda boda groups were arrested by police on that day.

Mr. Kitatta was elected as the patron and Mr. Antansi Kafeero the chairperson of Kampala central. This marked the beginning and emergency of Boda Boda 2010 that paid allegiance to police and NRM.

THE COMMENCEMENT OF ATROCITIES

The patron of the group Abdullah Kitatta became untouchable. He began to venture into crime while being protected by the authorities because they openly subscribed to the ruling NRM party. They mainly ventured in opposition rallies, hound and beat up opposition supporters to create breathing space for the ruling party. The group acquired guns from the police force to enforce his actions. These guns were used by them to enrich themselves despite the continued allegations nothing was done.

In its activities, while being backed up by the ruling party, the group banned cyclists from showing support to opposition leaders lest they lose their slots at the stages. That's how the atrocities of the group commenced in Kampala und eth direction of police and the ruling party. Many questioned about this group that was threatening civilians in Kampala and where it derived its mandate.

On one fateful day, the group under the ruling party chairperson for Rubaga, Abdullah Kitatta, attacked the bus belonging to Winter land primary School, Kyebando beat up 27 pupils, two teachers and ten security guards including plain clothes police personnel accompanying them.

The children dressed in red, black and yellow national colours were ironically going to perform at celebrations marking the annual police week held at Nkumba University. The bus was stopped and the pupils asked to change from red to any other colour so that they are not mistaken for opposition politicians who have adopted the colour red as a symbol of their fight against lifting a presidential age limit. This happened after the group had vowed to fight whoever challenged the lifting of the

presidential age limit.[880]

Ideally, no one could understand the legality of the group working for police and NRM. "This is why Kayihura didn't want them registered under KCCA to know their designated areas. He deploys them to do political work which is too dangerous. So, instead of police fighting these criminals, they fear them, and they continue torturing people which increases crime."[881]

On September 3rd, 2017, Byamukama Desderio a boda boda rider lost his arm in an incident where he was nearly killed by element of the rogue group. He was attacked by 3 members of Boda Boda 2010 who stopped him, sought information about his work station and later attempted to kill him. "I was stopped by 3 people who asked for my card. While I was still on my motorcycle, one of them hit me with a machete on the head. On second attempt, I instead raised my arm which was cut off and then I fell down as though I was dead and the gang took off with my motorcycle.""[882]

Surprisingly, those that reported to police could not obtain justice simply because Kitatta had connections with the senior police officers and at most times files could go missing. "Kitatta intimidates our police officers that are why our files have been disappearing. Sometimes, they would tell us that a certain file had been picked at the police by Kitatta himself and we wonder who Kitatta is." [883] That is how Ugandans were suffering at the hands of reckless people with the support of the police.

Many of the youth lost their lives to the group and others lost their motorcycles which perhaps served as their source of income and these were left helpless. The group was masterminding murders, espionage, robberies and women murders in Wakiso and Entebbe. The group was behind the murder of Case Hospital accountant, Francis Ekalungar.

Francis Ekalungar was reported missing and his body was later discovered burnt beyond recognition and dumped in Kajjansi. It's not clear up to now why Kitatta and his men decided to murder Ekalungar. Kitatta was picked up and arrested by operatives of the chieftaincy of military intelligence from Wakaliga where he was hiding in a lodge for the gruesome murder of Ekalungar Francis.

Surprisingly, after being arrested and sentenced to ten years, the court martial chaired by Turyamubona reduced Kitatta and Ngobis punishment to three years and later were released without spending 2 years in prison despite the many atrocities they committed.[884] Many people were left pondering of how such a group could be formed and operate in the heart of Kampala without reasonable steps being taken especially that up to date no clear information and report is out about this group.

[880] The Observer. Police disown Boda 2010 gang. 6th Oct, 2017
[881] Muwanga Kivumbi shadow Minister for Internal Affairs at Parliament during a press interview. Oct 2017.
[882] Byamukama Desderio during an interview with the Uganda Human Rights Commission.
[883] Siraje a former boda cyclist while talking to Uganda Human Rights Commission and the press.
[884] The Observer. Boda 2010s Kitatta, body guard released from prison Aug 8th, 2020

CHAPTER TEN

PROPER PRESIDENTIAL MANDATE DOS AND DONTS

This chapter involves a requirement for the president to keep balance of his mandate, in other words, to refrain from arbitrariness and excessive in line with the powers of the presidential office. It can also be interpreted as a president exercising his mandate in accordance with the principles of rule of law. In the first instance, respect Article 1 and 2 of the 1995 constitution. That the power and authority belonging to the people. The instances of strangling the democratic principle of independence of the electoral commission must be foregone for proper exercise of proper presidential mandate.

Secondly, the principle of separation of powers, the tendencies of infringing on the independence of the judiciary as has been the unfathomable norm should be constitutionally tightened to secure the integrity of the different arms of government. When there are no loose ends in regards to all branches exercising uninterrupted functions except for the entrance of checks and balances, that then is proper practice of presidential mandate.

Presidents most especially, through annexation of the law tend to misuse it against the citizens under a concept of the *"rule by law*" the Ugandan president has been commonly marked by this tendency most especially when there is presumed threat on his presidency, the opposition force. It should also be accepted that suffocation of the opposition faction is a dated tactic of ancient regimes, and to rather adopt political intellectualism as a modern tool of proper governance. Which also serves to halt repression against forces of change in a country.

Under Article 99(2)[885] the president is required by law to maintain the constitution and all laws made under. To be the head of state and fountain of honor as stipulated in Article 98 (1)[886] of the Constitution. In line with his mandate to appoint, the president mode of appointment shouldn't be one motivated by personal dealings and partisan politics. The president shouldn't also appoint and dismiss at will as the case of Opolot v attorney General[887]. Since except for parliament, the president's powers of appointment are to be found in all administrative and judicial positions (113, 119 and 119A, 122,142, 146), stretching to government agencies, corporations, and institutions.

Even though the president has appointing powers in the electoral commission of Uganda (60), it is

[885] Constitution of the Republic of Uganda, 1995 (As amended)
[886] Ibid
[887] [1969]1 EA 631

unconstitutional for him to puppet the commission because art, 62 like Article 128 of the constitution promote the independence of the commission. The reality of this notion however has been a subject of debate since the creation of Uganda.

The contentions powers of the presidency in times of war and state of emergency (art 110, 1) are the most misused since state of emergency literally denotes the suspension of law and rights and the acquisition of special powers. In this corona era, leaders around the world have passed decrees and legislation expanding their reach during the pandemic. For Uganda's case, the pandemic was untimely in a sense that it struck at the time when general elections where ripe. There has been intrusive surveillance of citizens, encroachment on fundamental human rights and the president declaring it a heavy offence of murder if one is found holding a gathering. Restrictions on movement were also severe and unreasonable because there could be alternative measures for regulated movements. In Hungary the prime minister ruled by decree, in Britain powers of detention were over served, the prime minister of Israel shut down courts and in Chile military rule lingers while Bolivia postponed its election.[888] Therefore under these circumstances the president should refrain from over reaches in the exercise of presidential mandate. Or possible still, parliament should provide a degree for which the emergency powers maybe used. Hence the most important concept in the exercise of presidential powers should be respectful consideration of the rule of law and democracy.

INTERNATIONAL PERSPECTIVE

The fact that most African leaders usurp powers of other organs of the government, such as judiciary and legislature has made it difficult for such leaders even when they commit crimes to be prosecuted before the local courts. But since most of the countries subscribe to international treaties, laws have been put in place to check on their conduct during the tenure of office. These laws are directed to put them on pressure so as to perform and conduct proper while still in office.

Generally, international customary law accords serving presidents absolute immunity from any civil or criminal liability for public or private acts done while they are in office.[889] Where a president has committed an international crime like crime against humanity or war crimes, they may be tried in an international tribunal if the treaty establishing this tribunal so pronounces or may be tried in a foreign domestic court if it has quasi universal jurisdiction over such international crimes making it unlikely that claim to absolute immunity will surface. Examples of these statutes include the Rome Statute that created the International Criminal Court in 2002. This statute does

[888] (NYT,march 30, 2020 selamgebrekidan)

[889] Democratic Republic of Congo V Belgium (February, 15, 2002)4ILM 536 (2002).

not recognize presidential immunity. Article 27(1) provides that this statute shall apply to all persons without any distinction based on official capacity in particular, official capacity as a Head of State or Government, a member of Government official shall in no case exempt a person from criminal responsibility under this statute nor shall it in and of itself, constitute a ground for reduction of sentence.

Article 27 (2) of the Rome Statute provides that immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not bar the court from exercising its jurisdiction over such a person. This is enough to prove that the immunities of African leaders shall not accord them defense before the international criminal court once crimes of international nature are brought against them.

The major obstacle to this court is that it does not have independent powers to arrest and therefore. It generally relies to sister or member states to have this affected. ICC issued an arrest warrant of the president of Sudan. It only had to await the affection of this by designed to supplement domestic prosecution and in that sense it will not take jurisdiction where a given country is willing to do the prosecution. In Africa, this has been natured by the misunderstandings between the African union and the international criminal court. In 2011, upon launching of an arrest warrant for Omar Al Bashir, the African union encouraged African states to defy and ignore the arrest warrant of Bashir and Gaddaffi.[890] This saw many countries denying the order. Majority of them were referred to the Security Council for ignoring this matter. Countries like Kenya, Chad, Malawi, saw this as a joking matter which still makes the idea of a toothless backing dog.[891]

As others defy it, some countries have complied to it since it is there mandate to protect and promote it and in some countries the constitutional immunity is of no consequence. Countries like Kenya and Uganda have adhered to the Rome Statute by enacting Acts like the International Crimes Court Act 2008 of Kenya under section 27 and section 25 (1) of the Uganda International Criminal Court Act of 2010 which provide that such constitutional immunity of the president shall be of no consequence. The Rome Statute has continued in its move to achieve the purpose to mandate national courts with power to arrest serving leaders who are alleged to have committed international crimes.[892] But even where it has expressly provided for such its implementation is law reason being that majority of the African leaders control every agency and organ of the government.

[890] CC Jalloh Regionalising International Criminal Law? Int. Crim. L. Rev 445 (2009).
[891] International Criminal Court Refers African Countries to UN.
[892] International Criminal Court Act of Uganda SS 17 and 18

GOVERNORS' POWERS AND AUTHORITY

Governors, all of whom are popularly elected, serve as the chief executive officers of the fifty states and five commonwealths and territories. As state managers, governors are responsible for implementing state laws and overseeing the operation of the state executive branch. As state leaders, governors advance and pursue new and revised policies and programs using a variety of tools, among them executive orders, executive budgets, and legislative proposals and vetoes.

Governors carry out their management and leadership responsibilities and objectives with the support and assistance of department and agency heads, many of whom they are empowered to appoint. A majority of governors have the authority to appoint state court judges as well, in most cases from a list of names submitted by a nominations committee.

Although governors have many roles and responsibilities in common, the scope of gubernatorial power varies from state to state in accordance with state constitutions, legislation, and tradition, and governors often are ranked by political historians and other observers of state politics according to the number and extent of their powers.

Ranking factors may include the following.

- Qualifications and tenure
- Legislative-including budget and veto- authority
- Appointment sovereignty

Although not necessarily a ranking factor, the power to issue executive orders and take emergency actions is a significant gubernatorial responsibility that varies from state to state.

AFRICAN UNION PERSPECTIVE

This body was adopted to replace the defunct organization of African unity that was formed in 1963 which body was referred to by many scholars as a toothless backing dog. The body mainly worked towards achieving complete independence of African countries. Its chatter did not provide it with the powers to intervene and have civil wars continued and dictatorial leaders continued violating human rights without intervention. This was to be checked upon by the African Union. Its Constitution Act Article 4h) permits it to intervene in member states in respect of grave circumstances especially defined as amounting to war crimes. Article 4(10) rejects impurity, and paragraph (h) states that it condemns and rejects unconstitutional changes of governments, but because the African Union as a body is subscribed to by African countries, the African presidents have always weakened its activities making it hard to achieve its objectives and so the leaders continue with their nasty administration.

PRESIDENTIAL POWERS OF APPOINTMENT

Most of the African countries subscribe to democracy but although it is physically manifested; it is being insidely infected by the desires of most of the African leaders to stay in power. This is backed up by the appointment powers and select their relations, friends, and mostly tribesmate who can fulfill their interests. It is not indispute that indeed, these appointments are the foundations for mal administration in countries. Indeed, it's a trick for all leaders that wish to prolong their administration. In Uganda Gen. Idi Amin appointed his fellow Kakwa tribemates in the army policies and other important offices, assassinated Langi Military officials suspecting them of being Staunch Obote supporters.[893] In Democratic Republic of Congo, history has it that Mobuko Seseko had filled his government with mostly the relatives, friends and tribemates. Generally, this had become a trend in and around Africa.

In order to remedy this, most of the African countries have adopted appointment provisions in their constitutions but it is worth nothing that the powers of appointments vary from country to country and their purpose is achieved basing on their nature and scope.

NATURE AND SCOPE OF PRESIDENTIAL POWERS OF APPOINTMENT

The nature and scope of presidential appointment powers as already noted varies from country to country. Presidents are accorded with powers to appoint and disappoint so long as their actions are justified by the law.[894] The powers of appointment are normally expressly provided for in the constitution and the national for this is to enable the president realize people that shall enable him or her to fulfill his agenda. Basically it is the biggest way the president influences the departments and agencies of the executives.

In South Africa, Article 84 (2) (e) of the Constitution provides that it includes the powers to make any appointments that the constitution or legislature requires the president to make other than as head of the national executive.[895] Just like other countries once the president has conducted the appointment, he cannot remove any person from office except where their conduct falls short of Article 194 which is to the effect that a member of a commission may be removed on any ground of misconduct, incapacity or incompetence finding to that effect by a committee of National Assembly and the adoption by the Assembly of a resolution calling for that person's removal from office. In Zanzibar, the situation is almost the same. Section 110 (2) d of their Constitution empowers the president to make appointments which the constitution or legislature requires the

[893] Henry Kyemba. A State of Blood
[894] Shaban Opolot V Attorney General (1969) E.A 631
[895] President of the Republic of South Africa V South African Rugby Football Union [1999]2 ACC 11.

president to make. But this being the case, removal from office of members of the independent commissions is dealt with under section 237 which applies to the removal of judges in office.[896] Once the president has affected an appointment he can only discuss the person in situations where they fell short of certain provisions of the constitution that provide for ceasing of office.

But this is not the situation in other countries. In Namibia, the president has mandate to remove the person he has appointed. This is justified under Article 32(1) and (4) which provides that the president has power to appoint specified persons including other persons or person who are required by other provisions of the constitution or any other law to be appointed by the president. Further Article 32 (6) also supplements on this and provides that subject to the provisions of this constitution or any other law, any person appointed by the President pursuant to the powers vested in him or her by this constitution or any other law may be removed by the president by the same process through which such person was appointed. This stands to be the same situation in Kenya where the president has mandate to appoint and dismiss. Article 132 (2) (f) provides that the president shall nominate and appoint and may dismiss any other state or public officer whom the constitution requires or empowers the president to appoint or dismiss.

In countries like Ghana, this power is so broad. The constitution sets out the list of office leaders who are to be appointed by the president. Article 297 adopts a very broad definition of powers to appoint. It provides that the power to appoint a person to hold or to act in office in the public office in the public services includes the power to confirm appointments to exercise disciplinary control over persons holding or acting in any such office and to remove the person from office.

In the United States of America, the power is not absolute as the president's powers of appointment are confirmed by the senate and these are filled through civil service processes not appointments.[897] The power to appoint is conferred to the president under Article 11 (2) which provides that the president shall nominate and by and with the advice and consent of the United States senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court and all others of the United States, whose appointments are note here in otherwise provided for and which shall be established by law. But the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law or in the Heads of Departments. The President nominates and the senate advises.[898]

In Uganda, just like in other countries, the power of appointment is vested in the present. He dispenses this duty basing on the advice of various commissions like the public service

[896] Section 187 of the Constitution of State of Zanzibar as amended.
[897] United States Senate must confirm appointments.
[898] Mc Ginnis, John O. Essays on Article 11: Appointment clauses Heritage Guide to the Constitution. The heritage foundation retrieved Feb, 10, 2018

commission. The judicial service commission advises him on the appointment of judicial offers but their approval is done by parliament. Article 142 (1) provides that the Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court shall be appointed by the president acting on the advice of the judicial service commission and with the approval of parliament.[899]

The appointment powers of president in Africa are subject to limitations. This is aimed at reducing excessive use of power and avoiding the usurpation of powers of other organs. As already noted majority of the presidents tend to use this constitutional right to lob for themselves persons that can aid them to fulfill their personal interests. It is this rationale that derives the desire of masses in various jurisdictions to have the appointment powers of incumbents limited as a possible way of achieving a national goal and objective.

LIMITATIONS ON THE POWERS OF PRESIDENTIAL APPOINTMENT

Although the president is mandated to make appointment, there powers are limited and this perhaps is necessary to check on the exercise and misuse of these powers. These powers vary basing on the jurisdiction and the aspirations of the people expressed in the preamble of the constitution. The art of these limitations is in the various forms through which they exist such as requirements for parliamentary approval, membership requirements and limitations on the term of appointment.[900]

CONSULTATION REQUIREMENTS

In some jurisdictions basing in Africa, the president is required by the constitution to consult before appointments are made. In Ghana, Article 70 of the Constitution provides that the president shall in consultation with the Council of State, appoint certain specified persons. Further Article 91 mandates the Council of State to advice the president where appointment is needed. It is worth nothing that even these members of the council are appointed by the president on consultation of Parliament.

MEMBERSHIP REQUIREMENTS

Almost in all jurisdictions around the world, constitutions do express requirements for one to be appointed by the president if they are to assume a particular office. Still the Constitution of Ghana is laud on this under Article 44 (1) that the person cannot be qualified to be appointed as a member of the Electoral Commission unless he qualifies to be a Member of Parliament. In South Africa, the

[899] The 1995 Constitution of Republic of Uganda as amended.

[900] Report of the Sierra Leone Constitution Review Committee concerning Executive appointments and Commissions, September, 2014 University of Oxford, Oxford Pro Bruno Publico.

situation is the same. Section 193 of South African Constitution provides that members of any commission of South African must be men and women who are citizens of South Africa. A non citizen cannot be appointed to take up the above mentioned office in East Africa, Article 250 (3) of Kenya's Constitution applies to all the independent commissions established under chapter 15 which requires that to be appointed, a person shall have the specific qualifications required by this constitution or national legislation. On further clarity, Article 250 (1) provides that each commission shall consist of at least three but not more than nine members. Namibia holds the same position. Article 112, which public service commission provides that the commission shall consist of a chairperson and no fewer than 3 and not more than six persons.[901]

LIMITATIONS ON THE TERM OF APPOINTMENT

It is not in dispute that all constitutions provide for a limit on the term for which appointment may be effected. Uganda's constitution requires under Article 144 that a judicial officer may retire at any time after attaining the age of sixty years and shall vacate his or her office (a) in the case of Chief Justice, the Deputy Chief Justice, a Justice of the Supreme Court and Justice of Appeal, an attaining the age of seventy years.[902]

Further Article 250 (6) of Kenya provides that a member of a commission or holder of an independent office shall be appointed for a single term of six years and shall not be eligible for the reappointment. But this has a limitation under Article 171 (4) it provides that members of the Judicial Service Commission apart from the Chief Justice and Attorney General provided they remain qualified, hold office for a term of 5 years and are eligible to be nominated for one further term of five years.

REQUIREMENTS FOR PARLIAMENTARY APPROVAL

This is a general provision in almost all constitutions in Africa. In Uganda, parliamentary approval is a must requirement where the president has appointed a person. Parliament has discretionary powers to approve the appointment on to disapprove. The approval must be done by two thirds of members of parliament. In South Africa, the situation is the same the president is given mandate to appoint members of the South African Human Rights Commission for Gender Equality and the electoral Commission on the recommendations of the National Assembly.[903] Generally Parliamentary approval is a requirement that is guided jealously for its affords checks and balances

[901] No appointments can be made without compliance to the constitutional requirements and in failure to comply, the appointments can be challenged in a court of law or may not be approved by Parliament.
[902] The 1995 Constitution of the Republic of Uganda.
[903] Section 193 (4) of the Constitution of the Republic of South Africa; 1996

to the exercise of powers vested in the president as the head of the executive arm.

PRESIDENTIAL CORRECTION

A president like any other public servant is entitled to the same rights as do other citizens, may resign from office. Through the principle of checks and balances, the president's powers of hiring and firing plus appointments of public officers are restricted at least, with the approval of Parliament or any commission the president appoints public officials like the justices of c court, civil servants et all. Although the hiring and firing laws were perhaps uncertain among the previous regime as evidently discussed in the 1969 case of Opolot v Attorney General. The court upheld the dismissal of the applicant as commander in the army on grounds that the president enjoyed the prerogative powers of the dismissal of civil servants and public officers without cause.in the proceeding arguments, prior to independence the British crown had the power to dismiss at will for civil and military officers in its service.

Section 44 of the constitution of Uganda (first amendment) act 1963 the prerogative powers of the crown passed to the president and by October 1966, the prerogative powers were, by section 131of the 1966 constitution vested in the president of Uganda on that date. Therefore, the president (Milton Obote) had the right to dismiss at will.

The Opolot ghost seem to be institutionalized in Article 108A (4)(a), but that is corrected by Article 28 and 44 of the constitution. On this case, justice Kanyeihamba through the case of Attorney general v Major General Tinyefuza echoed, that in this age of modernity, democracy and entitlement to human rights and freedoms, Opolot's case can no-longer be treated as good law. Article 132 (4) clearly and emphatically provides for the removal from office of public servants.

PRESIDENTIAL IMPEACHMENT

With great power, comes great responsibility ~ Peter Parker; Spider-man.

Ordinarily, anything done by the president out of the confines of the Constitution and the laws subordinate is tantamount to abuse of the presidential powers. The constitution also envisages this likelihood and provides for ways through which this abuse can be rectified. Article 107 of the Constitution provides thus;

1. The President may be removed from office in accordance with this Article on any of the following grounds

a. abuse of office or willful violation of the oath of allegiance and the presidential oath or any provision of this Constitution;
b. misconduct or misbehaviour-

i. that he or she has conducted himself or herself in a manner which brings or is likely to bring the office of President into hatred, ridicule, contempt or disrepute; or
ii. that he or she has dishonestly done any act or omission which is prejudicial or inimical to the economy or security of Uganda; or

c. physical or mental incapacity, namely that he or she is incapable of performing the functions of his or her office by reason of physical or mental incapacity.

The provision provides for situations when the president can be removed and further provisions on the procedure to be followed. However, never in the history of the Constitution has this provision ever been invoked and yet it can never be said that the president has never abused the power granted by the Constitution. Therefore, it begs the question of which abuses have been made that warrant invoking this provision and why have they gone unpunished?

Impeachment concerns the process by which a legislature or any other legally constituted tribunal initiates charges against a public official for misconduct.[904] Since a president has immunity (As discussed in Chapter 5) against any civil and criminal proceedings while still in office due to the sole executive powers vested in him backed up by other reasons as already explained, the president can be removed from office while still serving through invoking the impeachment provisions of a given jurisdiction. The grounds for institution of these impeachment changes perhaps vary from country to country but the affection of such provisions has been rare despite the increasing breach of such provisions by incumbents especially in Africa.

In Africa, though the conduct of most African leader is nasty and negative, impeachment is and has remained rare. This is due to the fact that most of them rule by or lead by the force of military and therefore they tend to frustrate such motives. Indeed, the impeachment proceedings are a variety in the African context but as noted above it is not surprising given the history of dictatorial regimes, one powerful party system and subservient media. I dearly in Uganda, impeachment has not been witnessed yet and even where Members of Parliament have tried to take such moves, many of their plans have always been ending up on ground crash. Impeachment of a president from office is on grounds of abuse of office or willful violation of the oath of allegiance and the presidential oath. Misconduct or misbehavior that he or she has conducted himself or herself in a manner which brings or is likely to bring the office of president into hatred, ridicule, contempt or disrepute or that he or she has dishonestly done any act or omission which is prejudicial or initial to the economy or security of the country.

[904] Landau, Sidney. Funk and Wagnalls (1996) edition. Standard Desk Dictionary, United States Harper and Row Publishers.

Secondly, due to physical or mental incapacity, [905]Just like in Uganda, even other jurisdictions do adopt impeachment provisions in their constitutions and these are basically done by the Legislative body or organ of government. In Nigeria, impeachment as a form of accountability was first tried by the Legislature in 1985 against Nwabweze Awotokun in 1998 and later Idang in 2002.[906] The impeachment in South Africa is provided for under section 89 of the Constitution and it lays down the procedure for impeachment. The impeachment provisions are able to achieve the purpose basing on their nature and scope.

DEFINITION OF IMPEACHEMENT

The word impeachment is an equivalent of indictment in criminal law. The word impeach is derived from the Middle English "empechen" meaning to impede or accuse, and the Latin impedicare" which means to entangle or put in fetters.[907]

Many scholars have tried to enrich the world with definitions and explanations about impeachment in the basic simplest understanding. Thomas Jefferson explains impeachment to mean a scarecrow of the Constitution.[908] In his broad understanding, Alan Hirsch defines it as the process by which charges are brought against a government official which can result in his removal from office.[909] It can as well be explained to mean a constitutional remedy addressed to serious offences against the system of government. It is the first step in a remedial process of removal from public office and possible disqualification from holding further executive offices.

Therefore, in its broad sense, impeachment is designed as a mechanism for punishing abuse of office under the various Constitutions around the world. It is a form of accountability for crimes committed in office by presidents and other leaders in public offices. It is both constitutional and political arrangements to remove erring public officers from office for gross misconduct or grave violations of the Constitution.

In that sense, an executive officer leaves office not only at the end of his tenure in office or his death or incapacitation as it is the ideal but also upon impeachment. The purpose of impeachment is not personal punishment rather its function is primarily to maintain constitutional governance.[910] In other words, impeachment is not such to punish as to secure the state against its officials misdemeanor.

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[905] Article 107, Clause 1 of the 1995 Constitution of Republic of Uganda as amended.
[906] Charles Manga and Enyinna. Nwauche. African Journal of Legal Studies 5 (2012) 91-118 on Africa's Imperial Presidents. Immunity; impurity and Accountability. Martinus NIJHOFF Publishers.
[907]JideOgunsakin: Evaluation of impeachment Proceedings under the Constitution of Federal Republic of Nigeria 1999. Journal of Law, Policy and Globalisation [2015] (34) p.132.
[908] Jefferson. T. Political and Government in the United States 2nd Edtn. (Brace and world Inc.1968. p.36.
[909] Alan Hirsch: A Citezens Guide to Impeachment. https://essential-book.org/books/impeach/>accessed 25th June 2021.
[910] See Descher. Ch 14 App.pp 726-728.

THE HISTORY OF IMPEACHMENT

In the old history of man, there were rulers of mankind known as kings during the strong ages. These kings could access power as at birth. These had excess powers and always did as pleased in their eyes. They always had little or no concern of how their governance affected the populace that was governed. As society evolved, there was advancement in man's conscious and raised need to depose those authorities of their untouchable powers which saw the devolution of powers from these strong monarchs to the people.

The needs to check on the authority of the leaders put in places of authority led to the evolution of checks and balances where in arms of government were employed to check on their authority. When checks and balances were observed to be ineffective, there was need for a weapon to check the ultimate decision maker whenever he begins to error and thus impeachment was developed in many democratic societies of the world.[911]

The impeachment process practice dates as far as the 14th Century in the British Parliament. In 1376 Lord Latimer was impeached by the British Parliament; **"The Good Parliament."**[912]Mitong notes that impeachment developed because certain officers of government were for various reasons placed beyond the reach or ordinary courts. High judicial and Executive officers were not subject to complaints of private individuals in the ordinary courts.[913]

He further remarks that private persons aggrieved by the actions of such officers, turned to Parliament for redress. The House of Commons became the accuser and the House of Lords the body that tried cases of impeachment.

From the year of 1376 when impeachment was first tested in Britain, the practice developed and was adopted gradually in various democracies across the world.

ORIGIN OF IMPEACHMENT

The impeachment ideology was adopted from Britain by the framers of the 1776 American Constitution. They went ahead to make a proper employment of the principle of separation of powers that is through creating a legislative, executive and judiciary.[914] Their history is characterized by only three successful presidential impeachments but no sitting president, however has ever been removed from office.

President Andrew Johnson was the first successfully impeached president of the USA. He came to

[911]MitongDapal. The Concept and Procedures of impeachment.A comparison between Nigeria and the United States of America. Munich, GRIN Verlag. https://www.grin.com/document/512624
[912]Peter Woll, America Government Readings and Cases. (5th Edtn, Little, Brown and Company Canada Ltd. P.102-103.
[913] Ibid
[914]Articles; I, II, III of the Constitution of the United States of America.

power in 1865 and in 1867; the Tenure of Office Act, the violation of which was the legal basis for his impeachment was passed by Congress over Johnsons veto. This act was forbidding the president from dismissing any civil officers appointed with the consent of the Senate without the approval of the Senate. President Johnson removed the Secretary of war Edwin Stanton. This led to his impeachment by Congress and acquitted Senate trials.

The other was President Richard Nixon in 1974, President William S.J Clinton and President Donald Trump. President Richard Nixon resigned office before his impeachment inquiry could be completed in 1974 while J. Clinton and Donald Trump were fully impeached by Congress but as well acquitted at Senate trials.[915] President Trump was impeached for abuse of power and obstruction of Congress making him the third president in history to be charged with committing high crimes and misdemeanors and face removal by the Senate.[916]

IMPEACHMENT IN THE UNITED STATES OF AMERICA

Removing a sitting president in the United States through impeachment is described as "the most powerful weapon in the political armory short of a civil war."[917] Indeed, there is a wealth of scholarship on the mechanism of impeachment in the United States Constitution.[918]

Its excellence starts from the framers design and then reasons from that design to present applications. As a result, it explores a relatively narrow area within the space of possible constitutional design. For example, it presents an ambiguous term "high crimes and misdemeanors" to define a threshold for presidential removal but interestingly, it fails to specify a standard of proof either for impeachment or conviction as well as failing to specify clearly whether a sitting president can be indicted prior to the completion of impeachment proceedings.[919]

In the US jurisprudence, impeachment may be brought against the president, vice president and all civil officers of the United States. It is instituted through a written accusation document known as **Articles of Impeachment"** which states the offense charged; in the same way, it serves the same purpose as an indictment in an ordinary criminal proceeding.

This impeachment is expressed by the statement: "the Congress's ultimate weapon against the president is known as impeachment. Most people think this means removal from office but impeachment is only the first step in the process by which Congress can remove a president from

[915] Daniel H. Erskine. The Trial of Queen Caroline and the Impeachment of President Clinton: Law As a weapon for Political Reforms; 7 Wash. U. Global Stud. L. Rev. 1 (2008)
[916]The New York Times. Nicholas Fundos. Dec 18, 2019.
[917]T.F.T.Pluncknett, Presidential Address,3 TRANS, ROYAL.HISTORICAL.145 (1953)
[918]See CASS SUNSTEIN, IMPEACHMENT: A CITIZENS GUIDE (2017).
[919] See U.S Dep't Just: Office of Legal Counsel, A sitting Presidents Amenability to indictment and criminal Prosecution (2000), available at https://www.justice.gov/file/19351/download.

office. Impeachment means the formal bringing of charges against the president. It is the rough equivalent of an indictment in an ordinary criminal case. The Constitution gives the sole mandate of impeachment to the House of Representatives. If the House decides there is sufficient evidence against a president it impeaches, that is, it brings charges against him. The president must then stand trial, with the Senate acting as a judge. If two thirds of the Senate find the president guilty, he is convicted and removed from office." [920]

GROUNDS FOR IMPEACHMENT

The early iterations of the impeachment mechanism considered by 1787 Constitutional Convention limited impeachment only to cases of treason or bribery but George Mason of Virginia opposed this on the basis of insufficiency to remove a president who committed no crime but was inclined towards tyranny.[921] Mason proposed for treason, bribery and mal administration but his mal administration was objected by James Madson. When it was denied attention, Mason put forward treason, bribery or other "high crimes and misdemeanors." It's this that was ultimately adopted in the US Constitution.

From this basis, the grounds for impeachment and conviction were adopted under Article II, section 4 of the US Constitution to include treason, bribery or other high crimes and misdemeanors. Another provision of the Constitution that has been construed is one that provides that judges of the Supreme Court and other inferior courts shall hold their offices during good behavior.

Presidents could only be impeached when the opposition controlled the congress and then only for committing indictable crimes or at least significant violations of the law. However, the debates on impeachment of Clinton and Trump have changed and deepened this conflation between serious crimes and impeachment. These modern impeachments appear to be tied to identification of bad actors.

Importantly to note is that for a president to be impeached and removed from office, their law is designed in a format that two processes are supposed to be complied with. The first concerns impeachment by the House of Representatives and second is the trial by the Senate which is presided over by the Chief Justice of the United States of America.

When the House determines that the grounds for impeachment exist and they are adopted, these are presented to the Senate in Articles of Impeachment for trial which may decide either to acquit or convict them by a two third majority of the members.[922]

[920] Krasner, M.A.Et al; American Government Structure and Process (Macmillan Publishing Co.Inc. New York 1977. P.57-58.
[921] JOHN. R. LABOVITZ; PRESIDENTIAL IMPEACHMENT 2 (1978)
[922]Jeffersons Manual states that: By the usage of Parliament, in impeachment for writing or speaking, the particular

Therefore, impeachment is not removal of any misconducting public officer from office but rather is only a first step in the process by which the Congress removes a president from office; which forms part of the crucial process of removing the president from office before his tenure.

IMPEACHMENT IN AFRICA

In Africa, impeachment proceedings largely depend on the Constitutional design and the nature and scope of crimes covered and the manner in which the proceedings are conducted. Unlike the US where impeachment takes an ambiguous and narrow format, Most African impeachment provisions are more elaborate.

Under most Francophone African Constitutions, the only ground for impeaching the president is treason.[923] Others are more elaborate for example Article 138 of the Constitution of Burkina Faso includes any violation of the Constitution and misappropriation whilst Article 173 of the Chadian Constitution includes threats, grave and systematic violation of human rights, misappropriation of public funds, corruption, drug trafficking, introduction of toxic waste and disposing or storing this on national territory.

The impeachment proceedings are always forwarded conducted and upheld before either a court of impeachment or a High Court of Justice composed of members of Parliament and Judges of the Supreme Court.[924]

In Anglophone Africa, most of the Anglophone Constitutions impeachment provisions are more elaborate and the impeachment crimes include;

a) Crimes of treason and espionage.
b) Willful violation of the Constitution, abuse of office, willful violation of the oath of allegiance.
c) Heinous crimes.
d) Fraudulent conversion of public funds and any other dishonest acts prejudicial or inimical to the economy.
e) Acts that bring or are likely to bring ridicule to the office of president or contempt and disrespect.

In Kenya, Article 1143(1) mandates the impeachment of the president where he has committed crimes under the international law. Further under their jurisprudence, Article 45(A) (2) (a) and (b) remarks that the president can be impeached for violation of laws concerning ethics of public

words need not be specified in the accusation. House Rules and manual (Jeffersons manual s.609 (1973)

[923] Article 53of the Constitution of Cameroon and Article 78 of the Constitution of Gabon.

[924] Charles Manga Fombad. Africas Imperial Presidents, Immunity, Impunity and Accountability.

leaders or contravene the conditions concerning the registration of political parties.[925]

In Tanzania, Article 46(A) (5) of the Constitution requires the president to step aside or vacate his office when allegations are made against him and the impeachment proceedings commence against him. A special committee is instituted by Parliament to investigate the allegations and make recommendations to Parliament. The president is impeached by a majority vote of two thirds. In Uganda, impeachment is under Article 107[926] which provides crimes such as unlawful violation of oath of allegiance, misconduct or misbehavior, physical or mental incapacity of the president.

Surprisingly, nothing has yet been done to the president despite the massive embezzlement, frequent violation of the Constitution including the change of the term limits after bribing members of Parliament in 2005.[927]

In Africa, impeachment incidents remain rare and perhaps nonexistent. The Challenge is that most of the elaborate impeachment provisions have been manipulated by the African leaders making them dead ab initio.

The important factor to consider is that impeachment in Africa is more political than being a legal process. It is dependent on the weight of Parliamentary majorities which is difficult to see how it can effectively operate or pose a veritable threat to the abuse of office by African imperial presidents which is way different from that of the state.

THE NATURE, SCOPE AND EFFECT OF IMPEACHMENT PROVISIONS

Impeachment is one of the most affordable and appropriate way of punishing abuse of office under the comment system of administration throughout the world. This however depends on the nature and scope of crimes covered and the manner in which the proceedings are conducted. It as well the only genuine way of accountability for crimes committed while in office by the presidents it is basically provided in most of the constitutions worldwide. As emphasized its adoption is to restrain leaders from poor conduct that may destroy or tarnish the dignity of the office of the president and the country's image.

In most of the Francophone countries, the only ground for impeachment is treason.[928] But this is way different from Anglophone countries for example Article 138 of Constitution of Burkina Faso provides that it may occur in case of violation of the constitution and misappropriation. This is not different with Chad. In its constitution, Article 173 provides that this may include threats, grave and systematic violations of human rights, misappropriation of public funds, corruption, drug

[925]Supra.
[926]The 1995 Constitution of the Republic of Uganda.
[927] See. " Corruption Endemic in Uganda," https://www.guardian.co.uk/katine/2009/mar/13/corruption.endemic-in-uganda.
[928] Article 53 of the Cameroon Constitution and Article 78 of the Constitution of the Republic of Gabon

trafficking introduction of toxic waste and disposing or storing this on natural territory. But proceedings are also strict and conducted before court of Justice of Members of Parliament and judges of the Supreme Court.

In Anglo phone countries, the provisions of impeachment are so broad that they tend to include crimes of treason and espionage, willful violation of the constitution, heinous crimes any conduct that is likely to bring ridicule of the office. This is the case in Kenya, Article 143 (s) provides for the impeachment of the president where there are serious reasons for believing that he has committed a crime under international law. Further Article 46 (a) and (b) makes it an impeachment crime president to violate any law concerning the ethics of public leaders or contravene the conditions concerning registration of political parties. In Tanzania's constitution, impeachment is as well provided for and this particularly is under Article 46 (A) (5) and Article 175 of the Chadian the president is required to vacate office immediately when allegations are made against him and the impeachment proceedings commence. It is challenging that even when provisions do provide that the president be impeached, nothing is done to affect them reason being they tend to look at the laws to be lower than them. We should actually say that the impeachment provisions have done nothing towards checking on bad governance in Africa.

In the United States of America impeachment is as well recognized by their constitution. It's not way different from that of Africans. The constitution permits Congress to remove presidents before their term is up if enough law makers vote to say that they committed treason, bribery or other high crimes and misdemeanors. In the American history, impeachment has been tested. This has been through the two presidents they were impeached. The first was President Andrew Johnson in 1868 and Bill Clinton in 1988 and both were ultimately acquitted and completed their terms in office. The power of impeachment is given to the House of representations under Article 1 and clause 5, Article 1, 2 classes gives the senate the sole power to try all impeachments. The house of representations shall have the sole power of impeachment and the senate shall house the sole power to try all impeachments but no person shall be convicted without the concurrence of two thirds of the members present[929]. It should be noted that actually all civil officers of the United States are subject to impeachment. This justices Alexander Hamilton's writing that impeachment is a method of national inquest into the conduct of public men accused of violating trust.[930]

Primarily, impeachment's practicability has been justified in developed countries where democracy forms the basis of national governance and its failure in some regions like Africa it has been due to political legal darkness created by the power thirsty men in the region.

[929] Article 11 clause 3 of the American Constitution
[930] The Federalist No. 65

CAN WE SPEAK OF IMPEACHMENT?

Impeachment is the process by which a legislative body or other legally constituted tribunal initiates charges against a public official for misconduct.[931] Impeachment may be understood as a unique process involving both political and legal elements.[932]

In Europe and Latin America impeachment tends to be confined to ministerial officials[933] as the unique nature of their positions may place the minister beyond the reach of the law to prosecute, or their misconduct is not codified into law as an offense except through the unique expectations of their high office. Both "peers and commoners" have been subject to the process however.[934] From 1990 to 2020 there have been at least 272 impeachment charges against 132 different heads of state in 63 countries.[935] Most democracies (with the notable exception of the United States) involve the courts (often a national constitutional court) in some way.[936]

In Latin America, which includes almost 40% of the world's presidential systems, ten presidents from six countries were removed from office by their national legislatures via impeachments or declarations of incapacity between 1978 and 2019.[937]

Even the greatest leaders of the greatest democracies have faced impeachment for being found incompetent or portraying misconduct. The impeachment of Bill Clinton occurred when Bill Clinton, the 42nd president of the United States, was impeached by the United States House of Representatives of the 105th United States Congress on December 19, 1998 for "high crimes and misdemeanours". The House adopted two Articles of impeachment against Clinton, with the specific charges against Clinton were lying under oath and obstruction of justice. Two other Articles had been considered, but rejected by House vote.

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[931]Landau, Sidney; Brantley, Sheila; Davis, Samuel; Koenigsberg, Ruth, eds. (1996). Funk & Wagnall's Standard Desk Dictionary. 1 (1996 ed.). United States: Harper & Row, Publishers, Inc. p. 322. ISBN 978-0-308-10353-5. 1. To charge (a high public official) before a legally constituted tribunal with crime or misdemeanor in office. 2. To bring discredit upon the honesty or validity of.

[932]Michael J. Gerhardt (2019). The Federal Impeachment Process: A Constitutional and Historical Analysis (3d ed.). University of Chicago Press. pp. 106–07. The ratification debates support the conclusion that 'other high Crimes and Misdemeanors' were not limited to indictable offenses but rather included great offenses against the federal government. ... Justices James Wilson and Joseph Story expressed agreement with Hamilton's understanding of impeachment as a political proceeding and impeachable offenses as political crimes.

[933]Davidson, Roger (2005). "Impeachment". World Book Encyclopedia. I 10 (2005 ed.). Chicago. p. 92. ISBN 0-7166-0105-2.

[934]"Impeachment". UK Parliament Glossary. Retrieved 5 February 2021. Impeachment is when a peer or commoner is accused of 'high crimes and misdemeanours, beyond the reach of the law or which no other authority in the state will prosecute.'

[935]Lawler, David. "What impeaching leaders looks like around the world". Axios.

[936]Huq, Aziz; Ginsburg, Tom; Landau, David. "Designing Better Impeachments: How other countries' constitutions protect against political free-for-alls". Boston Review. Retrieved 8 February 2021. Constitutions in 9 democracies give a court—often the country's constitutional court—the power to begin an impeachment; another 61 constitutions place the court at the end of the process.

[937]Ignacio Arana Araya, To Impeach or Not to Impeach: Lessons from Latin America, Georgetown Journal of International Affairs (December 13, 2019).

Clinton's impeachment came after a formal House inquiry, which had been launched on October 8, 1998. The charges for which Clinton was impeached stemmed from a sexual harassment lawsuit filed against Clinton by Paula Jones and from Clinton's testimony denying that he had engaged in a sexual relationship with White House intern Monica Lewinsky. The catalyst for the president's impeachment was the Starr Report, a September 1998 report prepared by Independent Counsel Ken Starr for the House Judiciary Committee.[938]

Clinton was the second American president to be impeached (the first being Andrew Johnson, who was impeached in 1868)

The approved Articles of impeachment would be submitted to the United States Senate on January 7, 1999. A trial in the Senate then began, with Chief Justice William Rehnquist presiding. On February 12, Clinton was acquitted on both counts as neither received the necessary two-thirds majority vote of the senators present for conviction and removal from office—in this instance 67. On Article One, 45 senators voted to convict while 55 voted for acquittal. On Article Two, 50 senators voted to convict while 50 voted for acquittal.[939] Clinton remained in office for the remainder of his second term.[940]

In the same country, much more recently, there has been an attempt to impeach Donald Trump. Twice!

The second impeachment trial of Donald Trump, the 45th president of the United States, began on February 9, 2021, and concluded with his acquittal on February 13. Trump had been impeached for the second time by the House of Representatives on January 13, 2021. The House adopted one Article of impeachment against Trump: incitement of insurrection. He is the only U.S. President and only federal official to be impeached twice.[941] The Article of impeachment addressed Trump's attempts to overturn the 2020 presidential election results (including his false claims of election fraud and his efforts to pressure election officials in Georgia) and stated that Trump incited the storming of the Capitol in Washington, D.C., while Congress was convened to count the electoral votes and certify the victory of Joe Biden and Kamala Harris.[942]

At the beginning of the trial, Senator Rand Paul forced a vote to dismiss the impeachment charge on the basis that it was unconstitutional to try a former president because the sole remedy for impeachment and conviction is removal from office and Trump was no longer holding the office.

[938]Glass, Andrew (October 8, 2017). "House votes to impeach Clinton, Oct. 8, 1998". Politico

[939]Baker, Peter (February 13, 1999). "The Senate Acquits President Clinton". The Washington Post. The Washington Post Co.

[940]Riley, Russell L. "Bill Clinton: Domestic Affairs". millercenter.org. Charlottesville, Virginia: The Miller Center, University of Virginia

[941]Fandos, Nicholas (January 8, 2021). "How to Impeach a President in 12 Days: Here's What It Would Take". New York Times.

[942]Fandos, Nicholas (January 13, 2021). "Trump Impeached for Inciting Insurrection". New York Times.

The motion was defeated in a 55–45 vote, with all Democrats, both independents, and five Republicans (Susan Collins of Maine, Lisa Murkowski of Alaska, Mitt Romney of Utah, Ben Sasse of Nebraska, and Pat Toomey of Pennsylvania) voting against the motion.[943] This was the first time that a former president had been tried. Jamie Raskin was the lead impeachment manager and the primary author; along with Representative David Cicilline and Representative Ted Lieu – of the impeachment Article, which charged Trump with inciting an insurrection by sparking the storming of the Capitol. Joaquin Castro, Eric Swalwell, Madeleine Dean, and Stacey Plaskett also assisted in delivering the oral arguments for conviction.

Trump's defense was led by Michael van der Veen, a personal injury lawyer from Philadelphia, along with David Schoen and Bruce Castor. Van der Veen's style and substance during the trial drew criticism from many, with gasps and laughter in the Senate when he stated that he would seek to depose at least 100 people at his Philadelphia office, including Nancy Pelosi and Vice President Kamala Harris. Trump had originally hired Butch Bowers and Deborah Barbier to represent him, but they quit along with three other lawyers after "the former president wanted the lawyers representing him to focus on his allegations of mass election fraud and that the election was stolen from him."[944]

At the conclusion of the trial, the Senate voted 57–43 to convict Trump of inciting insurrection, falling 10 votes short of the two-thirds majority required by the Constitution, and Trump was therefore acquitted. Seven Republican senators joined all Democratic and independent senators in voting to convict Trump, the largest bipartisan vote for an impeachment conviction of a U.S. president.[945]

Africa has over time proven to have a rather more interesting way of showing their disinterest in the leadership of a president deemed incompetent of misconducting oneself.

The most recent situation was in **Sudan**, 11 April 2019. Omar al-Bashir, who had been in power for 30 years, was ejected by the army and placed in detention — following four months of civil protests. Consequently, a Transitional Military Council was established.[946]

That same month, only a few days earlier, 2 April 2019, Abdelaziz Bouteflika — who was in power for 20 years in **Algeria**, resigned after a month of unprecedented protests against his run for a fifth term. Many Algerians, frustrated with the political system, continued to raise their voices for over a

[943]Hughes, Siobhan; Wise, Lindsay (January 26, 2021). "Most Republican Senators Reject Constitutionality of Trump Impeachment". Wall Street Journal.
[944]O'Connell, Oliver. "Trump impeachment lawyers quit after he 'demanded they repeat election fraud claims'". The Independent
[945]Fandos, Nicholas (February 13, 2021). "Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes 'Guilty'". New York Times.
[946]https://www.africanews.com/2020/08/20/a-brief-look-at-african-leaders-ousted-out-of-power//

year until the arrival of the Covid-19 pandemic halted their activism.

South Africa's first Zulu president, Jacob Zuma who was sworn in May 2009 and made to resign, 14 February 2018 — under the threat of impeachment and pressure from his political party, the African National Congress (ANC). The party was eager to close the chapter on Zuma's corruption scandals. Current president Cyril Ramaphosa succeeded him.

In **Zimbabwe** Robert Mugabe, abandoned by his supporters and the army after 37 years in office resigned 21 November 2017. This was amidst debates at the National Assembly over his dismissal. His former vice-president Emmerson Mnangagwa, who himself had been sacked two weeks earlier, later assumed the position as president.

Blaise Compaoré, in **Burkina Faso** who was in power for 27 years, resigned 31 October 2014, due to public pressure before then eventually going into exile.

In the **Central African Republic**, Michel Djotodia, who proclaimed himself President of the Republic on 24 March 2013 after the then-president, François Bozizé was overthrown by the Seléka rebels and fled the country — only for Djotodia to be ousted himself out of power, 10 January 2014.

In **Egypt**, Mohamed Morsi, the successor to Hosni Mubarak and the first head of state to emerge from a democratic election, was overthrown, 3 July 2013, by General Abdel Fattah al-Sissi. Still in Egypt years before, Hosni Mubarak was ousted after an 18-day revolt and the army took over leadership of the country.

A putsch led by the vice-chief of staff, General Mamadu Ture Kuruma, overthrew interim President Raimundo Pereira and Prime Minister Carlos Gomes Júnior, 12 April 2012, in **Guinea-Bissau** amidst a presidential election dispute.

Libyan head of state, Muammar Gaddafi, was assassinated, 20 October 2011, in Sirte — facing an uprising that turned into armed conflict.

And to bring it all back around, **Mali** has already seen a military coup in March 2012 when soldiers overthrew Amadou Toumani Touré's regime. They cited "incompetence" in the fight against Islamist groups and the Tuareg rebellion in the North as their reasons. The now-removed Ibrahim Boubacar Keïta came into power months later in 2013.

Impeachment has only been used as a threat in Africa to force a resignation. Many other rough and far-reaching measures have been used instead. This is not particularly desirable to the peace and development of these countries because many were still struggling in development.

However, many countries have done this before. Either by invoking their impeachment clause or use other rudimentary methods. Therefore, it can be agreed that should the Ugandans make up their mind, something can be done to check the presidential powers.

I need to stress once again that the whole reason why our fore fathers fought tirelessly to topple the colonial government was so that we could live a life governed with serenity and compassion. This dream was the soil and roof for the different countries that were built. For those who built on a strong dream, they have since realised their fruits. For those who built on feeble dreams, or who did not guard theirs jealously, continue to burn in the fire they started.

A COMPARATIVE ANALYSIS BETWEEN THE UNITED STATES OF AMERICA AND AFRICA.

Many scholars have documented literature concerning impeachment and its law levels of success for removal of presidents and other public officials but none of them has drawn attention or systematically examined the design dimensions of presidential impeachment systems from a comparative perspective or analysis. The design for removal of chief executives is a matter of reflection on the Constitutional design of impeachment provisions which implicates a number of questions that are fundamental to a democracy and yet remain relatively unexplained. [947]

This paper therefore analyses the impeachment of leaders in a comparative analysis or perspective in the United States of America visa-vi African context. It presents a comparative analysis of how the question of impeachment is addressed in USA and how it differs or relates with the African constitutional design in terms of impeachments for executives. It starts by defining impeachment, its purpose, history and proceeds to give a clue as to what legal and political factors matter in practice.

Indeed, impeachment is an important power in every political system to the extent that even traditional monarchies have some procedures for removing such kings who are incapacitated or incompetent.[948] However, my descriptive findings and normative suggestions focus on fixed term executives mainly presidents and parliamentarians which are mainly in an array of political systems and basically presidential and Parliamentary systems.

UNITED STATES CONSTITUTIONAL PROVISIONS OF THE DOCTRINE OF PRESIDENCY

Article two of the United States Constitution establishes the executive branch of the federal government, which carries out and enforces federal laws. Article Two vests the power of the executive branch in the office of the president of the United States, lays out the procedures for

[947]Tom Ginsburg and Alberto Simpsor. Introduction in CONSTITUTION IN AUTHORITARIAN REGIMES 1,6 (Tom Ginsburg and Alberto Simpser, eds, 2013.

[948] Indeed between 1327 and 1485, five English monarchs were deposed following the question of monarchical removal during the middle ages. See William Huse Dunham and Charles T. Wood. The Right to Rule in England: Deposition and the Kingdoms Authority, 1327-1485, 81 AM.HIST.REV,738-9 (1976).

electing and removing the president, and establishes the president's powers and responsibilities.

Section 1 of Article Two establishes the positions of the president and the vice president, and sets the term of both offices at four years. Section 1's Vesting Clause declares that the executive power of the federal government is vested in the president and, along with the Vesting Clauses of Article One and Article Three, establishes the separation of powers among the three branches of government. Section 1 also establishes the Electoral College, the body charged with electing the president and vice president.

Section 1 provides that each state chooses members of the Electoral College in a manner directed by each state's respective legislature, with the states granted electors equal to their combined representation in both houses of congress. Section 1 lays out the procedures of the Electoral College and requires the House of Representatives to hold a contingent election to select the president if no individual wins a majority of the electoral vote. Section 1 also sets forth the eligibility requirements for the office of the president, provides procedures in case of a presidential vacancy, and requires the president to take an oath of office.

Section 2 of Article Two lays out the powers of the presidency, establishing that the president serves as the commander-in-chief of the military, among many other roles. This section gives the president the power to grant pardons.

Section 2 also requires the "principal officer" of any executive department to tender advice.

Though not required by Article Two, President George Washington organized the principal officers of the executive departments into the cabinet, a practice that subsequent presidents have followed. The treaty clause grants the president the power to enter into treaties with the approval of two-thirds of the senate. The Appointments Clause grants the president the power to appoint judges and public officials subject to the advice and consent of the senate, which in practice has meant that presidential appointees must be confirmed by a majority vote in the senate. The Appointments Clause also establishes that congress can, by law, allow the president, the courts, or the heads of departments to appoint "inferior officers" without requiring the advice and consent of the senate. The final clause of section 2 grants the president the power to make recess appointments to fill vacancies that occur when the senate is in recess.

Section 3 of Article Two lays out responsibilities of the president, granting the president the power to convene both houses of congress, receive foreign representatives, and commission all federal officers. Section 3 requires the president to inform congress of the "state of union"; since 1913 this has taken the form of a speech referred to as the state of the union. The recommendation clause requires the president to recommend measures s/he deems "necessary and expedient" the Take Care Clause requires the president to obey and enforce all laws, though the president retains some

discretion in interpreting the laws and determining how to enforce them.

Section 4 of Article two establishes that the president and other officers can be removed from office through the impeachment process, which is further described in Article one;

Section 1: President and vice president

The executive power shall be vested in a president of the United States of America. He shall hold his office during the Term of four years, and, together with the vice president, chosen for the same Term, be elected, as follows:

Section one begins with a vesting clause that confers federal executive power upon the president. Similar clauses are found in Article I and Article III; the former bestows federal legislative power exclusively to congress, and the latter grants judicial power solely to the Supreme Court, and other federal courts established by law. These three Articles together secure a separation of powers among the three branches of the federal government, and individually, each one entrenches checks and balances on the operation and power of the other two branches.

Article one grant certain powers to congress, and the Vesting Clause does not reassign those powers to the president. In fact, because those actions require legislation passed by congress which must be signed by the president to take effect, those powers are not strictly executive powers granted to or retained by congress per se. nor were they retained by the US congress as leftovers from the Articles of confederation. The Articles of confederation, continental congress and its powers were abolished at the time the new U.S. Congress was seated and the new federal government formally and officially replaced its interim predecessor. And although the president is implicitly denied the power to unilaterally declare war, a declaration of war is not in and of itself a vehicle of executive power since it is literally just a public declaration that the U.S government considers itself "at war" with a foreign political entity.

Regardless of the inability to declare war, the president does have the power to unilaterally order military action in defense of the United States pursuant to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

By U.S law, this power is limited in that he must notify congress within 48 hours after the beginning of military operations, explaining the source of his authority for the action. Once proper legal notification is given to the required members of congress, military action can continue for upto90 days if the president "determines and certifies to the congress in writing that unavoidable military necessity respecting the safety of united states Armed forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

As treaties are by U.S law official agreements with foreign governments recognized as such only after senate ratification, the president obviously cannot make treaties unilaterally.

However, the president does determine and decide U.S foreign policy, and can enter into non-binding discussions and give conditional approval to agreements reached with foreign governments subject to senate ratification at a future date.

Additionally, since official treaties are specifically created under and by constitutional U.S law, and are entered into both government and the people as a whole, in their capacity as head of state and as the single individual representative of the United States and its citizens, the president does have co authority and constitutional duty to unilaterally withdraw the united states from treaties if he or she determines the best interests and wellbeing of the U.S and its citizens are benefitted by doing so.

As far as presidential appointments, as with treaties a person is not officially and legally appointed to a position until their appointment is approved by the senate. Prior to senate approval and publication of that approval along with an official date and time for their swearing-in and assumption of duties and responsibilities, they are nominees rather than appointees. And again, the president nominates people for specific positions at their pleasure and can do so without or in spite of senate advice. Senate consent occurs when a majority of senators votes to approve and therefore appoint a nominee.

The head of the executive branch is the president. Although also named in this first clause, the vice president is not constitutionally vested with any executive power. Nonetheless, the constitution dictates that the president and the vice president are to be elected at the same time, for the same term, and by the same constituency. The framers' intent was to preserve the independence of the executive branch should the person who was vice president succeed to the duties of the presidency.

Section 2: presidential powers

In the landmark decision Nixon v General Services Administration (1977), Justice William Rehnquist, afterwards the Chief Justice, declared in his dissent "it would require far more of a disclosure than could profitably be included in an opinion such as this to fully describe the preeminent position that the president of the united states occupies with respect to our republic. Suffice it to say that the president is made the sole repository of the executive powers of the united states, and the powers entrusted to him as well as the duties imposed upon him are awesome indeed."

Unlike the modern constitutions of many other countries, which specify when and how a state of emergency maybe declared and which rights may be suspended, the U.S constitution itself includes no comprehensive separate regime for emergencies. Some legal scholars according to the Atlantic believe however that the constitution gives the president inherent emergency powers by making him commander in chief of the armed forces, or by vesting in him a broad, undefined "executive

power".

Congress has delegated at least 136 distinct statutory emergency powers to the president, each available upon the declaration of an emergency. Only 13 of these require a declaration from congress; the remaining 123 are assumed by an executive declaration with no further congressional input.

Congressionally-authorized emergency presidential powers are sweeping and dramatic and range from seizing control of the internet to declaring martial law. This led the magazine The Atlantic to observe that "the misuse of emergency powers is a standard gambit among leaders attempting to consolidate power", because, in the words of Justice Robert H Jackson's dissent in Korematsu v United States (1944), the decision that upheld the internment of Japanese Americans, each emergency power "lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Section 3: presidential responsibilities

He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extra ordinary occasions, convene both Houses, or either of them, and in case of Disagreement between them, with respect to the time of Adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the united states.

Section 4: Impeachment

The president, vice president and all civil officers of the United States, shall be removed from office on Impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.

The constitution allows for involuntary removal from office of the president, vice president, cabinet secretaries, and other executive officers, as well as judges, who may be impeached by the House of Representatives and tried in the senate.

Any official convicted by the senate is immediately removed from office, and to prevent the president's Article II appointment power from being used as a de-facto pardon the senate may also vote by a simple majority, that the removed official be forever disqualified from holding any future office under the United States. Constitutional law expert senator Matthew Carpenter reported that without the permanent disqualification clause impeachment would have no effect, because the president could simply reinstate his impeached officers "the next morning."

While no other punishments may be inflicted pursuant to the impeachment proceeding, the convicted party remains liable to trial and punishment in the courts for civil and criminal charges.

WESTERN CUSTOMS ON PRESIDENTIAL POWERS.

Article 2 of the US constitution creates the executive branch of the government consisting of the president, the vice president and other executive officers chosen by the president. Perhaps the most important of all presidential powers is command of the US States Armed Forces as commander- in-chief. While the power to declare war is constitutionally vested in Congress, the president commands and directs the military and is responsible for planning military strategy.

Along with the armed forces, the president also directs U.S foreign policy. Through the department of state and the Department of Defense, the president is responsible for the protection of Americans abroad and of foreign nationals in the US.

The president decides whether to recognize new nations and new governments and negotiations treaties with other nations, which become binding on the United States when approved by two-thirds vote of the Senate.

The president also has the power to nominate federal judges, including members of the US courts of appeals and the supreme court of the US.

The constitution's ineligibility clause prevents the president from simultaneously being a member of Congress. Therefore, the president cannot directly introduce legislative proposals for consideration in Congress.

WESTERN LIMITATIONS ON PRESIDENTIAL POWERS

INELIGIBILITY CLAUSE.

The constitution's ineligibility clause prevents the president from simultaneously being a member of Congress. Therefore, the president can not directly introduce legislative proposals for consideration in Congress.

Twenty third amendment under the Twenty Third Amendment, the District of Columbia may choose no more electors than the state with the lowest number of electoral votes. No senators, representatives or federal officers may become electors.

War powers Resolution: The War Powers Resolution of 1973 (50.U.S.C 1541-1548 L1) is a federal law intended to check the president's power to commit the U.S to an armed conflict without the consent of the Congress. The resolution was adopted in the form of a US congress joint resolution, this provides that the president can send US armed forces into action abroad only by authorization of congress or in case of "a national emergency created to attack upon the US, its territories or possessions, or its armed forces".

SENATORIAL COURTESY.

A written political custom (or constitutional convention) in the US whereby the president consults the Senior US Senator of his political party of a given state before nominating any person to a federal vacancy within that Senator's state.

The expressed powers of the president are those expressed in the constitution of the US. Article 2 of the US constitution creates the executive branch of the government consisting of the president, the vice president and other executive officers chosen by the president.

Clause 1 states "that the executive power shall be vested in a president of the US of America. He shall be"

CRITIQUE IN RELATION TO THE LIMITATIONS ON THE SAME.

Recent weeks have seen increased global media attention to Uganda following the incidents surrounding the arrest of popular musician and legislator, Bobi wine; emblematic events that have marked the shrinking democratic space in Uganda and the growing popular struggles for political change in the country.

The spotlight is also informed by wider trends across the continent over the past few years- particularly the unanticipated fall of veteran autocrats Muammar Gaddafi in Libya, Hosni Mubarak in Egypt, Yaya Jammeh in Gambia, and most recently Robert Mugabe in Zimbabwe- which led to speculation about whether Yoweri Museveni, in power in Uganda since 1986, might be the next to exist this shrinking club of Africa's strongmen.

Yet the Museveni state, and the immense presidential power that is its defining characteristics, has received far less attention, thus obscuring some of the issues at hand. Comprehending its dynamics requires paying attention to at least three turning points in the National Resistance Movement's history, which resulted in a gradual weeding-out of Museveni's contemporaries and potential opponents from the NRM, then the mobilization of military conflict to shore up regime legitimacy, and the policing of urban spaces to contain the increasingly frequent signals of potential revolution. Together, these dynamics crystallized presidential power in Uganda, run down key state institutions, and set the stage for the recent tensions and likely many more to come.

UGANDA AS A COMPARATIVE ANALYSIS

The constitution of the Republic of Uganda 1995 (as amended) provides that;

Article 98,

(1) There shall be a president of Uganda who shall be the Head of State, Head of Government and commander-in-chief of the Uganda People's Defense Forces and the fountain of honor.

(2) The president shall take precedence over all persons in Uganda, and in descending order, the Vice President, the Speaker, and the Chief Justice shall take precedence over all other persons in Uganda.

(3) Before assuming the duties of the office of president, a person elected President shall take and subscribe the oath of allegiance and the presidential oath specified in the fourth schedule to this constitution.

(4) While holding office, the president shall not be liable to proceedings in any court.

(5) Civil or criminal proceedings maybe instituted against a person after ceasing to be president, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was president.

Article 99, executive authority of Uganda;

(1) The executive authority of Uganda is vested in the president and shall be exercised in accordance with this constitution and the laws of Uganda.

(2) The president shall execute and maintain this constitution and all laws made under or continued in force by this constitution.

(3) It shall be the duty of the president to abide by, uphold and safeguard this constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.

(4) Subject to the provisions of this constitution, the functions conferred on the president by clause (1) of this Article may be exercised by the president either directly or through officers subordinate to the president.

(5) A statutory instrument or other instrument issued by the president or any person authorized by the president maybe authenticated by the signature of a Minister; and the validity of any instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the president.

Article 100, notification of the absence of the President from Uganda.

The President shall, whenever leaving Uganda, notify in writing the Vice President, the Speaker and the Chief Justice.

Article 101, Presidential addresses;

(1) The President shall, at the beginning of each session of Parliament, deliver to Parliament an address on the state of the nation.

(2) The president may, also, in consultation with the Speaker, address Parliament from time to time, on any matter of national importance.

Article 102, Qualifications of the president;

A person is not qualified for election as president unless that person is-

(a) A citizen of Uganda by birth

(b) Not less

(c) than thirty five years and not more than seventy-five years of age; and

(d) A person qualified to be a Member of Parliament.

Article 103, election of the president;

(1) The election of the president shall be universal adult suffrage through a secret ballot.

(2) A person shall be a candidate in a presidential election unless-

(a) that person submits to the Electoral Commission on or before the day appointed as nomination day in relation to the election, a document which is signed by that person nominating him or her as a candidate; and

(b) The nomination is supported by one hundred voters in each of at least two-thirds of all districts in Uganda.

(3) Apart from the election required to be held by clause (2) of Article 61 of this constitution, election of the president shall also be held in the following circumstances-

(a) An election held under clause (6) of Article 104 of this constitution;

(b) An election held under clause (3) of Article 105 of this constitution

(c) An election held under clause (2) of Article 109 of this constitution; and

(d) An election necessitated by the fact that a normal presidential election could not be held as a result of the existence of a state of war or a state of emergency, in which case, the election shall be held within such period as Parliament may, by law, prescribe.

(4) A candidate shall not be declared elected as president unless the number of votes cast in favor of that candidate at the presidential election is more than 50 percent of valid votes cast at the election.

(5) Where at a presidential election no candidate obtains the percentage of votes specified in clause (4) of this Article, a second election shall be held within thirty days after the declaration of the results in which election the two candidates who obtained the highest number of votes shall be only candidates.

(6) The candidate who obtains the highest number of votes in an election under clause (5) of this Article shall be declared elected president.

(6a) notwithstanding the provisions of clauses (4) and (6) of this Article, where, in a presidential

election only one candidate is nominated, after the close of nominations, the Electoral Commission shall declare that candidate elected unopposed.

(7) The Electoral Commission shall ascertain, publish and declare in writing under its seal, the results of the presidential election within forty-eight hours from the close of polling.

(8) A person elected President during the term of a president shall assume office within twenty four hours after the expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President.

(9) Subject to the provisions of this constitution, Parliament shall by law prescribe the procedure for the election and assumption of office by a president.

Article 104, challenging a presidential election

(1) Subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) A petition under clause (1) of this Article shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed.

(4) Where no petition is filed within the time prescribed under clause (2) of this Article, or where a petition having been filed, is dismissed by the Supreme Court, the candidate declared elected shall conclusively be taken to have been duly elected as President.

(5) After due inquiry under clause (3) of this Article, the Supreme court may-

(a) Dismiss the petition;

(b) Declare which candidate was validly elected, or

(c) Annul the election.

(6) Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.

(7) If after a fresh election held under clause (6) of this Article there is another petition which succeeds, then the presidential election shall be postponed; and upon the expiry of the term of the incumbent president, the speaker shall perform the functions of the office of president until a new president is elected and assumes office.

(8) For the purposes of this Article, Article 98(4) of this constitution shall not apply.

(9) Parliament shall make such laws as may be necessary for the purposes of this Article, including laws for grounds of annulment and rules of procedure.

Article 105. Tenure of office of the president

(1) A person elected president under this constitution shall, subject to clause (3) of this Article, hold office for a term of five years.

(2) A person may be elected under this constitution to hold office as President for one or more terms as prescribed by this Article.

(3) The office of the president shall become vacant-

(a) On the expiration of the period specified in this Article; or

(b) If the incumbent dies or resigns or ceases to hold office under Article 107 of this constitution.

(4) The president may, by writing assigned by him or her, and addressed to the chief Justice, resign from office as President.

(5) The resignation of the president shall take effect when it is received by the chief justice.

(6) The chief justice shall, immediately upon receiving the resignation of the president and the electoral commission of the resignation.

Article 106. Terms and conditions of service of the president.

(1) The president shall be paid a salary and allowances and afforded such other benefits as Parliament shall by law provide.

(2) Parliament shall, by law, make provision for the grant of benefits for a president who ceases to hold office otherwise than by being removed under Article 107(1) (a) or (b) of this constitution.

(3) The salary, allowances and other benefits granted to a President under this Article shall be charged on the Consolidated Fund.

(4) The President is exempted from direct personal taxation on allowances and other benefits except on the official salary.

(5) The president shall not hold any other public office other than those conferred by this constitution or any office of profit or emolument likely to compromise the office of the president.

(6) The salary, allowances and other benefits granted to the president under this Article shall not be varied to the disadvantage of the president while he or she holds office.

(7) The retirement benefits granted to a president under this Article shall not be varied to the disadvantage of the president.

Article 107. Removal of the president.

(1) the presidency may be removed from office in accordance with this Article on any of the following grounds-

(a) abuse of office or willful violation of the oath of allegiance and the presidential oath or any provision of this constitution;

(b) misconduct or misbehavior-

(i) that he or she has conducted himself or herself in a manner which brings or is likely to bring the office of president into hatred, ridicule, contempt or disrepute; or

(ii) that he or she has dishonestly done any act or omission which is prejudicial or inimical to the economy or security of Uganda, or

(2) for the purpose of removal of the president under clause (1)(a) or (b) of this Article, a notice in writing signed by not less than one-third of all the members of Parliament shall be submitted to the speaker-

(a) stating that they intend to move a motion for a resolution in Parliament for the removal of the president on the charge that the president has-

(i) wilfully abused his or her office or wilfully violated the oath of allegiance and the presidential oath or any other provision of this constitution in terms of clause (1)(a) of this Article; or

(ii) misconduct himself or herself or misbehaved in terms of clause (1)(b) of this Article; and

(b) Setting out the particulars of the charge supported by the necessary documents on which it is claimed that the conduct of the president be investigated for the purposes of his or her removal.

(3) The speaker shall, within twenty-four hours after receipt of the notice referred to in clause (2) of this Article, cause a copy to be transmitted to the president and the chief justice.

(4) The chief Justice shall, within seven days after receipt of the notice transmitted under clause (3) of this Article, constitute a tribunal comprising three justices of the Supreme Court to investigate the allegation in the notice and to report its findings to parliament stating whether or not there is a prima facie case for the removal of the president.

(5) The president is entitled to appear at the proceedings of the tribunal and to be represented there by a lawyer or other expert or person of his or her choice.

(6) If the tribunal determines that there is a prima facie case for the removal of the president under clause (1)(a) or (b) of this Article, then if Parliament passes the resolution passed by the votes of not less than two-thirds of all members of Parliament, the president shall cease to hold office.

(7) For the purposes of the removal of the president on grounds of physical or mental incapacity under clause (1)(c) of this Article, there shall be submitted to the speaker a notice in writing signed by not less than one-third of all members of Parliament-

(a) Stating that they intend to move a motion for a resolution in Parliament for the removal of the president from office on grounds of physical or mental incapacity; and

(b) Giving particulars of the alleged incapacity.

(8) The speaker shall, within twenty-four hours after receipt of a notice under clause (7) of this Article, cause a copy to be transmitted to the president and the chief justice.

(9) The chief justice shall, within seven days after receipt of the notice transmitted under clause (8) of this Article and in consultation with the professional head of the medical services in Uganda, constitute a medical board comprising five qualified and eminent medical specialists to examine the president in respect of the alleged incapacity and to report its findings to parliament.

(10) The chief justice shall, within twenty-four hours after constituting the medical board, inform the president accordingly, and the president shall submit himself or herself to the medical board for examination within seven days.

(11) If the medical board determines that the president is by reason of physical or mental incapacity unable to perform its functions of the office of president, and parliament passes the resolution for the removal of the president supported by the votes of not less than two-thirds of all the members of parliament, the president shall cease to hold office.

(12) If the medical board, after the expiration of the period of seven days referred to in clause (10) of this Article, reports that the president has failed or refused to submit to the medical board in accordance with that clause, and Parliament passes the resolution for the removal of the president supported by the votes of not less than two-thirds of all the members of parliament, the president shall cease to hold office.

(13) The motion for a resolution for the removal of the president shall be moved in Parliament within fourteen days after the receipt by the speaker of the report of the tribunal or the medical board.

(14) The president is entitled to appear in person and be heard and to be assisted or represented by a lawyer or other expert or person of his or her choice during the proceedings of parliament relating to the motion for a resolution under this Article.

CRITIQUE IN RELATION TO THE LIMITATIONS ON THE SAME.

Recent weeks have seen increased global media attention to Uganda following the incidents surrounding the arrest of popular musician and legislator, Bobi wine; emblematic events that have marked the shrinking democratic space in Uganda and the growing popular struggles for political change in the country.

The spotlight is also informed by wider trends across the continent over the past few years- particularly the unanticipated fall of veteran autocrats Muammar Gaddafi in Libya, Hosni Mubarak in Egypt, Yaya Jammeh in Gambia, and most recently Robert Mugabe in Zimbabwe- which led to speculation about whether Yoweri Museveni, in power in Uganda since 1986, might be the next to exist this shrinking club of Africa's strongmen.

Yet the Museveni state, and the immense presidential power that is its defining characteristics, has received far less attention, thus obscuring some of the issues at hand. Comprehending its dynamics requires paying attention to at least three turning points in the National Resistance Movement's history, which resulted in a gradual weeding-out of Museveni's contemporaries and potential opponents from the NRM, then the mobilization of military conflict to shore up regime legitimacy, and the policing of urban spaces to contain the increasingly frequent signals of potential revolution. Together, these dynamics crystallized presidential power in Uganda, run down key state institutions, and set the stage for the recent tensions and likely many more to come.

THE PURGE

From the late 1990's, there has been a gradual weeding out the old guard in the NRM, which through an informal "succession queue, "had posed an internal challenge to the continuity of Museveni's rule. It all started amidst the heated debates in the late 1990s over the reform of the then decaying Movement system; debates that pitted a younger club of reformists against an older group. The resultant split led to the exit of many critical voices from the NRM's ranks, and began to bolster Museveni's grip on power in a manner that was unprecedented. It also opened the lid on official corruption and the abuse of public offices.

Over the years, the purge also got rid of many political and military elites – the so-called "historical"- many of whom shared Museveni's sense of entitlement to political office rooted in their contribution to the 1980-1985 liberation war, and some of whom probably had an eye on his seat.

By 2005 the purge was at its peak; that year the constitutional amendment that removed presidential term limits passed after a bribe to every legislator saw almost all insiders that were opposed to it, summarily dismissed. As many of them joined the ranks of opposition, Museveni's

inner circle was left with mainly sycophants whose loyalty was more hinged on patronage than anything else. Questioning the president or harboring presidential ambitions within the NRM had become tantamount to a crime.

By 2011 the process was almost complete, with the dismissal of Vice President Gilbert Bukenya, whose growing popularity among rural farmers was interpreted as a nascent presidential bid, resulting in his firing.

One man remained standing, Museveni's long-time friend Amama Mbabazi. His friendship with Museveni had long fueled rumors that he would succeed "the big man "at some point. In 2015, however, his attempt to run against Museveni in the ruling party primaries also earned him an expulsion from both the secretary general position of the ruling party as well as the prime ministerial office.

The departure of Mbabazi marked the end of any pretensions to a succession plan within the NRM. He was unpopular, with a record tainted by corruption scandals and complicity in Museveni's authoritarianism, but his status as a "president- in- waiting" had given the NRM at least the semblance of an institution that could survive beyond Museveni's tenure, which is firing effectively ended.

What is left now is perhaps the "Muhoozi project", a supposed plan by Museveni to have his son Muhoozi Kainerugaba succeed him.

Lately it has been given credence by the son's rapid rise to commanding positions in elite sections of the Ugandan military. But with an increasingly insecure Museveni heavily reliant on familial relationships and patronage networks, even the Muhoozi project appears very unlikely. What is clear, though, is that the overtime, the presidency has essentially become Museveni's property.

THE EXTENT.

Fundamental to Museveni's personalization of power also has been the role of military conflict, both local and regional. First was the rebellion by Joseph Kony's Lord's Resistance Army in northern Uganda, which over its two-decade span enabled a continuation of the military ethos of the NRM. The war's dynamics were indeed complex, and rooted in a longer history that predated even the NRM government, but undoubtedly it provided a ready excuse for the various shades of authoritarianism that came to define Museveni's rule.

With war ongoing in the north, any challenge to Museveni's rule was easily constructed as a threat to the peace already secured in the rest of the country, providing an absurd logic for clamping down on political opposition. More importantly, the emergency state born of it, frequently provided a justification for the president to side step democratic institutions and processes, while at the same

time rationalizing the governments misappropriate expenditure on the military. It also fed into Museveni's self-perception as a "freedom fighter" buttressed the personality cult around him, and empowered him to further undermine any checks on his power.

By the late 2000s the LRA war was coming to an end – but another war had taken over its function just in time. From the early 2000s, Uganda's participation in a regional security project in the context of the war on Terror, particularly in the Somali conflict, rehabilitated the regime's international image and provided cover for the narrowing political space at home, as well as facilitating a further entrenchment of Museveni's rule.

As post-9/11 western foreign policy began to prioritize stability over political reform, Museveni increasingly postured as the regional peacemaker, endearing himself to donors while further sweeping the calls for democratic change at home under the carpet- and earning big from it.

It is easy to overlook the impact of these military engagements, but the point is that together they accentuated the role of the military in Ugandan politics and further entrenched Museveni's power to degrees that perhaps even the NRM's own roots in a guerilla movement could never have reached. The expulsion of powerful elites from the ruling circles and the politicization of military conflict had just started to cement Musevenism, when a new threat emerged on the horizon. It involved not the usual antagonists –gun-toting rebels or ruling party elites –but ordinary protesters. And they were challenging the NRM on an unfamiliar battleground –not in the jungles, but on the streets: the 2011" walk –to -work" protests, rejecting the rising fuel and food prices, were unprecedented.

But there's another reason the protests constituted a new threat. For long the NRM had mastered the art of winning elections. The majority constituencies in one hand and the electoral commission itself was largely answerable to Museveni. With rural constituencies in one hand and the electoral body in the other, the NRM could safely ignore the minority opposition- dominated urban constituencies. Electoral defeat thus never constituted a threat to the NRM, at least at parliamentary and presidential levels.

But now the protesters had turned the tables, and were challenging the regime immediately after one of its landslide victories. The streets could not be rigged. In a moment, they had shifted the locus of Ugandan politics from the rural to the urban, and from institutional to informal spaces. And they were picking lessons from a strange source: North America.

There, where Museveni's old friend Gaddafi, among others, was facing a sudden exit under pressure from similar struggles. Things could quickly get out of hand. A strategic response was urgent.

The regime went into overdrive. The 2011 protests were snuffed out, and from then, the policing of

urban spaces became central to the logic and working of the Museveni state.

Draconian laws on public assembly and free speech came into effect, enacted by a rubber-stamp parliament that was already firmly in Museveni's hands. Police partnered with criminal gangs, notably the bodaboda 2010, to curb what was called "public order" –really the official name for peaceful protest. As police's mandate expanded to include the pursuit of regime critics, its budget ballooned, and its chief, General Kale Kayihura, became the most powerful person after Museveni - before his recent dismissal.

For a while, the regime seemed triumphant. Organizing and protest became virtually impossible, as urban areas came under 24/7 surveillance.

Moreover, key state institutions –the parliament, electoral commission, and judiciary, military and now the police were all in the service of the NRM, and all voices of dissent had been effectively silenced. In time, the constitution would be amended again, by the NRM –dominated house, this time to remove the presidential age limit –the last obstacle to Museveni's life presidency –followed by a new tax on social media, to curb "gossip". Museveni was now truly invincible. Or so it seemed.

But the dreams of "walk-to-work" –the nightmare for the Museveni state –had never really disappeared, and behind the tightly –patrolled streets always lay the simmering quest for change. That is how we arrived at the present moment, with a pop star representing the widespread aspiration for better government, and a seemingly all-powerful president suddenly struggling for legitimacy.

Whatever direction the current popular struggles ultimately take, what is certain is that they are learning well from history, and are a harbinger of many more to come.

CHAPTER ELEVEN

THE ROLE OF THE LEGISLATURE IN CHECKING THE EXECUTIVE

SOVEREINGTY OF THE LEGISLATURE

The principle of parliamentary supremacy ironically derives from the doctrine of separation of powers which deals with the mutual relations among the three organs of the government namely; Legislature, Executive and Judiciary**.** Lord Mustill **in R v Home Secretary, Exparte Fine Brigade Union** [949]explained the doctrine of separation of powers to mean a feature of separation of pecuniary powers that Parliament, the executive and judiciary have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on administration of the country in accordance with the powers conferred on it by law. The Judiciary interprets the laws and see that they are complied with and obeyed. It's the specific powers conferred upon these that checks on the usurpation of powers by others through the checks and balances.

Montesquieu tried to give the rationale for this when he remarked that when the legislative and executive powers are united in the same person, or in the same body or magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive power, the life and liberty of subject would be exposed to arbitrary control for the judge would then be the legislation.

The doctrine is well enshrined in the 1995 Constitution of The Republic of Uganda which goes ahead to underline the powers, functions and roles of each organ of government and each play a unique role and are expected to check on each other. The legislature is under chapter six. This is justified by Article 77(1) [950]which is to the effect that there shall be a Parliament of Uganda and Article 79(1) [951]provides for its primary function which is the effect that Parliament shall have powers to make laws on any matter for peace, order, development and good governance of Uganda. That is the, major function of Parliament. The executive can be traced under chapter seven and is basically Article 98(1) [952]paints the picture of the executive. It is to the effect that there shall be the President of Uganda who shall be the head of state, head of government and commander in chief of

[949] [1995] 2AC 513
[950] The 1995 Constitution of the Republic of Uganda as amended.
[951]Supra.
[952] supra

the Uganda Peoples Defense Forces and the fountain of Honor. This is a clear manifestation that the executive organ of government is headed by the president. On the other hand the Judiciary is enshrined under chapter eight and basically Article 126(1) [953]provides that the judicial power is derived from the people and shall be exercised by the courts established under the constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. Though the major provision to consider mostly is Article 128 [954]which provides for the independence of the judiciary, This sis justified by the reason that because there is need to administer justice equally without regard to socio economic and political statues to promote equally before the law.

In this paper, my emphasis is placed on the legislature and specifically its sovereignty in what can be generalized as the legislative supremacy. This discussion shall relate on its supremacy in relation to the other two organs of the government that is the executive and the judiciary. Though in Uganda supremacy of the legislature is not operative, am to present it on the basis of checks and balances by the legislature.

Parliamentary sovereignty in Uganda is in few areas though critical in nature in terms of clear governance to achieve the national objectives and principle of state policy. Its sovereignty is rooted in its mandate to make laws without hindrances, mandate to amend the constitution, approval of presidential appointees, state of emergencies and others. Unlike the judiciary that essentially deals or checks on the two organs from the perspective of legality that is whether their activities and conduct falls within the confines of the law, the legislature has mandate to check on the policies of the executive and question the executive activities.

It is worth noting that for Parliament to achieve its sovereignty in terms of operativeness, the members of the house must be afforded security. It's this rationale that Parliament Powers and immunities Act Cap 258 was put in place to afford security to all members of the house in everything that they put forward before the House.

Parliamentary immunity started from way back in 1642 during the reign of King Charles I when he entered the House of Commons sat in the speaker's chair to demand for the Members of the House that had passed the law restricting him from doing mining. The speaker by then William Lenthall of the House of Commons in the Long Parliament had this to say.

"May it please your majesty, I have neither eyes to see nor tongue to speak in this place but as this house is pleased to direct me whose servant I am here: and humbly beg your majesty's Pardon that

[953] The 1995 Constitution of the Republic of Uganda as amended.
[954]Supra.

I cannot give any other answer than this to what your majesty is pleased to demand of me"[955]

This has remained the stand up to date in that legislators are afforded immunity majorly to give life to the doctrine of separation of powers. In Uganda Parliamentary immunity is a great concern which the framers of the 1995 Constitution could not undermine. It's a point of concern under Article 97(1) [956]which states that, the speaker, the deputy speaker, members of parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of parliament or any of its committees shall be entitles to such immunities and privileges as parliament shall by law prescribe.

In order to see this in operative , Parliament while exercising its mandate under Article79(1) enacted the Parliamentary Powers and Privileges Act Cap 258 which states that " An Act to declare and define powers, privileges and immunities of parliament, and of the members of parliament, to secure freedom of speech in Parliament , to regulate admittance to the precincts of parliament, to give protection to the persons employed in the publication of the reports and other papers of parliament and for purposes incidental to or connected with the matters aforesaid" .

Further section 2[957] of the Act provides that no civil or criminal proceedings may be instituted against any member for words spoken before or written in a report to Parliament or to a committee, or by reason of any matter or thing brought by the member in Parliament or a committee by petition, bill, and motion or otherwise.

The rationale for this is that permits members to speak freely in the chambers during the sitting or in committees during meetings while enjoying complete immunity from prosecution for any comment they might make[958]. The freedom of speech is essential for the effective working of the house as members are able to make statements or allegations about outside bodies or persons which they may hesitate to make without the protection privilege[959]. According to center for public interest law, the rationale behind the immunities and privileges is the constitutional principle of separation of powers to enable Parliament to carry out its duties effectively; they must be given some privileges and immunities to avoid external influence or threats from the other arms of government. The most questions are on its effectiveness in Uganda which I shall not discuss being not party of this discussion.

Before I leave or detach from this parameter, important to note is that the immunities and privileges can be waived by obtaining special leave of parliament to allow the proceedings or information laid

[955] House of Commons Journal Volume 2:4 January 1642. Page 376-368.
[956]The 1995 constitution of the Republic Of Uganda.
[957] The Parliament Powers and Immunities Act Ca.p 258
[958]Maigont, 2nd Edition, pp-33, for a discussion on freedom of speech and criminal law.
[959]Stockdale v Hansard [1839] 9 AD & E 11; 112.

before Parliament to be used in court or in any other proceedings outside Parliament itself. The person responsible for granting this leave is the speaker of parliament or in absence or incapacity of the speaker or the clerk of parliament during the dissolution of Parliament[960].

Having critically analyzed the parliamentary powers and immunities as a necessity to achieve Parliamentary sovereignty and the rationale for separation of powers, it's prudent that I shall now look at the sovereignty of legislature in Uganda putting emphasis on the various provisions of the Constitution from which it derives mandate.

POWER TO MAKE LAWS

The critical point for consideration is that Parliament is the Supreme law maker of the land. Its sovereignty is rooted in the common law practice. It is too powerful that it can do anything under the sun[961].Its mandate to make laws for the effective governance of Uganda is provided for under **Article 79(1)**[962] which is to the effect that subject to the provisions of this constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

In exercising that mandate, Parliament must comply to the necessary procedure required. **Article 91(1)** is to the effect that the power of parliament to make laws shall be exercised through bills passed by parliament and assented to by the president. This is a clear manifestation that Parliament cannot make any law without use of a bill. These bills are in two forms that is the private members bill and the government bill.

In his wisdom, Justice George Kanyeihamba as he then was in **Paul Ssemwogerere Zachary Olum and Anor v Attorney General** [963] observed that such laws made by parliament remain uncertain until court has pronounced its self on the matter. Therefore, being the fact that no other organ f the government has mandate to make laws, the Judiciary shall always intervene to question the legality of the laws made by the legislature as well as the legality of the procedure. In Muwanga Kivumbi v Attorney General Court declared the anti-homosexuality bill null on ground that parliament had not complied to the quorum required. In line with this, these laws are supposed to be in line with the constitution. Therefore, while making laws, Parliament must ensure that the laws and are in line with Constitution and where they contravene, the constitutional court has mandate under Article 137(1) to strike the law out. Example can be traced from the constitutional court

[960] This information can be found on www. Cepiluganda.org.
[961]YasinMugerwa. Daily monitor. Saturday September 3rd , 2016 .
[962]The 1995 Constitution of Republic of Uganda.
[963]Supreme Court Constitutional Appeal No 1 of 2002.

nullification **section 32**[964]of the police Act for being in contravention **of Article 29 of the Constitution.**

However, its mandate to make to make laws is also limited. The limitation is under Article 92 which restricts retrospective legislation. The provision is to the effect that parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment. Therefore, it is unconstitutional for parliament to use its powers to enact legislation which has been prohibited by the judiciary. This was emphasized and explained by Justice Cheborion in the case **of Human Rights Network Uganda and 4 others v Attorney General**[965]. This case concerned the fact that court had declared section 32 of the Police Act null and void therefore the petitioner's argument was that section 8 of the Public Order Management Act was passed in regulation of section 32 of the police Act. Court held that section 8 of the Public Order Management Act was void due to its inconsistence with the constitution.

Its therefore eminent that the sole function and primary responsibility of the legislature is to make laws but emphasis should be placed on the procedure and the constitutionality of the laws passed by the legislature. Even though the law may be inconsistent with the constitution, court shall not intervene unless it is moved by the citizens for court does not move its self into the matter. In every law made by parliament, such law cannot be passed unless it has been taken to the president for approval. The exception is under **Article 94(6)** which is to the effect that if the president refuses to assent to the Bill three times then the speaker shall cause a copy of the Bill to be laid before Parliament and the bill shall become law without assent of the president.

Parliament has mandate under Article 79(2) to delegate some of its law making powers. This is justified by the fact that the House Has a lot to consider during its tenure and therefore cannot handle every matter. Therefore it is proper for parliament to delegate some of its powers. These powers are delegated at times through statutes made by the legislature such as the Local Government Act Cap 243.Section 38 and section39 of the Act allows the local governments to make laws such as the ordinances under section 38 and the byelaws made under section 39 of the same Act. But these are not termed as statutes but rather statutory instruments.

THE AUTONOMY OF THE LEGISLATURE IN THE FACE OF MODERN-DAY CHALLENGES.

In the twenty-first century, there is a greater global interest than ever before in concerns of democracy and good governance. This reflects a growing recognition that democracy and good

[964] Uganda Police Act, Cap 312
[965] Constitutional Petition No 56 of 2013

governance are not optional but essential for long-term growth. Parliament, as one of the most important state institutions of a democratic government, plays a fundamental role in supporting democracy and good governance. Members of parliament have the noble job of ensuring administration by and for the people as democratically elected representatives of the people. Parliaments can actively participate in the formulation and implementation of laws, policies, and practices that promote democracy and good governance as part of their key legislative, representation, and oversight roles.

As an integral arm of the state, the parliament plays a critical role in promoting and defending democracy and good governance by setting not just the necessary checks and balances, but also norms and standards for democratic and governance institutions. In light of the core ideas and assumptions associated with parliamentary democracy, the role and tasks of parliament in promoting democracy and good governance have become increasingly important. A parliamentary democratic system recognizes that parliament gets its powers directly from the consent of the people, which is expressed through periodic elections, and that parliament's role includes, among other things, implementing the people's will. The 1995 Ugandan constitution affirms this, stating, "All power belongs to the people..."

Parliaments do not function in a vacuum; their operation and efficacy are heavily influenced by the context of the country, particularly the political situation. From post-independence political history to the modern multi-party system, the parliament has had an impact on how it functions.

It is vital to remember that the parliament must be shielded from all forms of influence, particularly from the administration, in order to efficiently accomplish its tasks. To protect people' liberty and prevent tyranny, the separation of powers doctrine requires that the state's three main institutions—executive, legislature, and judiciary—be properly divided. There can be no liberty when the legislative and executive functions are combined in the same person or body of magistrates. There is no liberty if judicial powers are not separated from legislative and administrative powers; everything would come to a stop if those three functions were exercised by the same man or body.

CHECKING ON THE EXECUTIVE POLICIES

It’s a constitutional mandate for the legislature to check on the policies of the executive. This is through assessing and evaluating activities of the executive and other bodies of the government, approval of presidential appointments as well as state of emergencies declared by the executive.

ASSESSING AND EVALUATING GOVERNMENT ACTIVITIES

This is by the legislature through the creation of committees such as the sessional committee, standing committee and the select committee. The sessional committees are created to monitor the ministers on how they exercise their powers in performance of their activities. The Standing committee is responsible for accountability and the select committees are created by the speaker to inquire into certain matters of the ministry or any minister. In order to strengthen the exercise of this role, opposition members of parliament chair the accountability committees.

These committees may conduct investigations, hold public hearings, acquire reports from the executive as such evaluation findings would greatly benefit the work of accountability. These accountability committees include the public accounts, local government's accounts, commissions, statutory authorities and state enterprises and government assurances.[966]In addition, one of the rules developed by Parliament requires ministers to answer questions from legislators about policy and thus in response to ministerial policy statements, individual legislators would find results of evaluations of great use in demanding accountability. The office of the Auditor General receives and examines audited accounts showing the appropriation of the sums granted by parliament to meet the public expenditure of government and provides its reports to parliament for use by the accountability committees.[967]

Ministerial accountability developed around the 19th century and entry 20th century as government departments and the role of ministers, separate from civil servants became more distinct. This means that they are supposed to provide and answer parliament and provide information. But this depends on what has gone wrong.[968]Therefore legislature checks on the activities of the executive and its policies through such committees.

APPROVAL OF APPOINTMENTS AND STATE OF EMERGENCIES

The mandate for approval of executive appointments and state of emergencies is a preserve of the legislature. These appointments are in various categories but mainly appointments by the president for public offices for example ministers, judges, ambassadors and other positions specifies in the constitution.[969]Example to this is Article 108(A) which provides for the appointment of the prime minister with the approval of Parliament.

[966] Find this in the National Policy on Public Sector Monitoring and Evaluation 2013
[967] This an be obtained from www. Library.health.go.ug.
[968]Bronmen Maddox; 27 August 2020 ministerial accountability. See also www.institute for govt. org.uk.
[969]Parliament of Uganda at www.parliament.go.ug.

CHAPTER TWELVE

THE JUDICIARY

The Judiciary is often seen as the 3rd arm of government. In regard to the principle of separation of powers, the concern is the judicial independence of the courts which in terms of the idea of checks and balances, the Courts are considered to have the duty to uphold and protect the Constitution and to be the chief arbitrators over all disputes in the country. With specific regards to disputes between individuals and the other two organs of government i.e. the executive and legislative the courts are seen as a check on the arbitrary and excessive use of powers.

THE DOCTRINE OF SEPARATION OF POWERS

This doctrine basically says that there must necessarily be a differentiation between the functions of government as well as the separation, conceptual and factional between the bodies that exercise power.

According to Montesquieu in his book The Spirit of the Laws [1748], there must be 3 separate organs of govt. There must be the organ that makes law i.e. the legislature, there must be the organ that executes Law I.e. Executive and lastly there must be a body to interpret the Law and to mediate disputes over the Law I.e. Judiciary.

To Montesquieu therefore, separation of powers meant 3 basic things.

i) Each organ of the state should be operated by different people i.e. it should not be one individual running all the 3 organs so that at no time should a Judge make the Law nor should he be involved in an executive function.

ii) That each of the state organs should be independent of one another i.e. there should be an absence of control, influence or direction by one organ of state over another i.e. there should be autonomous operation. No one organ of state should control activities of the other.

iii) No one organ of the state should take over the powers of the other.

The doctrine was exemplified in the case of **Major General David Tinyefuza V Attorney General**[970] wherein Kanyeihamba JSC noted that 'the principle of non-interference by the Judiciary in legislative and executive matters should prevail save for exceptional circumstances involving the deprivation of the liberty of a citizen. The reluctance of the courts to enter into the arena reserved by the Constitution for the other arms of government reaches its zenith when it comes to the

[970] CONST. APP. NO.1 OF 1997

exercise and control of powers relating to the armed forces, their structure, organization, deployment and operations. The accepted principle is that courts will not substitute their own views of what is public interest in these matters especially when the other coordinate powers of government are acting within the authority granted to them by the Constitution and the law. As military matters are within the exclusive jurisdiction of both the Executive and Parliament, it is not for the courts to consider whether the discretion of the executive has been properly, if at all.

It is Parliament which has the authority to bring the executive to account in these military matters. In the English case of **Chandler V DPP**[971], Lord Devlin underscored this point when at p. 810 he said "the court will not review the proper exercise of discretionary power but they will only intervene to correct excess or abuse"…The Constitution provides that the Constitutional platform is to be shared between the three institutional organs of government whose functions and powers, I have already described. The Uganda Constitution recognized these organs as the parliament, the executive and the Judiciary. It was not by accident either that it created, described and empowered them in that order of enumeration. Each of them has its own field of operation with different characteristics and exclusivity and meant by the Constitution to exercise its powers independently. The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purposes of determining Constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the courts must refrain from entering arenas not assigned to them either by the Constitution or laws of Uganda. It can not be overemphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly causing injury thereby…the makers of the 1995 Constitution took away a lot of the powers which had hitherto been exercised by the executive and assigned them either to parliament or the Judiciary or the local governments. To whittle away the powers which are left in the executive by judicial engineering would in my opinion weaken the Executive further and be contrary to good and balanced governance in Uganda'.

All Constitutions in the world pay homage to this basic doctrine of separation of powers. And they tend also to separate the personalities. But even as they do so, there are limits at which you must separate power so the pure doctrine of separation of power no longer works like Montesquieu envisaged and instead scholars have chosen to use the phrase checks and balances as a way of dealing with the need to ensure that …. Is some separation and at the same time recognizing that there is an overlap of these organs of state? Therefore, the doctrine of checks and balances is taken

[971] (1964) AC 763

to mean that the organs of the state exist in a situation of mutual independence and interdependence so that if there is overstepping of the like by one of these organs, there is an ability to check that excessive action.

Through the doctrine of checks and balances, an effort is made to ensure that no one organ becomes more powerful than the others. The organs of government are like is 3 stones under a pot and each of them functions to ensure that the foods in the pot is effectively cooked and also that the pot does not fall over. So this doctrine of checks and balances is designed also to promote efficiency and for the individuals to operate these organs and develop an expertise

In the final analysis, a system which has checks and balances which may not function very effectively is far better than a situation in which you have excessive powers vested in a single organ which is uncontrolled.

THE PHENOMENON OF JUDICIAL POWER JURISDICTION OF COURTS

The exercise of judicial power is provided for in Chapter 8 of the 1995 Constitution i.e. Articles 126-The Phenomenon of judicial power essentially embraces a number of elements.

i) The structure and hierarchy of courts and their jurisdictional competence[972]
ii) Guiding principles in the exercise of judicial power[973]
iii) Participation of peoples in the administration of justice[974]
iv) Independence of the Judiciary in the exercise of judicial power[975]

THE STRUCTURE AND HIERARCHY OF COURTS AND THEIR JURISDICTIONAL COMPETENCE.

The structure of the Judiciary is governed by Article 129 which sets out the Courts of judicature which shall exercise judicial power in Uganda and these include the Supreme Court described in Articles 130-132, the Court of Appeal provided for under Articles 134 and 136. The Court of appeal is also constituted as the Constitutional Court under Article 137. The High Court of Uganda which is provided for under Article 138 to 139 and other subordinate courts as established by parliament which include the Qadhi Court.

Under Article 129(3), parliament is to make provision for the jurisdiction and procedures of the Courts and as a result of this, the Judicature Act 1996 was enacted which essentially provides for the various courts of judicature, the applicable law for the courts as well as prerogative orders that

[972] Articles 129, 139, 137, Constitution of the Republic of Uganda, 1995 (As amended)
[973] Articles 126, Ibid
[974] Article 127, Ibid
[975] Article 128, Constitution of the Republic of Uganda, 1995 (As amended)

may be issued including habeas corpus, mandamus, certiorari.

The jurisdictional competence of the Courts is provided for by the Constitution although in the case of the subordinate courts such as the magistrate courts, their jurisdictional competence will be found in the MCA (as amended).

The Supreme Court and the Court of Appeal as such, are essentially appellate courts although the Supreme Court is the final court of appeal by virtue of Article 132(1) yet on the other hand it acts as a court of original jurisdiction with regards to petitions on presidential elections by virtue of Article 104.

The Court of Appeal while acting as the Constitutional Court is by virtue of Article 137 enjoined with determining issues of the interpretation of the Constitution. The jurisdiction of the Constitutional competence is strictly limited to interpretation of the Constitution.

Reference can be made to the following cases, Ismail Serugo V KCC Const. Appeal 2/1998, Rwanyarare & Anor Vs AG Const. Petition 11/1997, U'da journalists safety committee V AG const. Petition 6/97 and 7/97, Abuki V AG Const. Case 2/97, In the matter of Sheikh Abdul Sentamu Const. Reference 7/98, Dr. James Rwanyarare & Anor V AG const. Petition 11/1997

The High Court possesses unlimited original jurisdiction in all matters as provided under Article 139(1). In **Myers & Anor V Akira Ranch Ltd**[976] In this case, the argument was presented that section 64 of the civil procedure Act allowing Court to summarily award compensation not exceeding 2000 Shs would be in derogation of the unlimited jurisdiction of the High Court and so was unconstitutional. The Judge held that the fact that the High Court is a court of unlimited jurisdiction does not mean that the legislature cannot limit the relief to which a person is entitled or even deprive him of relief altogether. In conclusion the judge noted that section 64 of the civil procedure Act does not in any sense suggest that it applied only to subordinate courts and in the opinion of the judge, it also applied equally to the High court.

GUIDING PRINCIPLES IN THE EXERCISE OF JUDICIAL POWER.

These are contained in Article 126 which starts off by stipulating that judicial power is derived from the people and exercise of that judicial power by the conformity with the law and the people and by conformity with the law and the values and aspirations of the people (Article 126(1).

In terms of Article 126 there are 5 guiding and motivating principles in the exercise of judicial powers by the courts.

a) The dispensation of justice to all persons equally irrespective of social or economic status. This is expounded by Article 21(1) which makes all people equal under the law [Refer to 126(2)(a)].

[976] (No.2) [1972] EA 347

b) The dispensation of justice shall be undertaken without undue delay [Read 126(b)]. This principle is corroborated by Article 28(1) that gives a right to a fair hearing.
c) Victims of wrongs (civil and criminal) shall be awarded adequate compensation. (Article 23(7), 26(2), 50(1), 126(2)(c))
d) The promotion of reconciliation between parties (Article 126(2) (d)).
e) The dispensation and administering of substantive justice without undue regard to technicalities. (Article 126 (2) (e))

NB. All the above principles are subject to the law.

ARTICLE 137

The jurisdiction of the Court of Appeal while sitting as the Constitutional court is by virtue of Article 137 taken to concern with questions on interpretation of the Constitution. The jurisdiction of the Constitutional Court and to an extent the Supreme Court since 1995 has tended towards a restrictive interpretation of the jurisdiction of the Constitutional Court such that where a petition submitted to the Constitutional Court has not involved interpretation of the Constitution, it has said to be outside the jurisdiction of the Constitutional Court and therefore incompetent.

The first instance where the issue of the jurisdiction of the Constitutional court was raised was in the case of Attorney General V Tinyefuza[977] before the Supreme Court. On appeal, the then Chief Justice Wambuzi posed the issue of whether the Constitutional Court should have had jurisdiction over Tinyefuza's petition in the first place. In answering this issue, the Chief Justice considered what the cause of action is Tinyefuza's petition was and determined that this was a purported violation of right to freedom from forced labour under Article 25(2)[978] and was brought under Article 50(1) Wambuzi CJ concluded that the petition was one essentially for the enforcement of human rights and not the interpretation of the Constitution and was in his view not within the jurisdictional competence of the Constitutional Court.

Kanyeihamba JSC on his part referred to the marginal note to Article 137 and concluded that jurisdiction of the Constitutional Courts is strictly limited to the interpretation of the Constitution and therefore does not extend to enforcement of human rights.

The Late Oder JSC on his part employed the contextual interpretation in determining the jurisdictional competence of the Constitutional Court. Contextual interpretation requires the interpretation of legislation or provisions of legislation in a context and therefore that provisions, should not be looked at in isolation. Oder JSC looks at:

[977] Const. Appeal 1/97
[978] Constitution of the Republic of Uganda, 1995 (As amended)

a) The provision on the right to petition under Article 50(1). It states that anybody who is aggrieved as to his rights may petition to a "Competent court".
b) Provision on jurisdiction of the Constitutional Court i.e. Article 137(1) and 3(a) & (b).
c) Procedural laws for instituting petitions for human rights violations. He comes with 2 laws.
d) Constitutional Court (Petition for declaration under art 137) Direction LN4/1996.
e) Fundamental Right & Freedoms (Enforcement Procedure) Rules SI 26/1992.

In the final analysis, Oder JSC came to the considered opinion that petitions for the enforcement of Human rights under the Chapter 4 and brought under Article 50(1)[979] may of necessity involve questions of interpretation of the Constitution. This view of Oder JSC was subsequently upheld in particular by Justice Mulenga and CJ Wambuzi in the case of Ismail Serugo V KCC[980]. Justice Mulenga in particular stressed that the jurisdiction of the Constitution Court is primarily that of the interpretation of the Constitution but it also extends to petitions for the enforcement of human rights which entail the interpretation of the Constitution.

The courts however were more active in dismissing those petitions which only concerned enforcement of human rights under Article 50 and did not at the same time involve issues requiring constitutional interpretation. These included: Rwanyarare & Anor V AG[981]

In this case, the petitioners challenged the constitutionality of several provisions of the Constitution including Article 269 as being in violation of their freedom of assembly and association under Article 29(1)(d) and (e). The Constitutional court considered the petition as brought under Article 50(1) as essentially concerning with the enforcement of human rights and dismissed it.

Uganda Journalist Safety Committee & Anor V AG CP 6/1997.

In this case the petitioners challenged the Constitutionality of sections 42 and 60 of the Penal Code on sedition and publishing false news as being in violation of their rights to freedom of speech and expression under Article 29(1)(a). The petition was also dismissed.

UJSC & 2 Others V AG CP 7/1997.

The petitioners in this case were challenging the Constitutionality of the Press and Journalists Statute 1995 as being in violation of their rights to freedom of the press under Article 29(1)(a) and right to conduct a lawful profession under Article 40(2). This petition was also thrown out.

In Onyango Obbo & Anor V AG[982], The Petitioners were challenging provisions as sedition and publishing false news under the PC as violating their right under 29(1)(a) and in any event these penal provisions were seen as a restriction to their rights under Article 43, they were not justifiable

[979] Constitution of the Republic of Uganda, 1995 (As amended)
[980] Civil Appeal 198(sc)
[981] Constitutional Petition 11/1997.
[982] Constitutional Petition 15/97.

in a free and democratic society.

Reference can also be made to the following cases, In Re Sheik Abdul Sentamu & Anor CR 7/98, Salvation Abuki & Anor V AG CC 2/97, Uganda V Kyamanywa (Crim. App. /98(SC), Zackary Olum & Anor V AG CC 6/99.

INDEPENDENCE OF THE JUDICIARY AS AN ELEMENT OF THE EXERCISE OF JUDICIAL POWER AND A CHECK ON THE EXECUTIVE

It has been opined by many legal writers that one of the most obvious ways to determine whether or not a particular country enjoys a high degree of democracy and justice is by looking at how independent its judiciary is. The doctrine of independence of the judiciary and its importance was underscored in the well known case of Masalu Musene & 3 Ors V AG[983] wherein Mpagi Bahigeine JA noted that judicial officers are charged with safeguarding the fundamental rights and freedoms of the citizenry. In the performance of their duties they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgment or cause them to play into the hands of corrupt elements. An independent judicial officer is indispensable to the administration of impartial justice and the rule of law. It was also noted that judicial independence must be upheld because of all the 3 arms of government, the judiciary is viewed as the weakest and the most vulnerable. The court cited the United States Supreme Court in Evans V Gore[984] where it was remarked that the judiciary is beyond comparison the weakest of the 3 arms and that all possible care must be taken to ensure that it defends itself against the attacks of the other two arms. It was noted that the Executive dispenses the honours and equally holds the sword of the community yet the Legislature commands the purse and prescribes the rules by which duties and rights of citizens are regulated. Yet in contrast, the Judiciary neither has the influence over either the sword or the purse.

The doctrine/principle of independence of the Judiciary is contained in Article 128 of the Constitution. The necessity of an independent Court which is also impartial is also an attribute to the right of a fair trial under Article 28.

Although Article 128 does not address this particular aspect the independence of the Judiciary requires that decisions of the Court be respected and upheld by the other organs of government otherwise this would render the entire judicial function illusory.

[983] Constitutional Petition No. 5 of 2004
[984] 253 US 245 (1920)

FACETS OF THE DOCTRINE OF JUDICIAL INDEPENDENCE AND THE SAFEGUARDS UNDER THE 1995 CONSTITUTION

These appear in the 1995 Constitution and include the following:

i) *Constitutional disposition of judicial power in the people of Uganda.*

Article 126(1)[985] provides that judicial power is derived from the people (and not the State or government in power) and shall be exercised by the courts in the name of the people and in conformity with law and with the values, norms and aspirations of the people. Similarly, Article 127[986] prescribes and enjoins Parliament to make laws providing for the participation of the people in the administration of justice.

Accordingly, judicial power does not any more flow from the Crown as it did in the Colonial days or from the President as it apparently did before the enactment of the 1995 Constitution. It can no longer be dispensed at the whims of the ruling government or any person or authority. This provision is meant to ensure that courts act in line with the aspirations and mandate of the people. Moreover, Article 1(1)[987] places all power in the Ugandan people. This power must now be taken to include judicial power.

The autonomy of the Judiciary is further sought to be re-enforced under clauses 5 and 6 in regard to the remuneration of judicial officers and financing of the Judiciary. All this money comes from a consolidated fund.

ii) *Constitutional provisions for the independence of the judiciary*

Article 128 (1)[988] provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. It then sets out 7 principles upon which this very fundamental doctrine rests. In MASALU's case, Twinomujuni JA noted that the 8 pillars in Article 128 are a single package and are about independence of the judiciary. One can not therefore remove any one of them without adversely affecting the others.

THE PILLARS

a) Article 128 (2) is to the effect that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions and under Article 128 (3) all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. In ***Masalu Musene*** case, Mpagi Bahigeine JA noted that the maintenance of judicial independence as enshrined in Article

[985] Constitution of the Republic of Uganda, 1995 (As amended)
[986] Ibid
[987] Ibid
[988] Ibid

> 128 depends upon public support for the judicial process to run effectively and independently. It is the public respect for that principle that sustains it. By public is meant the government to reinforce and facilitate the effectiveness of the independence.

Twinomujuni JA on his part reiterated that for the Judiciary to be effective, it needs assistance from all but especially from the Executive and Legislature. He thus regretted the so called chastisement of the Judiciary apparently for no other reason other than it doing a job vested in it by the Constitution. He cited examples where after passing a judgment, it is followed by threats to 'fix'' or 'sort out' the biased judges or to investigate corrupt judges. Clearly these two provisions form the bedrock of the doctrine.

However, the assistance must not only be necessary, but it must not be such that it instead violates the independence of the Judiciary. In The Uganda Law Society V Attorney General[989], the doctrine was held to have been blatantly violated. The back ground to it was that Rt. Colonel Kiiza Besigye, a leader of the political party known as the FDC and 22 others (the accused) were jointly charged with treason and misprision of treason under the Penal Code Act. The indictment was then read to them. The 1st accused, Dr. Besigye was separately charged with rape. They were later committed to the High Court for trial. On 16, November, 2005, the accused were taken to the High Court for a bail application before Lugayizi J. 14 of the accused satisfied the conditions for grant of bail and were granted the same. However, because of certain acts of the security personnel at the High Court premises, the bail papers could not be processed. The security men were dressed in dark clothes and heavily armed. They entered into some of the Court offices and interrupted the court's normal duties. The accused in consequence thereof had to be taken back to prison. A petition was accordingly brought challenging these acts of the army. In his judgment Engwau JA noted that 'under Article 128 (3)[990] of the Constitution, all organs and agencies of the state are required to accord to the courts such assistance as may be required to ensure the effectiveness of the courts. What those military personnel did that day was not an assistance envisaged in Article 128 (3) of the Constitution'

b) Under Article 128 (4), a person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power. This protection is further buttressed in the Judicature Act Section 46 (1) which is to the effect that a judge, commission or other person acting judicially shall not be liable to be sued in any civil court for ant act done or ordered to be done by that person in the discharge of his or her judicial functions whether or not within the limits of his or its jurisdiction.

[989] CONSTITUTIONAL PETITION NO. 18 OF 2005
[990] Constitution of the Republic of Uganda, 1995 (As amended)

The essence of this is that judges must not decide cases with a premeditated fear of civil or criminal actions against them. In EVANS V GORE, the US Supreme Court cited John Marshall, a famous 19th Century lawyer as intimating that it is to the last degree important that a judicial officer should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. To him one of the worst things that can exist is an ignorant, corrupt and dependent judiciary.

c) Article 128 (5) It is to the effect that the administrative expenses of the Judiciary including all salaries, allowance, gratuities and pensions payable to persons serving in the judiciary shall be charged on the Consolidated Fund and under Article 128 (6), the Judiciary shall be self accounting and may deal with the Ministry responsible for Finance in relation to its finances. These two provisions are meant to ensure that there is a reasonable degree of self accounting and control over judicial funds such that the welfare of judicial officers is not placed at the whims and mercy of the Executive or Legislature. It is not in doubt that you can not separate financial matters from the broad question of judicial independence.

d) Article 128 (7) is to the effect that the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage. In MASALU MUSENE's case, the Petition went to the core of this requirement. The 4 Petitioners all of whom are judicial officers sought a declaration under Article 137 that the application of Section 4 (1) of the Income Tax Act Cap 340 which sought to tax their salaries was inconsistent with Article 128 (7). The majority of the Court of Appeal sitting as the Constitutional Court did not hesitate to rule that Section 4 (1) was in violation of Article 128 (7). Mpagi Bahigeine JA on her part stated that since by the nature of their work, judicial officers can not engage on other business so as to bridge the financial vacuum besetting them, corruption will be nurtured by a system that fails to pay its judicial officers well. That without undiminishable or untaxable remuneration or compensation, the principle of the independence of the judiciary will have become nugatory and a mere mockery as lawyers will be less willing to join the Bench in preference of their lucrative chambers.

e) Article 128 (8)[991] states that the office of a Chief Justice, Deputy Chief Justice, Justice of the Supreme Court, Justice of Appeal or Judge of the High Court shall not be abolished when there is a substantive holder of that office. This provision is made stronger by Article 144 (1) which adds to the strength of this security of tenure. The retirement age of the Chief

[991] Constitution of the Republic of Uganda, 1995 (As amended)

Justice, Deputy Chief Justice, Justice of the Supreme Court, Justice of Appeal is 75 years whereas 65 years are stated for the Principal Judge or a Judge of the High Court.

Moreover, under Article 144 (2), a judicial officer may be removed from office only for i) inability to perform the functions of his office arising from infirmity of body or mind ii) misbehaviour or misconduct and iii0 incompetence. The word 'only' means that apart from those grounds, no other ground can be used to remove a judicial officer from office.

Even then, the removal must strictly comply with the procedure provided in Article 144 (4) – (7). Under Article 144 (4), the question of removal of a judicial officer should be investigated and referred to the President by either the Judicial Service Commission or Parliament. And under Article 144 (4) (a) in the case of a CJ, DCJ or PJ, the tribunal appointed by the President to consider the matter must consist of 5 people who are or have been Justices of the Supreme Court or are or have been judges of a court having similar jurisdiction or who are advocates of at least 20 years standing. In the case of a Justice of the Supreme Court or Justice of Appeal, under Article 144 (4) (b), it must consist of 3 persons who are or have been Justices of the Supreme Court or who are or have been judges of a court of similar jurisdiction or who are advocates of at least 15 years standing. In the case of a Judge of the High Court, 3 persons who are or have held offices as Judges of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from such a court or who are advocates of at least 10 years standing. The net effect of all these requirements is that the security of tenure of judicial officers should not be under threat.

f) Judicial appointments

Under Article 147 (1) (a), it is the Judicial Service Commission which advises the President in the appointment of top judicial officers and the JSC under Article 147 (2), is independent and shall not be subject to the direction or control of any other person or authority. The mode of appointment seeks to discourage judicial officers from seeing themselves as the beneficiaries of presidential prerogatives so that they can at all times administer justice without fear that he who appointed will without assigning any reason disappoint when he deems fit.

g) Amendment of Article 128 (1) must be the subject of a referendum

Under Article 259 (2) (g), Article 128 (1) i.e. the 8 pillars above, on the independence of the Judiciary shall not be amended unless (a) it is supported at the 2nd and 3rd readings in Parliament by not less than two thirds of all members of parliament and (b) has been referred to a decision of the people and approved by them in a referendum.

While commenting on this requirement in ***Masalu Musene's case***, Twinomujuni JA noted that its justification was that the Constituent Assembly who framed the Constitution were apprehensive that the other 2 strong arms of government might one day seek to destroy the 8 pillars of an

independent judiciary. That all the 8 pillars require a referendum since to amend or remove any one of them would be to amend Article 128 (1) by infection. To him, Article 259 (2) (g) goes to show how far the CA in their wisdom were prepared to go in order to establish and ensure retention of an independent judiciary.

h) The Judicial Code of Conduct, 2003

The Code has 6 principles which encourage self determination of the Judiciary. They include independence, impartiality, integrity, propriety, equality and competence and diligence. The Principle of independence which is more pertinent requires that a judicial officer shall not be influenced by any direct or indirect extraneous influence, inducements, pressures, threats or interference from any quarter or for any reason and he or she shall reject any attempt arising from outside the roper judicial process to influence his decision. The Code also gives independence at an individual level and adds that the officer must base his decisions on the basis of his or her assessment of the facts and in accordance with conscientious understanding of the law.

This is in addition to the protection and requirements of the judicial oath in Article 149 which requires every judicial officer to take an oath in the 4th Schedule to the Constitution before assuming office. This Oath enjoins the officers to exercise judicial functions entrusted to them and to do right to all manner of people in accordance with the Constitution and to dispense justice without fear or favour or affection or ill-will.

Independence of the Judiciary requires transparency of the process of appointment of judicial officers. This is to ensure that persons of good repute and moral conduct are appointed to the courts as well as to shelter judicial appointment from political and sectarian tendencies.

The JSC has been seen as an impartial body which allows for the appointment of Judges based on merit rather than political inclination. But not everybody has shared this view unanimously. There have been questions raised about certain appointments or the timing of the appointment with allegations of political patronage. This was particularly the case with the appointment of Professor Kanyeihamba as Justice of the Supreme Court just shortly before the hearing of the appeal by the government in the case of Attorney General Vs Maj. Gen Tinyenfuza Const. Appeal No. 1/97. Godfrey Lule, Counsel for Gen Tinyefunza made an appeal to the Supreme Court for Justice Kanyeihamba to disqualify himself from hearing the appeal on grounds of likelihood of bias since prior to his appointment he had been Presidential Advisor. Kanyeihamba refused to disqualify himself. Another victim has been Court of Appeal Justice, Steven Kavuma whom many see as a political appointee to the Bench to pacify and neutralize the Court of Appeal especially so because it also doubles as the Constitutional Court. Similarly, the appointment of Bart Katureebe a former Attorney General to the Supreme Court Coram was attended to with similar attacks.

Independence of the Judiciary requires that judicial officers are immune from any action or suit for acts or omissions by the officer in exercise of judicial power as stipulated under Article 128(4). The purpose if this provision is to ensure that the judicial officer is not destructed from carrying out his or her functions in order to deal with pending actions or suits as well as to ensure that he exercise justice freely without fear that one of the parties may institute a civil suit in respect of the decision read out by the judicial officer.

Refer to John Arutu V AG. Const. Petition No. 4/97 and Egbe V Adefarasim & Anor (1986) LRC (Const) 596.

The untamed president in the politics of Uganda seeks to manifest the hangover of the colonial era where all power was beginning from and returning to the colonial Governor, the exhibit of colonial power and whose presence meant that he was acting as the Chief administrator, Chief legislator, Chief Judge, Chief Police Officer and Chief Executioner. This colonial legacy seems to have been systematically inherited by post independence regimes.

As early as independence, the 1962 Constitution reflected this hangover. Plus, being the Commander-in Chief of the Armed forces, the President was empowered to appoint and dismiss chairmen and officers of the Public Service Commission and the Judicial Service Commission. Similarly, the same applied to the Chief Justice and the DPP. Courts were thus effectively prevented from inquiring into whether or not the President had acted upon the advice of anyone or indeed whether he had acted rightly.

The 1967 Constitution eroded other arms of government even more. Concerning courts, the most effective fetter on the Judiciary was the presidential power over the appointment of the Chief Justice and although concealed, the power to dismiss.

Independence of the judiciary was tested in recent times and it appears that the government failed miserably to stand up to the test. In The Uganda Law Society V AG[992], the doctrine was held to have been blatantly violated. The back ground to it was that Rt. Colonel Kiiza Besigye, a leader of the political party known as the FDC and 22 others (the accused) were jointly charged with treason and misprision of treason under the Penal Code Act. The indictment was then read to them. The 1st accused, Dr. Besigye was separately charged with rape. They were later committed to the High Court for trial. On 16, November, 2005, the accused were taken to the High Court for a bail application before Lugayizi J. 14 of the accused satisfied the conditions for grant of bail and were granted the same. However, because of certain acts of the security personnel at the High Court premises, the bail papers could not be processed. The security men were dressed in dark clothes and heavily armed. They entered into some of the Court offices and interrupted the court's normal

[992] CONSTITUTIONAL PETITION NO. 18 OF 2005

duties. The accused in consequence thereof had to be taken back to prison. The petition therefore sought among other declarations a declaration that the acts of the Anti Terrorism Task Force Urban Hit Squad at the High court on 16th November, 2005 contravened Articles 23(1) & (6) and 128 (1) and (2) of the Constitution. The court held that the said acts contravened the independence of the judiciary. That there were enough police personnel at the High Court premises and accordingly, the deployment of the Anti Terrorism Task Force was completely unnecessary. In his judgment Engwau JA noted that 'under Article 128 (3) of the Constitution, all organgs and agencies of the state are required to accord to the courts such assistance as may be required to ensure the effectiveness of the courts. What those military personnel did that day was not an assistance envisaged in Article 128 (3) of the Constitution.

In her judgment Byamugisha JA concluded that 'the acts of the military did interfere with the normal operation of the court and its independence in that the accused persons who had been granted bail were unable to process their bail documentation because of interference by the military. It was in my view a threatening scenario and it contravened the provisions of Article 128 of the Constitution which guarantees the independence of the judiciary…'

The after math of this clear abuse of the independence of the judiciary forced the Principal Judge Justice Ogoola James to write a poem about the events at the High Court which he described as 'the most naked and grotesque violation of the twin doctrines of the rule of law and the independence of the judiciary'. To him, this amounted to the defilement and desecration of our temple of justice. He equated the act to the heinous days of Idi Amin when Chief Justice Ben Kiwanuka was abducted from the premises of Court never to be seen alive again.

Shortly thereafter, the Uganda Law Society also issued a statement criticizing the acts. The Uganda Judicial Officers Association also followed suit. Members of the Uganda Law Society fully robed later protested in front of the High Court protesting the deterioration of the rule of law and the immediate resignation of the Attorney General, Khiddu Makubuya. They also issued a statement to the effect that they will no longer recognize the Attorney General. The East Africa Law Society also issued a statement challenging the said violations. Similarly, the International Commission of Jurists showed its own fears and immediately sent a Commissioner to oversee the Besigye trial.

As if these events were not enough to show that the independence of the judiciary had already been violated, on November 18th,2005 Lugayizi J withdrew from the treason case. He did not give any reasons for doing so but many believe that it was intimidation from the State. The Principal Judge then took over the Besigye hearing.

In this heat, on November 19th, 2005 there was an NRM National Delegates Conference which returned Y.K. Museveni as the unopposed party Chairman and presidential candidate. He in an

unprecedented speech threatened the judiciary by stating openly that he would not hesitate to fire judges who unjustly issue eviction orders. He said 'The government will not tolerate the eviction of tenants caused by the rulings of corrupt judges and magistrates. I will suspend any judicial officer and constitute a judicial commission of inquiry into his or her activities, if there is any evidence of any violation of the Land Act…'

The events of 16th November, 2005 created a new error of disrespect for the judiciary. Never had so clear a statement about threatening the judiciary ever been made by an executive leader.

On November 18th 2005, the drama continued. Dr. Besigye's co-accused were charged with terrorism before the General Court Martial (GCM). Terrorism charges must be tried by the High Court under S 6 of the Terrorism Act No. 14 of 2002 but the UPDF Act gives the GCM jurisdiction over any crime if the suspect is an ex-military or a civilian found to have aided or abated in unlawful military operations or to be in possession of arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces. 5 of the accused then petitioned the Constitutional Court challenging the constitutionality of the provisions of the UPDF Act. They as well challenged the parallel jurisdiction of the GCM and the High Court arguing that this would expose them to double jeopardy. The Uganda Law Society also independently lodged its own petition.

On November 24th 2005 when Besigye's bail application was scheduled to be heard by the High Court, he was instead committed to the GCM on charges of terrorism and illegal possession of fire arms. During the hearing, the Chairman of the GCM General Elly Tumwine ordered the arrest of two f Besigye's lawyers, Caleb Alaka and Erias Lukwago who were released thereafter. The following day. The Principal Judge granted what he termed s interim bail to Besigye. He acknowledged the pending reference of constitutional matters to the Constitutional Court. Another big blow to the independence of the judiciary was again witnessed. Despite the bail ruling, prison authorities refused to release Besigye. Their reason was that he was still on remand in respect of the GCM. This was not made any better by rumours that the Defence Minister Amama Mbabazi and the DPP had visited the Chambers of the Principal Judge.

On November 29th 2005, Besigye's lawyers filed a bail application at the High Court in respect of the GCM charges arguing that since the High Court was superior to the GCM, it has unlimited jurisdiction to grant bail to Besigye. They also concurrently lodged Constitutional Petition No. 17 of 2005 challenging the jurisdiction of the GCM arguing that the offences Besigye was charged with were based on the same facts as those over which he was being charged in the High Court which amounted to double jeopardy.

On November 2nd 2005, Justice Remmy Kasule ordered the GCM to stop hearing the case against Dr. Besigye. He also granted leave for him to challenge the authority of the GCM. He however

refused to order his release.

On December 12th 2005, Justice Kasule refused to order Besigye's release ahead of his nomination to run as a presidential candidate. His reasons were that the bail application which also challenged Besigye's trial in the GCM could not be heard until the Constitutional Court pronounced itself on those very important matters referred to it. Nonetheless, he ruled that the GCM was subordinate to the High Court until the Constitutional Court rules otherwise. Accordingly, he further restrained the GCM from proceeding with the case hearing.

On December 15th 2005 the Constitutional Court started hearing Constitutional Petition No. 16 of 2005 by Besigye and 5 others. On December 19th 2005 the treason trial of Dr. Besigye started. At the same time, Besigye's lawyers filed a fresh application challenging his continued illegal detention. Katutsi J on 22nd December ordered the Commissioner General of Prisons to appear before him to explain why Besigye continued to be in detention even after the grant of bail by the Principal Judge. He also ordered the immediate stay of the GCM proceedings.

On January 2nd 2006, the rape case against Besigye started at the High Court. Katutsi J found the extension of Besigye's remand warrant and his continued detention illegal. He ordered his immediate release upon which he was released. The independence of the judiciary was also later tested when Kagaba J who was hearing the treason case stood down.

More recently, the judiciary had displayed its anger towards the increased interference of the executive in judicial matters. On March 1st 2007, the PRA suspects being charged together with Besigye were produced at court for the hearing of an application filed by the Solicitor General. It was adjourned to March 7th 2007 at the request of the Solicitor General. Court in the interim ordered the release of the suspects on bail in accordance with its earlier order of 16th November, 2005 which had not been obeyed even at the time. As the Registrar of the High Court was processing the bail documents, security men surrounded the Criminal Registry and insisted on taking back the suspects to prison. A scuffle ensued at the court premises. 6 out of the 9 suspects satisfied the conditions for bail and the 3 who did not were handed back to the prisons authorities. The 6 however could not leave court premises because of a heavy deployment by the army. As the chaos continued, the army was directed by high ranking judicial officers at the court to vacate the court premises. They disobeyed and instead brought more reinforcement with a more aggressive intention of re-arresting the PRA Suspects. In the process, Mr. Kiyimba Mutale, counsel defending the suspects was badly beaten up and left soaked in blood. He was rushed to the chambers of the Deputy Chief Justice. At about 8:30 pm, the 6 suspects were released and handed over to their advocates but the military personnel using their high-handedness re-arrested them and whisked them to an unknown destination.

On 2nd March 2007, the judiciary met in an impromptu meeting and resolved to begin a sit-down strike because of these violations. In a press-statement read by the Deputy Chief Justice, they demanded an apology from the Executive for the events and re-assurances of non-repetition of the events which were an affront to the independence of the judiciary. Accordingly, they resolved to suspend all judicial business with effect from March 5th 2007.

In her statement, the Deputy Chief Justice notable cited the following reasons for the strike:

a) Disobedience of court orders with impunity
b) The constant threats and attacks on the safety and independence of the judiciary and judicial officers
c) The savage violence exhibited by security personnel within the court premises
d) The total failure by all organs and agencies of the State to accord to the courts assistance as required to ensure effectiveness of the courts under Article 128 of the Constitution
e) The recognition that judicial power is derived from the people, to be exercised by the courts on behalf of the people in conformity with the law, the values, norms and aspiration of the people of Uganda.

Shortly thereafter, the Uganda Law Society in an emergency meeting held on 6th March 2007 resolved to suspend the Attorney General and the DPP together with the Inspector General of Police from the Law Society and to go on a sit down strike after the Judges had resumed work. A meeting of the Judges and other judicial officers held on 7th March 2007 resolved to continue with the strike instead of requests from the President and other high ranking officers to resume duty. All this was said to be in retaliation of the gross violations of independence of the judiciary. Shortly thereafter, the Judges agreed to resume their duties effective 12th March 2007 yet the advocates on the same day effectively began their 3 day sit down strike. This has been seen by many as the climax of the abuse of the doctrine of judicial independence in Uganda. The State has failed to show its commitment to respect one of the 3 arms of government and the future of judicial independence remains very much in doubt.

But apart from this, there have been other events were the executive has displayed public willingness to disrespect courts of law and their decisions. In 2006, State Minister for information and communication technology, Alintuma Nsambu was convicted by Masaka Grade One Magistrate Godfrey Kaweesa for issuing a bounced cheque to a Rakai- district based women's group. He was sentenced to one year in prison or a fine of 3.2 million which he paid. Shortly thereafter, the then Minister for Ethics and Integrity, Dr. Nsaba Buturo disclosed that the matter had been discussed by government i.e. Cabinet which found that the magistrate had mishandled the case. He said that the magistrate was to be probed and that he had not considered all facts as he

should have and that the decision involved some politics. He added that he had advised him against appealing and that 'we shall handle the matter administratively'. It remains to be doubted what exactly these administrative measures meant. The Principal Judge in the days that followed undertook to stand up to the rights of the magistrate and to ensure that he would not be intimidated.

THE POST-1995 ERA AND JUDICIAL INDEPENDENCE

The courts during this time have tried to exercise their independence but amidst a lot of pressure on them from the other two arms. In the Movement Poster man case May 2000, an individual in Lugazi during the referendum period tore a movement poster and was brought before the magistrate. The magistrate saw no wrong with what he had done on the basis that he had been exercising his freedom of conscience under Article 29(1)(b).

THE INDEPENDENCE OF THE JUDICIARY IN CONTEMPORARY UGANDA

I have elucidated earlier on how the powers of the Kingdom of Buganda had an effect on the local courts. I have also drawn comparison from the origins of the court system in England and how the King had great influence in its promulgation. Today is not any different! Most offices in the judiciary today are by law constituted by appointment by the president. Can we therefore say that such a system can ever allow for the judiciary to be truly independent of the executive?

The Constitution of 1995 clearly provides for the independence of the judiciary. Judicial independence refers to the ability of courts and judges to carry out their responsibilities without being influenced or controlled by other actors, whether public or private. In a normative sense, the phrase also refers to the level of independence that courts and judges should have.

This ambiguity in the meaning of the word judicial independence has exacerbated already-existing debates and misunderstandings about its appropriate definition, prompting some scholars to wonder if the idea serves any analytical function at all. In general, there are two origins of disagreement. The first is philosophical, in the sense that there is a lack of clarity about the kind of independence that courts and judges can have. The second is normative, in the form of debate about the appropriate level of judicial independence.

In practice, independence from other governmental actors is commonly regarded as both the most crucial and the most difficult to attain sort of judicial independence. On the one hand, those who believe that courts have a specific obligation to ensure that individuals and minorities do not endure illegal or unjust treatment at the hands of the government or a tyrannical majority greatly respect judicial independence. On the other hand, that type is thought to be particularly difficult to attain because the other arms of government usually have the capacity to disregard or impede judicial

decisions, if not also to retaliate against the courts for decisions they disagree with. The judiciary, according to Alexander Hamilton's famous definition, is the "least dangerous" institution, as it has "no control over either the sword or the money," and hence is least capable of protecting itself against the other branches.

Judicial independence from government control has been formalized since at least 1701, when England's Act of Settlement offered judges legal protection from unilateral dismissal by the crown as part of a greater shift of power toward Parliament and the courts. Even states that do not implement judicial independence are likely to profess a commitment to it. The majority of the world's existing written constitutions include some type of express protection for the judiciary's independence, and the proportion of such texts has been steadily increasing over time. Judicial independence has also been explicitly acknowledged at the international level, as evidenced by the United Nations General Assembly's adoption of the Basic Principles on the Independence of the Judiciary in 1985. However, empirical evidence reveals that the existence of nominal constitutional protections of judicial independence is unrelated to actual judicial independence respect in practice.

Several problems must be addressed in any thorough and consistent understanding of judicial independence. “Independence for whom?”, “Independence from whom?”, and “Independence from what?” are the first three questions. However, in order to provide satisfying answers to such concerns, it is vital to analyze why judicial independence is important and what it is designed to achieve. In other words, it is vital to answer the question, "What is the aim of independence?"

Individual judges might be defined as having judicial independence, or the judiciary as a whole can be defined as having judicial independence. In terms of practicality, neither viewpoint is clearly superior than the other.

On the one hand, if judicial independence is protected at the institutional level but not at the individual level, individual judges may be constrained to follow the preferences of the judiciary's leadership, resulting in a less-than-complete application of the rule of law. The extent to which the judiciary as an institution compels obedience and conformity from its members, for example, has been criticised for producing timid judges who are unwilling or unable to rule against the government in Chile and Japan.

Individual judges, on the other hand, will be free to pursue their personal inclinations if judicial independence is secured at the individual level. Such unchecked authority not only encourages abuse, but it also increases the likelihood that judges would make contradictory decisions, thus jeopardizing the law's predictability and stability.

Only when a court settles a case involving the interests of some actor or organization with potential or real power over the court does the existence and sufficiency of judicial independence become

practical concerns. In general, the more powerful the actor whose interests are at issue, the more important it is to maintain the court's independence from that actor. However, if both parties in a disagreement are powerful, the symmetry of power may give some or all of the protection required.
Disputes between private actors, disputes between government actors, and disputes between private actors and government actors are the three scenarios that a court may meet. In the first scenario, the court must seek to maintain its independence from the parties, who may attempt to undermine it by bribery or intimidation, among other methods. In that case, the government is a supporter of judicial independence, and it can be expected to defend the court's independence from the parties' efforts.
In the second scenario, judicial independence has a good chance of being restored. The court is urged to select sides between two powerful actors in an unbiased manner rather than confronting a powerful actor on behalf of a weak one. Regardless of which side the court chooses, the consequence will be a two-against-one dynamic that should safeguard the court from vengeance. Because it is at war with itself, the government does not constitute a significant danger to judicial independence in such circumstances.
In the third scenario, the government does pose a serious threat to judicial independence, but the people can either mitigate or exacerbate the harm. For example, if a ruler seeks to illegally extend his or her own term of office, the court's independence from the government is threatened, but its ability to withstand that threat is greatly enhanced if it can count on public support if it rules against the government. The independence of the court is protected as long as it is in a position to side with either the government or the people. Either should be capable of supplying the court with the necessary support to survive the other's attacks. In other cases, such as illegal government discrimination against an unpopular minority, the court may be requested to take a position that is hostile to both the government and the public. The chances for judicial independence are at an all-time low: the judiciary is expected to display independence from both the government and the public, but it lacks a powerful friend to assist it withstand the pressures it faces.
In the long run, however, it will be difficult, if not impossible, to establish a totally independent judiciary free of all political and popular influence. Even a very independent court, such as the United States Supreme Court, is likely to be transformed by political forces over time and to fit the demands of a persistent political majority, according to the Supreme Court's comparatively long history. It is naive to believe that a small group of judges, who lack the power of the purse or the sword, could constantly disobey more powerful actors and organizations without suffering any consequences, regardless of what statutory protections they may have. There are limits to what may be accomplished simply by altering the judiciary's institutional characteristics or enacting solemn

affirmations concerning judicial independence's inviolability. Finally, even moderate degrees of judicial independence are likely to be contingent on political and historical factors that are external to the court and may be out of reach, such as the maintenance of a stable, competitive multiparty democracy.

Not all forms of judicial decision-making influence pose a threat to judicial independence. While some behaviours aimed at influencing courts, such as bribery and intimidation, may be prohibited by any reasonable definition of judicial independence, others can only be judged on the basis of debatable normative judgments. For example, in the instance of public protests in front of courthouses, one viewpoint would be that such protests should be valued as a form of political expression, and that judges in a democracy are allowed, if not required, to consider public opinion. Alternatively, one could argue that judges, like jurors, should be insulated from such manifestations of public opinion to ensure that their judgments are not affected by considerations that should be irrelevant. Similarly, a public campaign to deny a judge re-election because he has ruled in controversial ways might be viewed as either a positive expression of democracy or a threat to judicial independence.

By fiat, it is impossible to determine if such efforts to influence court decision-making are compatible with judicial independence. In such cases, defining the requirements of judicial independence necessitates a normative theory of what courts are supposed to consider when making decisions, what judicial independence is supposed to achieve, and how judicial independence can and should be balanced against other goals and considerations.

Judicial independence is sometimes viewed as a means to an end rather than a goal in and of itself. The ultimate goal, most people would agree, might be stated as the fair and unbiased adjudication of conflicts in conformity with the law. If that is the goal, however, the pursuit of judicial independence faces a number of challenges.

One argument is that the objective is unrealistic because it is founded on a misunderstanding of the nature of law and adjudication. Legal theorists often hold the belief that the law is frequently uncertain, making it impossible for judges to resolve disputes solely by applying past law. Rather, the act of adjudication, it is claimed, requires judges to create the very law that they appear to administer. However, if adjudication necessitates law making, judicial independence protects judges' ability to decide disputes in accordance with the law, rather than allowing them to make and impose whatever laws they see fit, a prospect that many see as incompatible with either the proper role of judges in a democracy or the concept of separation of powers.

Another argument is that judicial independence is neither required nor sufficient to provide unbiased adjudication in conformity with the law, and that if left unchecked, it may even harm that

purpose. On the one hand, a judge facing reprisal may nevertheless be able to decide cases impartially. Giving judges the flexibility to determine matters as they see fit, on the other hand, does not guarantee that they will choose to do so fairly and in line with the law. Even if it were feasible to create a judiciary that is fully independent of both popular and political influence, what would prevent judges from making decisions based on personal bias or self-interest? Many people believe it is critical to strike a balance between judicial independence and judicial accountability, as well as to discern between appropriate and inappropriate kinds of judicial influence. Any process designed to prevent or punish judicial abuse of authority, on the other hand, is likely to be vulnerable to abuse. The ensuing question of how to oversee the judges who oversee the government—*quis custodiet ipsos custodes* (Latin: "Who watches the watchers?")—has long perplexed constitutional and political scholars and admits no simple solution.

THE SHADOW OVER UGANDAS JUDICIAL INDEPENDENCE.

Since the 1960s, Ugandan courts have explored and applied the political question theory. The political question doctrine is a result of the separation of powers doctrine, and it states that certain constitutional concerns are constitutionally entrusted to the elected branches of government to resolve. As a result, such questions are non-justiciable, and the court must refrain from ruling on them if doing so would interfere with the elected branches of government's powers. The overarching idea is that such issues must be resolved through the political process. The development and application of the political question concept in Uganda, like Ghana and Nigeria, has been inspired by legal developments in the United States. The development of case law and tendencies in the application of the political question doctrine subject in Ugandan jurisprudence are examined in this article. The history of Uganda's political question philosophy is discussed in this article. This article also examines the case law developments and trends around the doctrine's application in Uganda, arguing that the theory is unquestionably part of Ugandan constitutional law.

In Uganda v Commissioner of Prisons Ex Parte Matovu[993], the Uganda High Court, sitting as a Constitutional Court, considered and accepted the political question theory. The applicant, Michael Matovu, was arrested on May 22, 1966, under the Deportation Act, and then released and held again on July 16, 1966, under the Emergency Powers Act and the Emergency Powers (Detention) Regulations 1966, which had come into effect after his initial detention. A number of events occurred between February 22 and April 15, 1966, including the imposition of a state of emergency in the Buganda region. Following these events, then-Prime Minister Milton Obote unilaterally

[993] Uganda v. Commissioner of Prisons Ex Parte Matovu, [1966] EALR 514.

suspended the 1962 Constitution, which established a federal form of governance between the Kingdom of Buganda and the Republic of Uganda. Through the imposition of a new Constitution in 1966, Obote effectively took over all powers of the government of Uganda by depriving the ceremonial President and Vice-President of Uganda of their offices, in violation of the 1962 Constitution, and vesting their authorities in the Prime Minister and the Cabinet. The pigeon hole Constitution, which was forced on Uganda when Parliament ratified it on April 15, 1966, is referred to some commentators as the pigeon hole Constitution because members of Parliament are reported to have found copies of the Constitution in their pigeonholes for them to approve. The Commission of Inquiry into Human Rights Violations summarizes the events of 1966 as follows:

The Prime Minister suspended the 1962 Constitution in February 1966. This was a unilateral decision made without consulting Parliament or the Ugandan people. Uganda was effectively administered without a constitution for a few months. Members of Parliament were stuffed into pigeonholes and asked to endorse the 1966 Constitution even before reading it, which they did. To put it another way, this Parliament unexpectedly and without consulting anyone formed a Constituent Assembly. They passed and promulgated a Constitution about which they had no idea.

The applicant in Matovu was seeking an order for his release. The Matovu Court had to decide whether the Emergency Powers Act 1963 and the Emergency Powers (Detention) Regulations 1966 were utra vires the Constitution to the extent that they allowed the President to take actions that were not justifiable for the purpose of dealing with the situation that existed during the state of emergency. Because there were two constitutions before the Matovu Court, the 1962 Constitution and the 1966 Constitution, the Court raised the issue of the legitimacy of the 1966 Constitution on its own. When questioned by the Matovu Court, counsel for the applicant stated that he had some reservations about the Constitution of 1966's legal legitimacy. The administration, on the other hand, claimed that the Matovu Court lacked jurisdiction to investigate the Constitution's legality because, among other things, the creation of a Constitution is a political act that falls outside the Court's purview.

According to the government's argument, because there are three branches of government, it was the legislature's and executive's responsibility to decide the Constitution's validity, as the issue was a political one; the Court's responsibility was to accept that decision and simply interpret the Constitution as it was presented to it. The administration further argued that members of the legislature who voted to pass the Constitution did so as representatives of their constituents, to whom they must account. Furthermore, the Matovu Court would be usurping the functions of the legislature if it undertook to enquire into and pronounce on the constitutional validity or otherwise of the Constitution of 1966, because judges are not elected but appointed and represent no specific

constituencies to whom they must account for their stewardship. The government cited the United States Supreme Court cases of Luther[994], Marbury v. Madison[995], and Baker v Carr[996] in support of this argument, as well as the concept of the political question as explored in these instances.

The Matovu Court acknowledged that "the government's exposition of political question doctrine as established in Luther cannot be criticized" in its response to the government's submissions. Commentators regard Luther as a famous example of the first application of the political question doctrine, which was formulated in Marbury.

The Supreme Court of the United States had to decide whether it had the authority to legalize the popular breakup of an entrenched state government in Luther. Martin Luther, the plaintiff, was jailed after martial law was declared but before the Rhode Island Constitution was enacted in 1843. Martial law troops detained the plaintiff when they broke into his home, ruined his possessions, and tormented his elderly mother. The complainant eventually filed a trespass lawsuit against the martial law troops. The defendants attempted to justify their actions by claiming that they were agents of the established lawful government of Rhode Island, which was then under martial law to defend itself against active insurgency; that the plaintiff was a participant in that insurgency; and that they entered his premises under orders to arrest the plaintiff.

The issue arose from the political divisions that enraged Rhode Islanders between 1841 and 1842, resulting in a scenario in which two organizations made rival claims to recognition as the lawful government. Plaintiff's claim against the military hinged on whether government was in power in Rhode Island at the time of his arrest: the royal charter government or the People's Constitution government. On appeal to the Supreme Court, the lower court's failure to hear arguments on the matter, its charge to the jury that the earlier established or "charter" government was legal, and the defendants' verdict were all upheld.

The majority judgment in Luther was written by Chief Justice Taney, who framed the question in institutional terms and concentrated his reasoning on the practical consequences of determining which sovereign was legitimate. He noted that if the Supreme Court rules that the charter government is unconstitutional, it might throw Rhode Island's legal system into disarray, including the invalidation of taxes and laws, as well as the nullification of court judgements. “When the decision of this court may result in such results,” Chief Justice Taney reasoned, “it becomes its duty to scrutinize very carefully its own powers before it undertakes to exercise jurisdiction.” The ability to judge whether constitution or government was legal belonged to state leaders, Congress, and the

[994] Luther v Borden, 48 U.S. 1 (1849) (held that controversies arising under the Guarantee clause of article four of the United States Constitution were political questions outside the purview of the court).
[995]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
[996] Baker v. Carr, 369 U.S. 186 (1962

President, not the federal courts, according to Chief Justice Taney.[997] Furthermore, he reasoned that Congress' decision to recognize a state government or its representatives under Article IV of the United States Constitution is obligatory on all other departments of government and cannot be challenged in court.' Professor Barkow is correct in her assessment of the case, arguing that Chief Justice Taney reiterated the classical theory of the political question doctrine and concluded that:

"This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted this proposition."

The Matovu Court based its judgement on Luther's work. According to the Court, Luther's political question concept "is a valid doctrine," but it was not appropriate to the Matovu circumstances. 'However useful and instructive the observations of the United States Supreme Court in the several matters discussed in that case may be, the Ugandan government erred in relying on it as supporting the proposition that the validity of the Constitution of 1966 was a non-justiciable political question,' it concluded. On the facts of Matovu, the Court also determined Luther to be immaterial and distinct.

To begin with, the Matovu Court observed that Luther was a contest between two rival groups for control of Rhode Island's government. It claimed that there was no such competition in Uganda, and that the Ugandan government is well-established and without a competitor. Unlike Luther, the Court stated that the question before it was the validity of the Constitution, not the legality of the government. While it is true that Luther primarily dealt with the question of which government was legitimate, it is false to say that he did not examine the Constitution's legality. The legality of the Constitution, on the other hand, was one of the issues before the Luther Court. Professor Amar noted in his analysis of the Dorr Rebellion, which led to the Luther case, that the charterists (one of the rival groups claiming to have established a lawful government) submitted a Constitution that received less than one third of adult males' votes, or less than half of the registered vote.[998] Despite this, the People's Constitution, which had been submitted by the opposing side, did not become the Constitution of the State of Rhode Island. According to Professor Amar, the legal Constitution earned 7,000 votes, while the People's Constitution received approximately 14,000 votes.

Chief Justice Taney assessed whether the People's Constitution, as opposed to the charterists' Constitution, which became the Rhode Island Constitution, was legal, and concluded that state

[997] R. Barkow, 'More Supreme than Court? The Fall of the political Question Doctrine and the Rise of Judicial Supremacy', 102 Columbia Law Review (2002), 237–336

[998] A. Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and The Denominator Problem' 65 University of Colorado Law Review (1994) 749–786, at 775.

officials, the president, and Congress had the authority to decide which Constitution was valid. On this point, Savitzky claims that Chief Justice Taney dismissed the vote cast on the People's Constitution as proof of its legal adoption, declaring:

"Certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision."

The lack of established law or a Constitution enabling popular action, as Savitzky claimed, was at the heart of Chief Justice Taney's application of the political question concept. He pointed out that, according to Taney, there was no rule that a court could use to evaluate the qualification of voters upon the ratification of the proposed Constitution unless there was some prior state law to guide it.

Second, the Matovu Court noted that Luther brought up a slew of political issues, including the right to vote and the criteria for such voters. In Luther, unlike in Matovu, two opposing governors were selected, and the antagonism between them resulted in a situation that was akin to civil war. The Court found that insurgency had occurred in Rhode Island, and that the state had been declared a war zone. It was also highlighted that Luther raised the issue of whether the government was republican or not, which is a political subject reserved for Congress under Article IV of the US Constitution. These circumstances were not present in Matovu, according to the Court.

While the Matovu Court noted that Luther dealt with political issues such as the ability to vote, it fails to acknowledge that this political issue was weighed in the context of deciding the legality of Rhode Island's two competing constitutions. Furthermore, while the political instability in Rhode Island at the time of Luther's decision may not be comparable to that in Uganda at the time of Matovu, the Matovu Court's portrayal of the political environment in Uganda at the time is inaccurate. The fact is that Matovu and surrounding political events caused a great deal of political instability in Uganda, which finally culminated to the coup d'état of 1971, which brought General Idi Amin to power.

Despite finding Luther to be distinct from Matovu, the Court came at a judgment that is consistent with Chief Justice Taney's principal considerations in ruling on Luther. The Court held that any judicial judgement on the government's legality may have far-reaching, devastating, and incorrect consequences because the issue was a political one that should be handled by the administration and legislature, which were accountable to the constituencies. Unlike Luther, however, the Matovu Court decided that a judgement on the Constitution's legality was within the Court's jurisdiction. The 1966 Constitution was ruled to be legitimate for a variety of reasons, including the fact that it was accepted by Ugandans and the international community, and that it had been firmly established and enforced throughout the country without opposition. As a result, the Court concluded that it

couldn't change the political situation. Another practical issue that may have prompted the Court to legitimize the 1966 Constitution is the risk of exposing all previous acts and taxes to legal dispute, including the validity of the judges appointed by Prime Minister Obote under the contested Constitution.

Matovu can be chastised for misinterpreting and misapplying Luther. I believe Luther was in control of Matovu because it teaches that constitutional creation is solely the province of the people as popular sovereignty. “Our power begins after theirs end,” wrote Justice Woodbury in his concurring decision in Luther. In this aspect, Uganda's government made the right decision in relying on Luther. While some observers have questioned Matovu, it is nevertheless good legislation in Uganda and has been cited by judges in Uganda and beyond. Since Matovu, the Uganda Court of Appeal has considered and applied the political question doctrine in Andrew Kayira v Edward Rugumayo & Others[999], where the Court, relying on Matovu, ruled that Professor Lule's removal from the office of President of Uganda was a political question not reviewable in the courts of law but reserved to the state's political organs. The Supreme Court of Uganda in Attorney General v Major General David Tinyefuza was perhaps the most important use of the political question theory under the post-1995 Constitution of Uganda.

THE NEED TO REDUCE SECURITY AGENCIES INTERFERENCE IN JUDICIAL WORK.

The security agencies ought to protect the human rights accruing to the citizens of Uganda but when the High court of Uganda in the case of Re Kyagulanyi Sentamu Robert & Barbra Kyagulanyi Itungo v AG, CDF & IGP[1000] ordered the security agencies to vacate the home of Mr. Kyagulanyi, the spokesperson of the UPDF said that, ‘’We are a law-abiding and do respect the High Court ruling but we shall not be vacating immediately because we have intelligence of an outbreak of planned violence’’[1001] yet it must be noted that the High Court in Namibia in the *Hamutenyav Hamutenya*[1002] that ‘’ *judgments, orders, are but what the Courts are all about. The effectiveness of a Court lies in execution of its judgments and order. A rule of Law is a cornerstone of the existence of any democratic government and should be proudly guarded*’’. This reaffirms that the courts of judicature are part of the institutions in place set to ensure that the rights are observed.

PERSISTENT "EXECUTIVE-MINDEDNESS" DOMINATES JUDICIAL IDEOLOGY

[999]Andrew Kayira v Edward Rugumayo & Others, Constitutional Case no 1 (1979)
[1000]HC Civil Division Misc. Cause No. 16 of 2021
[1001]https://www.trtwolrd.com
[1002] (PA-2004/195) [2005] NAHC1

In the two decades after Obote's 1966 coup, no less than five Chief Justices were removed by executive fiat: Sir Udo Udoma (shortly after legitimising Obote's 1966 coup), Dermont Sheridan, Samson Wambuzi, George Masika, Peter Allan and, of course, Benedicta Kiwanuka. [1003]with rare, brave exceptions like Chief Justice Kiwanuka, a persistent "executive-mindedness" dominated judicial ideology since Matovu.[1004] To be fair, judges in Kampala had to adopt this attitude or risk Kiwanuka's fate. But Chapter 3 mapped how the judiciary was willing to identify executive decree with valid law well before Amin militarised government. If anything, the constitutional interregnum up to 1986 further entrenched a judicial ideology that was "more statist than the executive".[1005]

OMNIPOTENCE OF EXECUTIVE POWER,[THAT] HAS LED TO A CONTINUAL ADDICTION TO THE NOTION OF JUDICIAL RESTRAINT.

In January 1986, Yoweri Museveni and his National Resistance Army captured Kampala from the remnants of the Obote government's Uganda People's Democratic Army. A few days later, with marked symbolism, Peter Allen, the British-born Chief Justice, swore in Museveni as President. Museveni became the first African leader to seize power with a rebel army; all previous coups across the continent had been confined to a few individuals in the capital.[1006] To consolidate his military gains in the Kampala hinterland, Museveni established Resistance Councils (RCs) in each village he captured from Obote's regime in Kampala. But they were fragile structures in a countryside ravaged by decades of centralized pillaging by a succession of despots.[1007]

The RCs were remarkably similar to the Ruwenzururu village councils. All adults were members of their village council, the RC-I 296 They elected a nine-person committee to decide local issues and in turn elected a nine-person RC-II committee at the parish level. Higher level RCs were elected indirectly, including reserved positions for women. Unlike the Ruwenzururu, however, there was not a parallel executive of appointed chiefs. While chiefs were ex Officio members of RCs, they may not vote. RC-IIIs and RC-Vs elected representatives to the National Resistance Council, which in turn appointed a District Administrator to oversee each district. The RC reforms

[1003]Mamdani &Oloka-Onyango, *supra*at504.

[1004] A few brave High Court judgesdid grant writs of *habeas corpus.* By the time Obote returned to power in 1980, however, military governments had "lost even the last vestiges of embarrassment".

[1005]*Id.*

[1006]Herbst, *supra* at254

[1007]AsJ.M.S. Ochola, then Minister for Regional Administrations, said in 1967:"all sectional interestsmust givewaybe for ethenational will, and that one structure of Government, interlocking from thePresidency down to the *miruka* [the basic unit of Ganda society], must guide and order all our efforts.": cited in Sathyamurthy, *supra*at443-44.

did infuse a degree of democracy and gender equality into local governance structures, but reproduced some elements of the colonial administrative hierarchy-notably a centrally-appointed District Administrator for saza chief of the 1902 Buganda paradigm.

In 1987, RCs were given judicial powers over minor civil (debts, contracts, assault and battery, property damage and trespass) and customary land, marital status of women, paternity of children, identifying heirs, impregnation of minors and bail) matters. [1008] A person could appeal an RC-I decision to the RC-II, then the RC-III and finally the chief magistrate in the formal court hierarchy. The rationale for decentralizing justice was to provide speedy, inexpensive and informal justice in a less foreign setting than magistrates' courts. Women were to benefit the most since the alternative state magistrates' courts demanded prohibitively high fees and some literacy to navigate its written laws.[1009]For the next few years RCs were important dispute settlement forums "in a period when state courts were unable to project themselves effectively in many rural areas".[1010]

In 1995, a Constituent Assembly adopted Uganda's fourth constitution since independence.[1011] Chapter 11[1012] of the Constitution entrenched local government in Uganda as distinct level of government with powers delegated by the national legislature. Details of the reformed LCs were set out in the Local Governments Act. LCs were supposed to build on the RCs's success and entrench local, democratic justice at the village level for all Ugandans.

Yet by 1997 the number of cases before Local Councils had dropped notably. Especially by women [1013]For women in particular, old patriarchal relations lurked beneath the new, democratic local courts. The colonial authority had created the chief as patriarchal despot ruling his tribal village through "customary law" By bifurcating the state legal system into civil (urban) and customary (rural) laws, the judiciary was cordoned off from the countryside. The LC reforms did not completely succeed in overcoming this legacy. Men still dominated the LC committees and its law judges were often relatively "educated, wealthier, and older men who have little knowledge of [civil] law or legal process."303 Moreover, a village's leading men often formed a tightly knit clique. As one woman in south-western Kabale district put it: "local councils stand up for each other because they all drink together".[1014]When women brought cases against men relating to land

[1008]Democracy: The Case of Resistance Councils in Uganda"in Mamdani&Oloka-Onyango, *supra at*365.
[1009]*&sistance Committees(JudicialPowers)Statute,* no. 1of 1988[RC *Judicial Powers Statute]*
[1010]Lynn S. Khadiagala,"The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights"(2001)32Development&Change55at56.
[1011]Jennifer Widner,"Courts and Democracy in Post Conflict Transitions: A Social Scientist's Perspective on the African Case"(2001) 95American JInt'lL.64at65.
On the making of the Constitution, see Benjamin J. Odoki, *The Search for a National Consensus: The Making of the 1995Uganda Constitution* (Kampala: Fountain Publishers,2005); see also Coel Kirkby,"LinkingPopularParticipationand DemocraticRepresentationinConstitution-Making.
[1012] Constitution of the Republic of Uganda, 1995 (As amended)
[1013] Khadiagala, *supra* at65.
[1014] Khadiagala, *supra* at 64.

or marriage, they often faced an unsympathetic court packed with the man's beer- drinking peers. Men also saw a marriage dispute as women misbehaving, rather than having their legal rights violated. The LC would dismiss their complaints and admonish them to "behave 'like women'.[1015] In short, the reforms did not succeed in extracting the patriarchal elements of local justice.

Village courts were also ridden with casual corruption. A woman in Kabale district complained that all the LC court "want is money. LCs are chasing money for nothing. If you have no money, you get no justice."[1016]While a litigant must pay a small filing fee, the court may demand more money or its equivalent in beer. This practice is nothing new: Tamukedde admitted to accepting payments (though never bribes) by litigants in his gombolola court during the 1940s. Corruption especially hurt women who often had less money for gifts. The three levels of LC appeals also increased the cost and time in resolving disputes. In practice LC courts proved more expensive than magistrates' courts, which belied their original goal of cheap, local and informal justice.

Another reason for introducing LC courts was to let communities develop indigenous solutions to local problems. This echoed Hone's logic for leaving native courts alone to progress towards the ideal of English law. In a study of the first few years of RC courts, Oloka-Onyango found that they adapted their laws to new realities after 20 years of military rule.[1017]Unfortunately, this experiment with popular justice led to some abuse contrary to the statutory framework, including overbroad jurisdiction, marginalizing rape and defilement, inventing excessive punishments, and creating new offences.[1018] Later reforms would try to recapture the initial popularity, but are still too recent to evaluate.[1019]

In 1997, the Constitutional Court, an appellate court created by the 1995 Constitution with original jurisdiction over constitutional cases, dealt with its first reported customary law case in Adekur v. Opaja [1020] Maliam Adekur married her husband in 1973, but five years later separated from him until his death in 1988. In the meantime, her husband had made Joshua Opaja his heir, and thus heir to Adekur's estate according to Iteso customary law. Adekur remarried after her husband's death, but was arrested by Opaja and the sub-county chief on charges of elopement. The newlyweds pleaded guilty and then filed a petition against the Attorney-General of Uganda (as well as Opaja, though it was later dropped) for the chief magistrate's failure to prevent their arrest by the LC.

The Constitutional Court struck out the petition since the district magistrate, though under the Attorney-General's control, was not liable for any act or omission whilst exercising judicial power.

[1015]*Id*

[1016]*Id*

Mamdani&Oloka-Onyango,*supra*at511[1017]

[1018]*Resistance Councils and Committees (JudicialPowers) Statute,* No.1of 1988;

[1019]*Local Governments(Amendment)Act,* No.27 of 2006; *Local Council Courts Act,* No.13 of 2006.

[1020](13June1997), Const'l Petition No.1of1997(C.C.).

The plaintiff should have sued the district council, the Court observed. Adekur's case highlights ordinary people's confusion on who had what powers over them. LCs's could arrest or otherwise intimidate "misbehaving" women with little fear of repercussions from the formal courts. The hard fought women's rights in Article 33 of the 1995 Constitution would have to wait another five years. Many people turned away from LC courts dominated by prominent local men.

Instead they appealed to the supposedly "impartial" chief magistrate. The shift has been so drastic that magistrates' courts in rural areas are now overwhelmed with land and Marriage disputes despite their impartial reputation, however were not sympathetic to the new constitutional promise. In divorce cases, for instance, most magistrates were reluctant to remedy clear gender bias in old laws. In Yia v. Yia, a typical early case, a woman petitioned the magistrates' court for a divorce. She had to prove both adultery and cruelty (a man had only to prove the former) pursuant to the Divorce Act,[1021] but she argued that the extra burden on women seeking divorce contradicted ss. 31(1) and 33(6) of the 1995 Constitution. In his judgment, the magistrate said he believed her counsel had only made this constitutional argument because the lawyer "was not sure of sufficient evidence" to prove both grounds. His prejudice was similar to the LC men who dismissed women raising marital or land cases as trouble- makers. The magistrate then applied the law as "that of England in 1923", the year the Divorce Act was copied whole by the colonial government, stating: where the words of a statute are in themselves precise and unambiguous, those words should be taken as declaring the intention of the legislature. If the legislature intended to avail the wife the ground of adultery alone as provided ... I wonder why the Constituent Assembly did not say so in clear and ambiguous (sic) terms. I think counsel has not properly interpreted the provisions of the Constitution vis-a-vis the Divorce Act.[1022]

This analysis illustrates "the weight of history and precedent, as well as the omnipotence of executive power, [that] has led to a continual addiction to the notion of judicial restraint."[1023] Yet the Yia decision was still the norm in divorce cases in magistrates' courts well after 1995.[1024] It offered little hope to women seeking to escape oppressive LCs and without money to reach the more sympathetic appellate courts.

As in Tamukedde's time as gombolola in the 1930s, women were the greatest challenge to LC courts' interpretation of customary law. Urban women's groups have recently tried to reach out to women in rural areas, and thus challenge civil and customary laws that have limited their equal

[1021] *Yiav.Yia*(1997), Mengo Divorce Cause No.4of1997(M.C.),cited in HenryOnoria,"Review of Major Decisionson Fundamental Rights and Freedoms in Uganda in 2004"(2005)11E.Afr.].Peace&H.R.at340.
[1022] *Id.*
[1023] Mamdani&Oloka-Onyango, *supra* at 504.
[1024] Onoria cites a number of magistrate court decisionstoshow that *Yiav.*Yia was a typical holding: Onoria, *supra at* 340.

rights in land and marriage. Their challenge was formulated in a rights-based discourse by Kampala's elite, educated women,[1025] but translated into an argument persuas1ve for local women.[1026] After years watching Parliament procrastinate over a comprehensive Domestic Relations Bill, various women's groups and individuals petitioned the courts to strike down the most discriminatory provisions from colonial-era marriage and succession laws[1027]

In 2002 the Constitutional Court finally and decisively overturned the dominant Yia interpretation of the Divorce Act. In Association of Women Lawyers V. Attorney-General, the unanimous Court found the second "cruelty" ground for women seeking divorce was unconstitutional. [1028] Justice Mpagi-Bahigeine described the law as “archaic” and “a colonial relic". She also recognized that while “old ideas and patterns exist”, marriage was now seen as an “equal partnership between husband and wife". "Legal rules" must "be made gender neutral". The Court thus struck out the offending provisions and in so doing gutted the Divorce Act. Justice Okello remedied this by making either of the two grounds for divorce, adultery or cruelty, available and applicable to both men and women. This appeared to be the first time a Ugandan court “read in" provisions to a statute to make it conform to the Constitution. Justice Okella added that the "[a]pplication of this order is likely to meet some difficulties," so responsible authorities should remedy the gap quickly. In other words, the Court would start modifying unconstitutional legislation, albeit reluctantly, if Parliament continued to dilly-dally.

Women's groups next targeted unequal penalties for adultery and rights to inherit. In Law Advocacy for Women in Uganda v Attorney-General, the Kampala-based nongovernmental organization targeted offensive provisions in the Penal Code and Succession Act.[1029] The Attorney General argued that striking out punishments for adultery "would encourage immorality and promiscuity" among Ugandan women. This "moral degeneration" argument, of course, was identical to those employed by Baganda chiefs to justify customary laws that limited women's newfound freedoms in the cities of the 1940- SOs. In oral arguments the government conceded the Penal Code sections in question were unconstitutional. The Court accepted this and struck out the offending provision. However, it refused to follow the government’s request to read in a similar adultery.

The most successful translation was the "sweat argument", which argued women have a right to co-

[1025]One petitioner, Dr. Sylvia Tamale, was the first female Dean of the Facultyof Law at Makerere University.
[1026]Themostsuccessfultranslationwasthe"sweat argument”, which argued women have a right to co-own land with their husbands because of their labour at home andin the fields: AiliMari Tripp,"Women's Movements, Customary Law, and Land Rights in Africa-The Case of Uganda"(2004) 7Afr.StudiesQ.1at11-2.
[1027]2003,online:Kituo ChaKatiba<http://www.kituochakatiba.co.ug/dorebil.htm>*[DomesticRelationsBill.*
[1028] (2002), Const’l PetitionNo.2of2002(C.C.) *[WomenLauyers]*.
[1029](5April2007), Const'l Petition Nos.13 of 2005&5of2006(C.C.).

- own land with their husbands because of their labour at home and in the fields: Aili Mari Tripp, "Women's Movements, Customary Law, and Land Rights in Africa-The Case of Uganda" (2004) 7 Afr. The Court replied that Article 137(3)[1030] only required a declaration of nullity and did "not seem to give this Court a mandate to modify a law which it has found to be inconsistent or in contravention with the provisions of the Constitution." The Court thus rejected the minority position of Justices Okello and Twinomujuni in Women Lawyers in this case since it was reluctant to read in a penal provision to "create a sentence that the courts can impose on adulterous spouses."

The Women Lawyers and Law Advocacy cases succeeded in pruning colonial-era laws of offensive provisions. In practice, however, these decisions had limited influence. By 2007 magistrates still did not receive copies of appellate court decisions.[1031] There was no case reporting system and magistrates only heard of cases like Law Advocacy when enterprising lawyers passed them dog-eared photocopies in person.[1032] Moreover, poor record-keeping by LC and magistrates' courts often led to a single plaintiff filing numerous claims for a strange wrong [1033] This perpuated the colonial era bifurcated system where magistrates looked to English precedent rather than Uganda's own appellate decisions. But if Justice Mpagi-Bahegeine was right that "no area of law impacts on women with greater force than the domestic law", then the actual impact of these two Constitutional Court decisions was even more disappointing since most women still lived in rural areas and were married under customary laws.[1034]

Museveni's innovative RC reforms, modelled after the Ruwenzururu experiments, introduced some measure of democratic local governance to people after decades of anarchic violence. The RC courts relieved the reformed magistrates' and appellate courts of overwhelming litigation.

The reforms could not break the tyranny of patriarchy though. And the Women Lawyers and Law Advocacy cases had little practical influence in villages separated by a reproduced bifurcation between customary/ rural/RC laws and civil/urban/ constitutional rights. Some women's groups have begun to break down this colonial cordon by translating common struggles against patriarchy across the rural-urban divide. While the judiciary has proven open to rights-based arguments to quash "It was not sufficient merely to plead the defence of res judicata, without evidence to

[1030] Constitution of the Republic of Uganda, 1995 (As amended)
[1031]Widner 2001, *supra* at 74.
[1032] Onoria, *supra*at352-3.
[1033]*Azizv.Maroku*(11April2001), Civil Appeal No.4of2002(S.C) [Odoki C.J.held,"Itwasnot sufficientmerelytoplead thedefenceof *resjudicata*, without evidence to substantiateit.The proceedings or judgments of the Local Council Courts should have been produced to establish the parties,and the subject matter of the dispute before them and the decisions of the Courts. The oral evidence adduced inCourt was insufficient to establish the plea."Of course, this ignores the underlying problem: LCs either kept poor record sornone at all! Chief JusticeOdoki'sstrict application of the *resjudicata* doctrine makes little sense given the realities of LCs in the last decade.].
[1034]*Women Lawyers, supra*

substantiate it. The proceedings or judgments of the Local Council Courts should have been produced to establish the parties, and the subject matter of the dispute before them and the decisions of the Courts. The oral evidence adduced in Court was insufficient to establish the plea." Of course, this ignores the underlying problem: LCs either kept poor records or none at all! Chief Justice Odoki's strict application of the res judicata doctrine makes little sense given the realities of LCs in the last decade.

Women Lawyers, supra note discriminating laws, it was reluctant to actively bridge the hazy frontier between local and magistrates' courts. Yet it is precisely this grey zone that stymies the bubbling-up of democracy of LC courts and the filtering down of a right to equality in the 1995 Constitution. The challenge for the judiciary is to question their ideological disinclination to creatively engage across the imaginary boundaries of state and customary laws.

EXECUTIVE SUPREMACY OVERTAKES PARLIAMENTARY SUPREMACY AS THE MANTRA OF THE JUDICIARY

We must guard against blind and selfish adherence to some precepts of law which we adopted from the colonialists and which we uncritically consider as sacrosanct.[1035]One September afternoon in 1972, Chief Justice Benedicto Kiwanuka disappeared. The last people to see him alive watched as policemen burst into his chambers, handcuffed him and dragged him into a waiting car. Before being shoved in its trunk, he was made to remove his shoes-a morbid attention to detail. Inside a restless courtroom was waited for him to return from a recess of the East African Court of Appeal. A week earlier Kiwanuka had frustrated Idi Amin's military regime by granting a writ of habeas corpus to a jailed opponent. He signed this simple decision and so signed his death warrant.

Kiwanuka's bloody removal was the nadir of state-sanctioned justice in Uganda. Ironically, President Obote and Chief Justice Udo Udoma set in motion their own falls in the fateful 1966 coup. Obote was himself deposed in a 1971 coup by his trusted ally Idi Amin, the officer who crushed Ganda resistance by razing the Kabaka's palace. Amin soon removed Sir Udoma as Chief Justice and sent him packing back to Nigeria.[1036] He continued to dismantle the civil courts and replaced them with numerous military tribunals offering speedy, informal and harsh justice. The judiciary then became little more than a subservient "moneymaking institution" for Amin's allies.[1037] Kiwanuka's death coincided with Amin's expulsion of so-called "Asian foreigners" from

[1035]YoweriMuseveni,"President'sAddresstotheJudiciary"(1987), cited in Mamdani&Oloka-Onyango, *supra at* 493-4,97.
Mahmood Mamdani, *Imperialism and FascisminUganda* (I'renton,NJ.: Africa World Press,1984) at 44;
Jennifer A. Widner, *Building the Rule of Law* (NewYork: W.W. Norton&Company,2001) at116.
[1036]Mamdani &Oloka-Onyango, *supra at* 487.
[1037] Mamdani 1984, *supra* at 116.

Uganda, despite their longstanding residence as traders before even Speke first visited the country. In 1972, a High Court justice lamented that "[t]here appears to be a widespread but mistaken belief ... that the police, soldiers, and private persons are lawfully entitled to arrest [people] without warrant ... [and] may shoot them in cold blood".[1038] Amin reacted by simply ending judicial review of any government action with the Proceedings Against the Government (Protection) Decree.[1039] He succeeded and no constitutional cases were reported again until after Amin's regime fell in 1979. The judiciary learnt its lesson well. That year even Benjamin Odoki (former Chief Justice) bent under executive pressure in Mugisa v. Uganda.[1040] He rejected a habeas corpus application even though the government had failed to follow its own regulation that required the detention to be gazetted within 30 days. In Uganda, executive supremacy overtook Parliamentary supremacy as the mantra of the judiciary.

[1038]Bukenyav.Attorney-General (1972),(H.C.) [unreported],cited in Mamdani&Oloka-Onyango,supraat489.
[1039]No.8of197
[1040] (1979), H.C.B.271 (H.C).

CHAPTER THIRTEEN

MORE CONSTITUTIONAL MINDED THAN THE EXECUTIVE: WHEN THE COURTS RAISE UP TO THE OCCASION TO DEFEND THE PEOPLE AND ASSERT JUDICAL INDEPENDENCE (SALUS POPULI LEX ESTO)

One of the most important tasks of the courts is to see that the powers of the executive are properly used, that is, used honestly and reasonably for the purposes authorised by Parliament and not for any ulterior motive.

G O S P E L

The word gospel is derived from the Anglo-saxon term god-spell, meaning "good story "a rendering of the latin evangelism and the Greek euangelion, meaning "good news" or "good telling" This chapter considers some of the times dissenting Justices have stood up to the Executive in defending the people.

G O S P E L A C C O R D I N G T O K A K U R U : V E R B E R T I M

Uganda is a constitutional democratic Country, which evolved from a British Protectorate declared in 1894. On Tuesday 9th October 1962 the Country attained its independence from the British and became a sovereign state. Its independence Constitution became the supreme law of the land. That Constitution was amended in 1963 to create the office of a Constitutional President. In April 1966, the Constitution was suspended and later abolished. It was replaced with an interim Constitution in May of that year.

The interim Constitution paved way for the 1967 Republican Constitution on 8th September 1967. The 1967 Constitution, remained in force until 8th October 1995 when the current Constitution was enacted by a Constituent Assembly on behalf of the people of Uganda.

Principles of Constitutional interpretation

They are: -

1) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See: -*Article 2(2)* of the Constitution. See: - also The Supreme Court decision in Presidential Election Petition

No. 2 of 2006 *(Rtd) Dr. Col Kiiza Besigye Vs Y.K. Museveni, Supreme Court Constitutional Appeal No.2 of 2006.*

2) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See: - *Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998. (SCU)*

3) The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See: *-P. K Ssemogerere and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002 and The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.]. EA 13.*

4) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible. See: - *Okello John Livingstone and 6 others Vs the Attorney General and another, Constitutional Court Constitutional Petition No. 1 of 2005, Dr. Kiiza Besigye vs Attorney General: Constitutional Court Constitutional Petition No.1 of 2006 and South Dakota vs. South Carolina 192, U.S.A 268, 1940.*

5) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6) Where the language of the statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. See: *The Attorney General Versus Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.*

7) The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. See: *Okello Okello John Livingstone and 6 others Versus the Attorney General and Another, Constitutional Court Constitutional Petition No.4 of 2005.*

8) The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

9) In searching for the purpose of the Act, it is legitimate to seek to identify the mischief sought to be remedied by the legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the grid, if any, of the related provisions and of the Constitution as a whole, including the underlying values of the Constitution that must be promoted and protected. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See: - *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

10) In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See: - *Apollo Mboya Vs Attorney General and others* (Supra).

11) It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone. All constitutional provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument. See: *Smith Dakota Vs North Carolina, 192 US 268(1940).*

12) The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in *Article 8A (1).*

See: - *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

Historical and Constitutional background:

Uganda has had a checkered constitutional history.

On 22nd March 1894, the British Government formally annexed Uganda, and declared it to be a Protectorate. By this declaration Uganda came within the ambit of the Africa Order-in-Council of 1889, which authorised the Local Consul to establish local jurisdiction under which the Consul was to exercise considerable executive, judicial and administrative powers[1041].

The geographical and political boundaries of Uganda were established by European powers at the Berlin Conference of 1884-5. On paper, the people who were placed under British colonial rule had consented to their subjugation through treaties, grants made by their Kings, Chiefs or Rulers. In areas where there was no centralized authority to sign such agreements with the British, their lands were simply incorporated into the protectorate by Orders–In-Council. The protectorate was administered by a Commissioner who had powers to make laws, Rules and Regulations. His legislative power was subject only to general or special instructions of the British Secretary of State. He could by ordinance, order that the laws of the United Kingdom, India or any other colony be applied to Uganda generally or subject to stated modifications. Some British statutes were made applicable to Uganda under the Foreign Jurisdiction Act of 1890.[1042]

Prof. Kanyeihamba, in his book Constitutional History of Uganda, described the period between 1902-1920 as dictatorial and despotic if not in practice, as least in law. In 1920 a new Order-in-Council was made establishing executive and legislative Councils. The members of those bodies were distinguished by His Majesty the King of the United Kingdom.

As late as 1945, no African was sitting on the legislative Council. The people were being ruled without their voices ever being heard. On 23rd October 1945, the British Government approved the appointment of three indigenous Africans to the legislative Council. They were to represent Buganda, Western and Eastern provinces. Kigezi and the North remained unrepresented because "they had not yet advanced to the stage of requiring the creation of centralized native executives." The first African Legislators entered the House on 4th December 1945. By 1950 the unofficial members of the legislative Council had become 16 constituted as follows; 8 Ugandans, 4 Asians, and 4 Europeans.[1043]

The first Ugandan Ministers were appointed in 1955. In 1956, the first African woman legislator entered the House, she was Mrs. Pulma Kisosonkole, a South African married to a Ugandan. In 1957 the Governor constituted a committee to consider and recommend a number of Constitutional reforms, aimed at preparing the Country for self rule and eventual independence. It was headed by

[1041] Kanyeihamba, Constitutional History of Uganda. Page 8
[1042] Ibid
[1043] Ibid

J.V Wild and his report bore his name. It was published in 1959, it recommended as follows: -

> *That direct elections be held all over the Country in 1961. A common roll or register be introduced. The elected representatives be 76, 20(twenty) for Buganda, 20(twenty) for Eastern province, 17 (seventeen) for Western province and 4 (four) for Urban areas.*

Buganda rejected direct elections to the legislature. The other Kingdoms too objected to direct elections. General elections were held in 1961 and UPC obtained the majority votes. However, Democratic Party (DP) won more seats in Parliament and formed Government because Buganda had opposed the elections.

In 1961, a conference was held in London, United Kingdom, to determine the constitutional dispensation that the independent Uganda would adopt. All delegations from different parts of Uganda were flown to London, the now famous or infamous Lancaster Conference. The delegates wanted a workable Constitution. Many issues remained unresolved notably, Bunyoro's demands for the return of its counties that had been annexed to Buganda by the British colonialists after their defeat of Kabalega the King of Bunyoro famously referred to in our political history as the *"lost counties"* the status of Buganda and other Kingdoms.

When finally, a comprise was reached, on March 1st 1962, the London agreement was signed, bringing into force a new Constitution. Still many issues remained unresolved, necessitating another conference in London in June 1962 to review and resolve the remaining obstacles, and amend the Constitution and confirm the date of independence.

In August 1962, the British Parliament passed an Act called, the Uganda Independence Act, which provided *inter alia* as follows: -

> "As *from October* 9, *the territories comprised in the Uganda Protectorate will together form part of Her Majesty's dominions with the, name of Uganda and henceforth Her Majesty's Government will have no responsibility for the government of Uganda, and no Act of Parliament of the United Kingdom passed after that date shall extend to Uganda. The Colonial Laws Validity Act of* 1865 *will no longer apply to any law made by the Uganda Legislature and no such law can be rendered void on account of repugnance to the law of England." (Sic)*

This was the much hyped 1962 Constitution, made almost entirely without the input of the citizens of Uganda. It was made by their Rulers whose interests were considered paramount by the British. It appears to me to have been a pay-off to the Rulers for their corroboration with the British imperialists. No meaningful consultations had been made, at least not with the people. Many constitutional issues remained unresolved. Some of the constitutional issues were embedded in the

Constitution itself. These included the status of Buganda, the indirect elections in Buganda, the lost counties of Bunyoro, the legal status of Busoga and its rulers and the land question. Uganda, under the 1962 Constitution, was neither a Republic nor a Monarchy. It was neither a federation of states nor a unitary one. There were a number of other petty but intricate constitutional questions that were embedded in the Constitution, as whether a Muganda commoner Benedicto Kiwanuka, could head the central Government and constitutionally occupy an office higher than that of the Kabaka, the Ruler of Buganda. Later the question arose as to whether the Kabaka or the King of Buganda could assent to a law ceding part of his Kingdom's territory to another kingdom within Uganda, such a law having been passed by the Parliament of Uganda. There was even an issue as to whose photograph was the official portrait of the Head of State and Government, the Kabaka's or that of the Prime Minister, Milton Obote.

There were also issues of revenue collection and sharing between the central government, Buganda and other territories. There were two High Courts. The High Court of Buganda and the High Court of Uganda, both presided over by the same Judges. Each federal state had a cabinet, legislature and judiciary. In this regard Prof. Kanyeihamba has observed: -

> *"The Independence Constitution emphasized division rather than unity. It placed regional interests above national interests and exalted regional leaders at the expense of national leaders….."*[1044]

The Constitution was designed to cater for a historical Uganda where traditions and economic power which had been placed was in the hands of a few by the British Colonialist were guaranteed. The Constitution can claim to have had legality in the sense that those who intended to protect it were in effective control of the nation's affairs. However, it lacked political legitimacy for it was not an expression of the will of the majority nor did it claim to have the consent of the masses even though it can be claimed that the framers were acting through the elected representatives. Lacking political legitimacy, the Constitution could not withstand the test of political pressure for if it were threatened with abrogation the masses would be reluctant to defend it.[1045]

Although Section 1 of the 1962 Constitution declared it to be the Supreme law of Uganda this Section was subject to Sections 5 and 6. Section 5 dealt with amendment of the Constitution. Under Section 5, Parliament could alter the Constitution except the provisions set under schedule 1, 2, 3, 4 and 5. These schedules were: - (1) The Constitution of Buganda, (2) special provisions relating to the Kingdom of Ankole, (3) special provisions relating to Bunyoro, (4) special provisions relating to Toro, (5) special provisions relating to the territory of Busoga. This Constitution was in fact an

[1044] Ibid
[1045] Ibid

Act of Parliament having been enacted as such in Britain and adopted as a law in Uganda upon independence. It contained a Bill of Rights. The Constitution was a delicate balancing act between the Central Government on one hand, the Buganda Kingdom government and the rest of Uganda on the other.

Then again, there was a balancing act between the central government and the semi federal states and territory.

In this regard Sections 73, 74(1), 75(1), 123 and 124 of the Constitution provided as follows: -

> *73.Parliament shall have power to make laws for the peace, order and good government of Uganda (other than the Federal States) with respect to any matter.*
>
> *74.(1) The Legislature of the Kingdom of Buganda shall have power, to the exclusion of Parliament, to make laws for the peace, order and good government of the Kingdom of Buganda with respect to the matters specified in Part I of Schedule 7 to this Constitution.*
>
> *75. (1) The Legislature of a Federal State (other than the Kingdom of Buganda) shall have power, to the exclusion of Parliament, to make laws for the peace, order and good government of the State with respect to the matters specified in Schedule 8 to this Constitution.*
>
> *123. The Ruler of a Federal State and the constitutional head of a District shall take precedence over all persons in the State or District other than the President:*
>
> *Provided that in the case of a traditional ceremony relating only to a particular Federal State or District the Ruler of the State or the constitutional head of the District, as the case may be, shall take precedence over all persons in the State or District*.

By looking at the above Sections of the Constitution, it is apparent that there were in it a number of inherent contradictions that would inevitably lead the country to a crisis. The crisis did emerge when in 1964 a referendum was held in the *"lost counties"* of Buyaga and Bugangaizi. These counties had been transferred from Bunyoro Kingdom to Buganda Kingdom by the British upon the military defeat of the former. In that referendum of the 1964 the population in those counties voted to leave Buganda and return to Bunyoro. An Act of Parliament was passed to that effect. The President who was also the Kabaka (King) of Buganda refused to assent to it, on the ground that he would not transfer part of his Kingdom to another.

The Prime Minister signed the bill into law. Under *Section 20* of the Buganda Constitution, which could not be amended by the National Assembly, the Lukiiko (Buganda Parliament) consisted of elected representatives, Kabaka's Ministers and his personal nominees. This Lukiiko indirectly elected the Buganda's representatives to the National Assembly.

With this background a motion of no confidence in the Prime Minister was tabled in the National

Assembly by one of the prominent Buganda representatives nominated by the Lukiiko Daudi Ochieng. It was supported by some members of the ruling party and government. It alleged corruption against Prime Minister Obote and Idi Amin the Army Commander. A commission of inquiry was set up to investigate the matter, headed by a High Court Judge from Tanzania.

Amidst accusations of and allegations of treason, on 22nd February 1966 upon the orders of the Prime Minister, five Cabinet Ministers were arrested at a cabinet meeting, together with others, they were detained and deported. Two days later the Prime Minister 'suspended' the Constitution, abolished the post of President, and Vice President and assumed the Power of government. Without doubt this was unconstitutional. Uganda remained without a Constitution, until 15th April 1966, when an interim Constitution was passed by Parliament. There was no consultation, no debate. The Members of Parliament were reportedly asked to enact the Constitution and afterwards pick their copies from their pigeon holes. This is the so called "Pigeon hole" Constitution. It is stated that Parliament was surrounded by the Army during this process.

The 1962 Constitution therefore was abrogated by means other than those set out in the Constitution. The federal nature of the 1962 Constitution, where it applied, was replaced with a unity government. The executive powers of government were vested in the President who now assumed the powers previously held by both the President and Prime Minister. The National Assembly was granted more powers than it enjoyed under the 1962 Constitution. Most importantly for the purpose of this Judgment, the rest of the provisions in the Constitution remained the same.

As expected, Buganda protested accusing the central government of having breached a social contract between the two. The entrenched provisions of the 1962 Constitution had been ignored.

Although no shots were fired on that day, the acts of the Prime Minister and Parliament amounted to a *coup d'etat* against the established Constitutional Order. The events that surrounded the abolishment of the 1962 Constitution were set out in detail in the Judgment of the Constitutional Court in *Uganda vs Commissioner of Prisons Exparte Matovu 1966 EA [P.54]*. The Judgment was delivered by *Sir Udo Udoma CJ*. The other Judges on the Coram were *Sheridan* and *Jeffrey Jones JJ*, on February 22, 1967.

I am constrained to reproduce it in *extenso*. The relevant parts read as follows: -

> *"On February 22, 1966, the then Prime Minister of Uganda issued a statement headed "Statement to the Nation by the Prime Minister", annexure A, declaring that in the interests of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. The statement is of great importance and we therefore reproduce it hereunder. It reads:*

"In the interest of national stability and public security and tranquility, I have today – February 22, 1966 –taken over all powers of the Government of Uganda.

I shall henceforth be advised by a council whose members I shall name later. I have taken this course of action independently because of the wishes of the people of this country for peace, order and prosperity.

Five former ministers have today been put under detention pending investigations into their activities.

I call upon the judges and magistrates, civil servants – both Uganda and expatriate – members of the security forces and the general public to carry on with their normal duties.

I take this opportunity to assure everybody that the whole situation is under control."

On February 24, 1966 there followed another statement made to the nation by the then Prime Minister, annexure B, in which, among other things, the Prime Minister disclosed that he had been forced to take "certain drastic measures" because of events and "unwelcome activities of certain leading personalities", who had plotted to overthrow the Government; that during his tour of the Northern Region of Uganda early in the month an attempt was made to overthrow the Government by the use of foreign troops; and that certain members of the Government had requested foreign missions for military assistance consisting of foreign troops and arms for the purpose of invading the country and overthrowing the Government of Uganda.

The Prime Minister then declared:

"The Constitution (of Uganda) shall be suspended temporarily with effect from 7 o'clock tonight.

In order however to provide for effective administration for the smooth running of the Government machine and also for the promotion of unity the following subjects contained in the Constitution [said the Prime Minister] shall be preserved:

(a) The Courts, Judges and Magistrates;

(b) The Civil Service;

(c) The Army, Police and Prison Services;

(d) The Rulers of Federal States and Constitutional Heads of Districts;

(e) The District Administration and Urban Authorities;

(f) The Schedules to the Constitution of Uganda; and

(g) The National Assembly."

There was to be established a council composed of ministers including the Attorney-General and certain members of the armed forces and the police. The ministerial portfolios were to function as before and certain vacancies caused by the absence of the ministers under detention were to be filled. The statement ended with an appeal to the people to remain calm and to co-operate with the security forces in the maintenance of law and order.

On February 25, 1966, the statement and declaration contained in annexure B were repeated and more elaborately spelt out in annexure C, which established a security council of which the Prime Minister was chairman. In annexure C however, which was signed by all the ministers then supporting the Prime

Minister, item (f) in annexure B was omitted.

On March 2, 1966, annexure D was published. In it the Prime Minister declared that acting with the advice and consent of the cabinet:

"(a) The executive authority of Uganda shall vest in the Prime Minister and shall be exercised by the Prime Minister acting in accordance with the advice and consent of the cabinet; and

(b) The duties, powers and other functions that are performed or are exercisable by the President or Vice-President immediately before February 22, 1966, shall vest in the Prime Minister by and with the advice and consent of the cabinet."

Thus by that declaration both the President and Vice-President of Uganda were not only deprived of their offices, but divested of their authorities. Immediately thereafter the President of Uganda was forcibly ejected from state house, which is the official residence of the President of Uganda.

For the proper appreciation of the state of affairs and the changes purported to have been made by the above mentioned statements and the declaration, we pause here to note that the Constitution referred to in the statement of February 24, 1966, was the Constitution of Uganda promulgated by the authority of the Uganda (Independence) Order-in-Council 1962, which came into force on October 9, 1962, and subsequent amendments thereto. Throughout this judgment therefore that Constitution will hereinafter be referred to as the 1962 Constitution.

In the 1962 Constitution, the offices of President and Vice-President of Uganda

were created by arts 34 and 35, the President being therein described as the Supreme Head and Commander in Chief of Uganda. The provision of art 37 was that the Parliament of Uganda should consist of the President and the National Assembly, while arts. 61, 62, 64 and 65 vested the President with the executive authority of Uganda with power to appoint a Prime Minister; and thereafter, acting in accordance with the advice of the Prime Minister, to appoint other Ministers, including the Attorney General; and to assign to such Ministers responsibilities for the business of Government, including the management of Departments.

In art 36 it was provided that the President and the Vice-President might at any time be removed from office by a resolution of the National Assembly, moved either:

> *"(a) by the Prime Minister; or*
>
> *(b) by a member of the Assembly other than the Prime Minister who satisfies the Speaker that not less than one half of all the members of the Assembly have signified in writing the intention to vote in support of the resolution, and which is supported by the votes of not less than two-thirds of all the members of the Assembly."*

In other words, by this Article, the President and Vice-President could not be removed from their office except by a resolution passed by the votes of not less than two-thirds of all the members of the National Assembly.

To return to the chronology of events. On March 5, 1966, the Prime Minister issued another statement, annexure E. The statement was in reply to a press report purported to have been published by Sir Edward Mutesa who, until February 22, 1966, when the Prime Minister seized all the power of Government, was the President and Supreme Head and Commander in Chief of Uganda. In his statement, the Prime Minister pointed out that in the press statement made by Sir Edward Mutesa the latter had openly admitted that unknown to him as Prime Minister or any of his Cabinet Ministers, he, Sir Edward, had made request for military assistance from foreign countries as a precautionary measure, because there were then rumours current in the country that troops were being trained somewhere in the country for the purpose of overthrowing the Constitution.

Then on April 15, 1966, at an emergency meeting of the National Assembly, the following resolution, annexure F at p. 20, which was proposed by the Prime Minister was passed:

"Whereas in the interest of national stability, public security and tranquility, the Prime Minister, on February 22, 1966, suspended the then Constitution of Uganda

and took over all the powers of the Government as a temporary measure.

And whereas the Government, on February 24, 1966, approved the action taken by the Prime Minister in order to ensure a speedy return to the normality which existed before the occurrence of the events which led to the suspension of the Constitution, and Whereas it is desirable, in order to return to the state of normality that a Constitution should be adopted.

Now, therefore, we the people of Uganda hereby assembled in the name of Uganda do resolve and it is hereby resolved that the Constitution which came into being on October 9, 1962, be abolished, and it is hereby abolished accordingly, and the Constitution now laid before us be adopted this day of April 15, 1966, as the Constitution of Uganda until such time as the Constituent Assembly established by Parliament enacts a Constitution in place of this Constitution."

On the adoption of the Constitution of April 15, 1966 (hereinafter to be referred to as the 1966 Constitution) oaths under the new Constitution were administered to the Prime Minister, who thereupon by virtue of provisions of art 36 (6) of the new Constitution became automatically by operation of law elected President and the Head of State and Commander in Chief of the Sovereign State of Uganda.

Thereafter oaths were administered to members of the National Assembly, both Government supporters and Opposition and other Officials of State. Members of the National Assembly were only able to take their seats in the State Assembly after the taking of the oath under the new Constitution.

On May 22, 1966, the applicant was arrested and detained at Masindi Prison under the Deportation Act (Cap. 308). He was subsequently transferred to Luzira Prison within the Kingdom of Buganda.

On May 23, 1966, by proclamation, Legal Notice No. 4 of 1966, a state of public emergency was declared to exist in Buganda Kingdom; and on May 25, 1966 by a resolution of the National Assembly the proclamation was affirmed and Emergency Powers Act (Cap. 307), and regulations made thereunder including the Emergency Powers (Detention) Regulations 1966, Statutory Instrument No. 65 of 1966were brought into force and in full operation.

On July 16, 1966, the applicant was released and ordered to go. Soon thereafter at about 12.45 p.m. as the applicant stepped out of prison, he was rearrested and detained again in Luzira Prison.

In respect of the validity of the 1966 Constitution the Court concluded as follows at page 539 of the Judgment: -

B. Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the above case, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since April 14, 1966, when it first came into force.

F. After a perusal of these affidavits, the contents of which have not been in any way challenged or contradicted, we are satisfied and find as a fact that the new Constitution has been accepted by the people of Uganda and that it has been firmly established throughout the country, the changes introduced therein having been implemented without opposition, as there is not before us any evidence to the contrary."

It is evident from the above cited constitutional case that the Judiciary, the Parliament, the Army, the Police and public servants accepted the new constitutional order as did the most of the people of Uganda. However, the picture was different in Buganda.

The events that followed enactment of the 1966 interim Constitution are narrated by Prof. Kanyeihamba as follows: -

"The new Constitution had required members of the National Assembly to swear allegiance to it, and to the new Uganda. Leadership of the Buganda and members of the Assembly refused to do so. Without consulting their minister, the Buganda leadership summoned a meeting of the Lukiiko to take stock, as it were.

. . . this was an utter rejection of the new Constitution by the Buganda Lukiiko, and a direct challenge to the central authorities, and so the latter regarded it. When Obote heard about the resolution, he is reported to have said: "This is an act of rebellion. Government will study it and deal with all those involved.

In the meantime, having passed the resolution, the committed Buganda county chiefs hurried back to their areas to prepare for battle, and the Central Government began to receive alarming reports that Buganda was planning to secede from the rest of the country, and that weapons and ammunition were being stock-piled in, the Kabaka's palace at Mengo. It was also rumoured that ex- soldiers and other able bodied persons had been summoned to go to the palace to await the Kabaka orders . . .

. . .Three of the more defiant County chiefs were arrested and detained. The beating

of war drums in many parts of Buganda followed these arrests. Many unruly elements in the kingdom decided to take the law into their own hands. Roads were blocked or damaged; law and order broke down in many parts of Buganda. As if chaos had been let loose, government property was indiscriminately and wantonly destroyed. Lawlessness was the order of the day. The Government could no longer tolerate this state of affairs. Rebellion had to be quelled. To that end, the Cabinet met and decided to send a small detachment to investigate the existence or otherwise of arms and ammunition at the palace. Unfortunately, however, when the unit arrived at the palace gate, the palace guards opened fire and the former were virtually wiped out in the exchange that followed. Inevitably, the Uganda Army found it necessary to dispatch reinforcements, and after a lengthy spasmodic exchange of fire, the palace was surrounded but miraculously, the Kabaka escaped undetected by jumping over the wall of the palace and, eventually, found his way to the United Kingdom, where he settled and later died a poor and broken man."[1046]

With the capitulation of the Kabaka, the *coup d'etat* that had overthrown the Constitution of 1962 was now complete both *de jure* and *de facto.*

The 1966 Constitution provided under *Article 145* that it would continue in force until a constituent assembly was established by the National Assembly for the enactment of a new Constitution.

The general political environment in which the constitutional proposals were to be debated was nothing but conducive in Buganda which was under a state of emergency. The Buganda region did not only contain a large percentage of the national population, but was also the location of the national capital, the seat of the Parliament, the only University, the only Radio and T.V stations were also located there. All major Newspapers, Magazines and Journals were printed and published there. As to whether or not the people of Buganda and the residents of the capital and other towns in the region were able to effectively debate the proposed Constitution remains a question. However, there is no doubt that the political atmosphere in Buganda and in the Country at large had a chilling effect on the population, on the debate in the National Assembly.

Nelson Kafir an academician and accomplished researcher compiled from different sources including newspapers, journals and the Hansard, what transpired in Parliament during the debate preceding the enactment of the 1967 Constitution. I have taken the liberty to repeat some of the excerpts here below: -

"The Transition 33

The Government issued its Constitutional proposals on the 9th of June, 1967 and Parliamentary Debate began on the 22nd of June. The debate was adjourned on the 27th of July. On the 4th of

[1046] Ibid

August the Government announced that it would submit new amendments to its own Constitutional proposals when Parliament reconvened. These amendments were published on the 29th of August. Parliament reconvened on the 6th of September to consider the sections of the proposed Constitution one by one. Only the Government proposals, as modified by its own amendments, were accepted and the Constitution was adopted on the 8th of September, 1967."

From the floor of Parliament as reported in the Hansard: -

> *Apparently Uganda was making good progress and he had not heard any Minister say he was being held up because he was being hampered by the Constitution. If that was the case, why was it necessary to have a new Constitution? We should not change our Constitutions in the way some men change their shirts. The Constitution should be a document of great sanctity. We should respect it and we should abide by it. ABU MAYANJA (UPC, Kyagwe N.E.) Uganda Argus 6th July.*
>
> *A Constitution which would suit Uganda should be a flexible one, which would be easy to amend. ABBAS BALINDA (UPC Ankole S.E.) U.A. 13th July.*
>
> *The President had spoken about a revolution in the country that was still going on. Were they going to have a new Constitution every time there was a revolution?*
>
> *H. M. LUANDE (Ind. Kampala E) U.E 29th July*
>
> *Muslims believe that on the day of Judgment an angel would read out an indictment – but that at least the person concerned has a chance to defend himself. Even God did not assume such powers as were envisaged under this Constitution……*
>
> *We are not here to govern this country like savages. We are not going to reject the standards which have been accepted by the rest of the civilised world. We are part and parcel of the civilised community. We are not going to justify autocracy and the granting of dangerous powers on the grounds that Uganda is backward and cannot have a civilised government. ABU MAYANJA (UPC, Kyagwe N.E)*
>
> *The system of presidential elections could bring into that important office a person who is not a true representative of the people. As that same person is empowered to nominate up to 27 Members of Parliament, that meant that key Ministries could also go to some of those nominated persons who were not true representatives of the people. The country could then end up by being ruled by those people who were not representatives of the people. A. LATIM (Leader of Opposition) 27th June.*
>
> *It was not democracy for the President to nominate 30 members of the House. It would be better for him to nominate all the Members of Parliament so that the country would clearly*

know that it was a dictatorship. If a man was nominated, he was bound to be a 'yes man." This was a clear step back to the dark days. H.M. LUANDE (Ind. Kampala E.) 29th June.

As far as the people nominated by the President were concerned, some people had said they would not be stooges, but what else could they be? They would be the remnants of the politicians who had failed at the polls. If the purpose of bringing these 27 people was to bring stability to the country, then it was better to find some other way. There were only a limited number of people available who could maintain the dignity of the House. A.A. NEKYON (UPC, Lango S.E.) 30th June.

If someone fails at the vote, let him not poke his nose in this noble House, Mr. Obwangor said amid cheers from both sides of the House. C. OBWANGOR (Min. of Planning and Econ. Dev.) 8th July.

One of the most serious indictments against the colonialists was the deprivation of some of the fundamental rights and freedoms of the individual. But still there were some rights which the colonialists guaranteed, and added that it was disappointing that even those rights and freedoms which were enjoyed during colonial times were going to be taken away by the present proposals. ABU MAYANJA (UPC, Kyagwe N.E.) 6th July.

What a shame that Members of Parliament should be asked by our President to give him powers to detain us and after he had done so to give him powers not to be taken to a court of law. J. W. KIWANUKA (UPC, Mubende N.) 14th July

In the Kingdoms there had been a ready-made system for providing for peace, order and good government-the three things African governments found it most difficult to obtain. The chiefs were accepted by the people as the representatives of the king. What was needed was not to reject kings, but to rechannel the loyalty to them to wider issues of nation building.

That is how we were elected.

E.M. K. MULIRA (UPC, Mengo N.) 30th June.

I am not in the House as a representative of the people. I was elected by the President on April 15 last year, as had every other member of the House. Since May 6 this year the mandate of every elected member of the House had expired. G.O. B. ODA (DP, W. Nile & Madi W.) 28th June.

Winding up, Mr. Mayanja underlined the fact that democratic government, of which he was unashamedly a supporter, could not be created by writing a Constitution. Ultimately, democracy did not reside in the Constitution, but in the hearts and minds of the people. ABU MAYANJA (UPC, Kyagwe N.E.) 8th July.

Democracy did not work anywhere. Some people confused democracy with general elections. He said that if Uganda decided not to have a general election for a generation it was up to it. He referred to the political situation in many European countries, where there had been no elections or real elections for years. VINCENT RWAMWARO (Deputy Minister of Foreign Affairs) 15th July.

Mr. Obonyo said certain individuals could be called bad, but this did not mean that the institution of kingship as such was bad. When the DP wanted to revise anything regarding institutions, they would go back to the people who were wiser than they were and ask their views. J.H. OBONYO (DP, Acholi S.E.) 20th July.

The Democratic Party proposed that before the start of the proposed new Constitution there should be a general election because the term of office of the present Parliament has expired and to prolong the life of the present Parliament is tantamount to taking away the powers of the electors. PAUL SSEMOGERERE (Publicity Secretary D.P.) 4th September.

We on this side of the House are few, but in spite of that we shall do our best and we shall speak without fear.... They had said that the Buganda Emergency should be lifted. They had said that the representatives of the people should be free to talk to the masses of the people they represented. But all this had not been given to them. People were in fear. The people could not express their views freely. A Member of Parliament had been quoted as saying he feared giving an opinion about the new proposals. If he could say that, how many more people outside could say it? This house is fearing to tell the truth. If a Member of Parliament is frightened to comment, how many people in the country are afraid to express their views? A.A. LATIM (Opposition Leader) 24th June.

The mere fact that the Government had brought the Constitutional proposals in this way indicated that the Government also believed that some of the proposals could be rejected and the House should have freedom to say what it wanted about each and every one. Party considerations were one reason why the proposals were difficult to debate. The members should be speaking as representatives of their constituents. If this were the case, they could see what was the right thing to include and what would please some people. If the proposals were being debated on a party basis, then there was only need for two members to speak: one from each party. There could not be 82 members speaking on party matters... I think we should speak as if there were no government now, no parliament now, no president now, and no judiciary now, because the Constitution is meant not only for today's government but for tomorrow's government and the government after that. Another reason why the proposals were difficult to debate was that it appeared that certain members of the House

were now under the impression that they were in real danger of being attacked by the security forces at any time because of their views. The sense of fear should be removed if the Constitution was going to be a good guide to the country for the future. A.A. NEKYON (UPC, Lango S.E.) 30th June.

Mr. Okelo said the opposition had not been afraid to speak their minds and would never be afraid to speak, even in the face of threats. They would sooner die. [He said] We will defend this principle against all comers. The ship of freedom is being torpedoed, and Ugandans are waiting to see what we, their elected representatives, are going to do to save the ship. M.A. OKELO (D.P., West Nile & Madi)

He read in full a letter to members of the Government side signed by the Chief Whip. This stated that members absenting themselves from the House without permission would be causing subversion, and no member should oppose or vote against the proposals. The letter stated that as far as he (the Chief Whip) was concerned, opposition had been dealt with at a Parliamentary group meeting, and members who opposed the proposals would be liable to be dealt with severely. We can now see what sort of Parliament we have got. M.A. OKELO (D.P., West Nile and Madi) 1st July.

Dr. Sembeguya criticised Government MP's whose "insulting and threatening" interjections during the past week's debates in the Constituent Assembly suggested that, already having prior knowledge of the proposals, they were intent on seeing that they were bulldozed through the Assembly. DR. F. G. SEMBEGUYA (UPC, Specially Elected) Daily Nation 4th July.

The debate went on and on. What is strikingly important for the purpose Judgment is the similarity in issues and undertones in this 1967 debate and the debate that followed the enactment of the impugned Act in 2017, fifty years later.

The 1967 Constitution was debated and enacted by Parliament which had constituted itself into a Constituent Assembly. The same Parliament extended its term for another five years under the new Constitution. The President was deemed to have been elected under the new Constitution as there were no general elections that year. The term of Parliament of five years had lapsed. The Members of Parliament who had constituted themselves into a Constituent Assembly in 1967 had been elected for a period of 5 years in 1962. Fresh elections were due to have been held in May of 1967. Instead Parliament extended its own term and that of the presidency for another five years.

I have found no reason to dwell on what happened between 1967 and 1971. Suffice it to say, the government remained in power and was accepted by the population especially outside Buganda, however, it lacked popular legitimacy. Both the President and the Parliament had not been elected.

The Constitution, the Supreme Law of the land, had been enacted without the participation of the population. The state of emergency remained in force in Buganda causing wide spread hardship. The government became more and more intolerant of criticism and relied more and more on the Army and the Police to keep down any political dissent or even discussion. There was no space for political opposition, compelling a number of opposition Members of Parliament to cross the floor to the ruling Uganda People's Congress (UPC) party. They followed the leader of the opposition, Mr. Basil Bataringaya, who had crossed earlier and was rewarded with a ministerial post, that of internal affairs.

David Martin in his book *General Amin (Faber and Faber Ltd London 1974)* Summaries the events that followed the enactment of the 1967 Constitution as follows at page 119:-

> *"It was a month after the Kabaka's death, as he was leaving a UPC conference, which had adopted a resolution demanding Uganda should become a one-party state, that Obote was shot. His assailant and the rest of the would-be assassins were all Baganda. Uganda's British Chief Justice five months later sentenced six people to life imprisonment including a defrocked clergyman, the Revd. Erisa Sebalu, while five others received terms of fourteen years for conspiracy. Sebalu said that a plot had begun in June 1969. After the assassination attempt, road blocks were set up in Buganda and the army behaved harshly towards civilians. The government said seven people were killed but it seems probable the figure was higher. Twenty-six people-twenty-one of them Baganda-were arrested including Members of Parliament and a former Vice-President, Sir Wilberforce Nadiope. Opposition parties were banned and Uganda became a de facto one-party state."(Sic)*

Not unsurprisingly no elections were held in 1971, as on 25th of January of that year, the Uganda Army overthrew Obote's government and installed Major General Idi Amin as the Military Head of State. The Army gave 18 reasons for the *coup d'etat* as follows:-

> *1. The unwarranted detention of people without trial;*
>
> *2. Prolonged state of emergency, which had been declared in October 1969;*
>
> *3. Lack of freedom to air political views;*
>
> *4. The frequent loss of life and property through armed robberies;*
>
> *5. The proposals for National Service;*
>
> *6. Widespread corruption in high places, especially ministers and civil servants;*
>
> *7. The failure of political authorities to organise any elections and the proposed three-plus-one electoral method which would only favour the rich;*
>
> *8. Economic policies that had caused poverty and unemployment;*

9. High taxes;

10. Low prices for crops as opposed to high cost of food and education;

11. Isolating Uganda from East Africa by expulsion of Kenyans and rejecting of Kenya and Tanzania currencies;

12. The creation of a wealthy class of leaders;

13. Failure of the Defence Council to meet under its chairman, the President;

14. Training of a private army with recruits from Akokoro county Obote's home area;

15. The Lango Development Master Plan which was designed to give all key positions in politics; army and commercial/industrial sectors to people of Akokoro in Lango;

16. Dividing the army and giving the Langi top positions;

17. Using the cabinet and officers to divide the army through bribery;

18. All above mentioned were leading to bloodshed.

See:-*David Mukholi "A Complete Guide to Uganda's Fourth Constitution, History, Politics and law (Fountain Publisher, 1995).*

Following the 25th January 1971 *coup d'etat*, the Army issued Legal Notice No. 1 of 1971. It stated:

Legal Notice No. 1 of 1971

WHEREAS on the 25th day of January, 1971 the Armed Forces of Uganda, for the reasons given in the statement by them to the Nation on that day, took over the powers of the Government of the Republic of Uganda and vested those powers in me MAJOR-GENERAL IDI AMIN DADA.

Now PURSUANT to such powers I HEREBY PROCLAIM

1. *Chapters IV and V of the Constitution are suspended and all appointments and offices excepting public offices held immediately before the 25th day of January, 1971, pursuant to the powers contained in those chapters are hereby terminated with effect from that date.*
2. *All the titles, privileges, prerogatives, powers, functions and exemptions formerly enjoyed or exercised by the former President of the Republic of Uganda under the Constitution are hereby vested in me with effect from the 25th day of January, 1971, and accordingly the Military Head of State shall be the Commander-in-Chief of the Armed Forces.*
3. *Parliament is hereby dissolved and all legislative powers referred to in the Constitution are hereby vested in me.*

4. *All legislative powers shall be exercised by me through the promulgation of decrees evidenced in writing under my hand and sealed with the Public Seal.*
5. *There shall be a Council of Ministers which shall be appointed by me and which shall advise me in the exercise of my executive and legislative powers.*
6. *Subject to this Proclamation, all liabilities and obligations incurred by the Government of the Republic of Uganda before the 25th day of January, 1971, shall continue in full force and effect.*
7. *No action or other legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court for or on account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said take-over of the powers of the Government if done in good faith and done or purported to be done in the execution of his duty or for the defence of Uganda or the public safety or for the enforcement of discipline or law and order or otherwise in the public interest by any other person holding office under or employed by a person holding office under or employed in the public service of Uganda or a member of the Armed Forces of Uganda or by any other person acting under the authority of a person so holding office or so employed.*
8. *(1) Those provisions of the Constitution, including Articles 1, 3 and 63 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency be void.*

   (2) Subject to this Proclamation, the operation of the Constitution and the existing laws shall not be affected by this Proclamation but shall be construed with such modifications, qualifications and adaptations as are necessary to bring them into conformity with this Proclamation.

Made under my hand and the public seal, this 2nd day of February, 1971

MAJOR-GENERAL IDI AMIN DADA

Military Head of State, head of government and commander –in chief of the armed forces.

Date of publication: 2nd February, 1971

From the time this proclamation was made until 11th April 1979 when Legal Notice No.1 of 1979 was issued by the forces that toppled Idi Amin's regime, the 1967 Constitution remained in force subject to Legal Notice No.1 of 1971.

During this whole period of more than 8 (eight) years there were no elections, and therefore, no Parliament. Political party activities were banned. Amin declared himself life President, although he had at the time of the *coup* promised to stay in power for only five years and hand over

government to elected leaders.

What happened to Uganda and its citizens during the 8 years of Idi Amin reign of terror cannot be summarised here. If all were to be written, there would be no space left in any library in this country, to house the literature.

Prof. Kanyeihamba describes Amin's regime in the following words;-

" . . . murdered or ordered the murders of such important people as the Chief Justice of Uganda, the Archbishop of the Church of Uganda, Ministers, public officers including the Vice Chancellor of Makerere University and others, in their thousands. . .

. . . thousands of Ugandans innocent suspected of treason and other offences were arrested and butchered everywhere. Official murders and assassinations became, under Amin, the normal way of, settling disputes, actual or imagined, between government and its citizens. It was again with great sadness and mortal fear that Ugandans recalled Amin's ominous words that he would not take prisoners.

. . .government that had violated the rights of citizens, mismanaged the economy and performed abysmally in running the affairs of the nation.[1047]

Prof. A.B.K. Kasozi in his book *The Social Origins of Violence in Uganda* under a section of the book headed *Government by Terror*: In regard to Idi Amin's reign of terror he observes as follows:-

> "*The Military police stated under Obote, was expanded. Makindye, its headquarters became notorious as a slaughterhouse in Amin's time. As the economy worsened, another paramilitary unit, the Anti Smuggling Bureau, was created under Bob Astles. It accused successful businessmen of smuggling and hording . . . Thousands of people in Uganda were tortured by Government agents. Detainees might be made to go through humiliating muscular ordeals such as hopping like a frog, while being beaten. The victim's eyes might be gauged out and left hanging out of their sockets. (Sic)*
>
> *During the wheel- torture, the victim's head was put in a wheel- rim that was repeatedly struck with iron bars. People were beaten with hammers, mallets, or iron bars to break their limbs as well as to kill them. Wires were attached to victim's genitals, nipples, or other sensitive parts of the body and then connected to an electric battery or wall socket. Women were raped or otherwise sexually abused. Prisoners were slashed with knives and bayonets, body organs were mutilated and Limbs cut off. Prisoners might be lined up and every second one would be ordered to hammer the first to death, the*

[1047] Ibid Page 159

second would hammer the third, and so on, until only one was left to tell the tale to other prisoners. Such incidents often happened at Makindye prison. These were by no means the only forms of torture, there were many others ... Important or prominent people were killed like other prisoners. However, their bodies were dismembered and their parts used for ritual purposes ... few victims were given a proper burial. Their bodies were thrown into rivers such as the Nile at Karuma, Jinja and other places in Uganda's many lakes, Victoria, George, Albert, Salisbury, Kioga, Wamala, etc., in mass graves or burnt in their houses or cars." (Sic)

The reign of terror went on and on until Idi Amin was overthrown in April 1979 by the Tanzanian Army assisted by Ugandan exiles. A government in waiting had been formed under the umbrella of Uganda National Liberation Front (UNLF), its armed faction was Uganda National Liberation Army (UNLA). On 8th May 1979, the following proclamation was issued in Kampala as Legal Notice No. 1 of 1979.

Legal Notice No. 1 of 1979.

Proclamation

WHEREAS from the 23rd day to the 25th day of March, 1979, the Moshi Unity Conference brought together 28 organizations of Ugandans both inside and outside Uganda which united and determined to overthrow the regime of Idi Amin for the good of every Ugandan.

WHEREAS the Uganda National Liberation Front was committed to the achievement of the objectives specified in Article 11 of its draft Constitution.

AND WHEREAS on the 11th day of April, 1979 the objective of overthrowing Idi Amin's regime was effectively achieved, the Uganda National Liberation Front assumed the powers of the Government of the Republic of Uganda headed by me, Y. K Lule.

Now PURSUANT to such powers and with the approval and advice of the National Consultative Council, I HEREBY PROCLAIM:

1. *Chapters IV and V of the Constitution are hereby suspended and all appointments and offices excepting public offices held immediately before the 11th day of April, 1979 pursuant to the powers contained in those chapters are hereby terminated with effect from that date.*
2. *All the titles, privileges, prerogatives, powers, functions and exemptions formerly enjoyed or exercised by the former President of the Republic of Uganda under the Constitution are hereby vested in the President with effect from the 11th day of April, 1979.*

3. *All legislative powers referred to in the Constitution are hereby vested in the National Consultative Council until such time as a Legislative Assembly is elected.*
4. *All legislative powers shall be exercised by the National Consultative Council through the passing of statues assented to by the President and published in the Gazette.*
5. *There shall be a Cabinet of Ministers appointed by the President which shall advise the President in the exercise of his execution functions.*
6. *No action or other legal proceedings whatsoever whether civil or criminal, shall be instituted in any Court of or on an account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said assumption of the powers of the government if done in good faith and done or purported to be done in the execution of his duty or for the defence of Uganda by a member of the Uganda National Liberation Army of those of our allies.*
7. *All liabilities and obligations incurred by the. government of the Republic of Uganda before the 11th day of April 1979, shall continue in force and effect but such liabilities and obligations shall be construed with such modifications, exemptions, qualifications arid adaptations as are necessary to bring them into conformity with the policy of the government and the Uganda National Liberation Front.*
8. *(1) Articles 3 and 63 of the Constitution shall not apply to the passing of a statute under the provisions of this Proclamations*

   (2) Subject to this Proclamation, the operation of the Constitution and the existing laws shall not be affected by this proclamation but such existing laws shall be construed with such modifications, qualifications and adaptions as are necessary to bring them into conformity with this proclamation.

9. *The Proclamation published under Legal Notice No.1 of 1971, is hereby revoked.*
10. *This Proclamation shall be deemed to have come into force on the 11th day of April 1979.*

Y.K. Lule

President

Date of Publication: 8th May 1979.

What is pertinent here is that once again the 1967 Constitution remained in force. In June 1979, Prof. Lule, the President was removed by the Legislative Council known as the National Consultative Council by a vote of no confidence. He was replaced by Godfrey Binaisa, Obote's former Attorney General.

The constitutionality of President Lule's removal from power was contested in Court in *Constitutional Petition No.1 of 1979, Andrew Lutakome Kayira and Paul Kawanga Ssemogerere vs Edward Rugumayo, Fredrick Ssempebwa and the Attorney General*. The decision of this Court is summarised below as follows: -

> *"Andrew Lutakome Kayira and Another vs. Edward Rugumayo and 2 Others - Court of Appeal Const. Case No. 1 of 1979 - 10/21/1980.*
>
> *Facts*
>
> 1) *On or about the 19th day of June, 1979 the National Consultative Council consisting of 30 members sought to approve ministerial appointments made by professor Y.K Lule; the then president of Uganda.*
> 2) *At the same meeting the council passed a vote of no confidence in Prof. Lule as a result of which he ceased to hold office as the chairman of UNLF and as president.*
> 3) *It was contended that the council acted unconstitutionally and therefore sought orders that*
>
> *(a) the Supreme law of Uganda is the constitution.*
>
> *(b) that the powers to make ministerial appointments to the public service is solely vested in the president and that the consultative council has no valid powers to ratify and approve such appointments.*
>
> *(c) that the National Consultative Council has no powers to remove the President from his office.*
>
> *(d) that when deciding upon matters of national interest the National Consultative Council must sit in the legislature and be governed and guided by the constitution of Uganda.*
>
> *Decision*
>
> 1) *The Constitution of 1967 is the Supreme law of Uganda. The power to make ministerial appointments vested solely in the President and the National Consultative Council had no and has no valid powers to ratify and approve such appointments.*
> 2) *Further, the National Consultative Council acting in its capacity as the legislature had and has no powers to remove the President from office.*

Order

1) *Appeal partially succeeds.*
2) *The defendant shall jointly and severally pay the costs of the second plaintiff.*
3) *The A.G will pay the costs from public funds.*
4) *There will be no order as to costs of the 1st plaintiff Kayira."*

In spite of the above decision, the Kelsen theory of pure law was applied and the illegal removal of the President was never reversed. In this case the President, and I may say the government, remained in power 'illegally' and since it had not been elected and it also lacked legitimacy. That notwithstanding, there was a *defacto* government nationally and internationally recognised and all the arms of government functioned normally including Courts of law.

President Binaisa's government was overthrown by the Army on 10th of May 1980 and power was vested in the Military Commission of UNLF. The President was accused of a number of things, principally, the removal of the powerful Army Chief of Staff without following procedure.

General elections were held in December 1980, under the 1967 Constitution. Four political parties contested the elections, which were held in a tense environment. There were Commonwealth observers who issued a report stating that the elections had irregularities but were generally free and fair. The majority of Ugandans had a different view. The elections did not reflect their will.

A new government came into force on 17th December 1980 amidst widespread allegations of vote rigging and a host of other electoral malpractices including intimidation, harassment, unjust and illegal disqualification of candidates.

On 6th February 1981 Yoweri Kaguta Museveni in protest against a government that had assumed power, through a rigged election, launched an armed resistance to overthrow that government and to have it replaced with a legitimate one that embodied the people's will. He had been one of the leading fighters against Idi Amin since 1971 and had effectively participated in the overthrow of Amin, he was a prominent figure in the post Amin government, Vice Chairman of the military commission of UNLF. In 1980 elections, he was the leader of the Uganda Patriotic Movement, a political party that participated in the disputed elections. He had led an armed faction during the fight against Idi Amin's regime known as the Front for National Salvation (FRONASA). See: - President Yoweri Kaguta Museveni: *The Struggle for Freedom and Democracy in Uganda: Sowing the Mustard Seed: Moran (EA) Publishers Ltd 2016.*

Between 1980 and 1985, the Country was plunged into a civil war causing untold suffering to the citizens. It is estimated that over 500,000 Ugandans lost their lives. Many more lost their properties and livelihoods.

Obote's second Uganda People's Congress government was overthrown in a military coup on 27th

July 1985. That government lasted only 6 months in power.

On 25th of January 1986, Yoweri Kaguta Museveni led the National Resistance Army into Kampala and ceased state power.

His army consisted of intellectuals and a great mass of ordinary peasants, men, women and children. Some bare footed, others in torn clothes, women carrying children on the backs with machine guns and rocket launchers on their shoulders. They were from all walks of life. Many had never been to Kampala. The people themselves had got fed up. They had risen up in a popular revolt against the legal but illegitimate government and had won.

Nowhere in Africa, except perhaps in Chad, had ordinary citizens taken up arms, defeated a national Army and overthrown their own government. In his own words, President Yoweri Kaguta Museveni narrates the events in his book, *Sowing the Mustard Seed: (Supra) as follows at page 248:-*

> *"…Kampala was so quiet that night. Unlike 1979, there was no looting whatsoever; neither by civilians nor by soldiers. Ugandans had never seen such a disciplined army. It was a marvel. As a consequence, the soldiers were "over-appreciated"…*
>
> *…There was no raping – not even a single one was reported…*
>
> *The following morning, the 27th of January, 1986, I did three things. I drove through Kampala. It was deserted but not looted. Secondly, I went to Radio Uganda and they, eventually got me somebody that could enable me to announce that the NRA had taken over the governance of the country but details would be given later. Thirdly, I convened a meeting of the High Command, Army Council members who could be spared from the operations and NRC members who were around. That is when I was elected by that body as the new President and that is where legal Notice No. 1 of 1986 was drafted and proclaimed…*
>
> *…Eventually, I was sworn in, as were a few ministers. That is when I addressed a mammoth crowd at Parliamentary Square. That is when I made the speech of the "Fundamental Change."*

As already stated, on the 29th January 1986, at the steps of the Parliamentary buildings, Yoweri Kaguta Museveni, was sworn in by the Chief Justice P.J Allen, as the 9th president of Uganda.

In his maiden speech to the people of Uganda he stated; -

> *"NO ONE should think that what is happening today is a mere change of guard: it is a fundamental change in the politics of our country. In Africa, we have seen so many changes that change, as such, is nothing short of mere turmoil. We have had one group getting rid of another one, only for it to turn out to be worse than the group it displaced. Please do not*

count us in that group of people: The National Resistance Movement is a clear-headed movement with clear objectives and a good membership.

Of course, we may have some bad elements amongst us – this is because we are part and parcel to Ugandan society as it is, and we may, therefore, not be able completely to guard against infiltration by wrong elements.

It is, however, our deliberate policy to ensure that we uplift the quality of politics in our country. We are quite different from the previous people in power who encouraged evil instead of trying to fight it.

You may not be familiar with our programme, since you did not have access to it while we were in the bush so I shall outline a few of its salient points;

The first point in our programme is the restoration of democracy. The people of Africa-the people of Uganda-are entitled to democratic government. It is not a favour from any government: it is the right of the people of Africa to have democratic government. The sovereign power in the land must be the population, not the government. The government should not be the master, but the servant of the people.

In our liberated zones, the first thing we started with was the election of village Resistance Committees. My mother, for instance, cannot go to parliament; but she can, surely, become a member of a committee so that she, too, can make her views heard. We have, therefore, set up village, muluka, gombolola and district committees.

Later we shall set up a national parliament directly elected by the people. This way we shall have both committee and parliamentary democracy. We don't want to elect people who will change sides once they are in parliament. If you want to change sides, you must go back and seek the mandate of the people who elected you.

Democracy

Some of these points are for the future, but right now I want to emphasise that the first point in our political programme is democracy for the people of Uganda. It is a birthright to which all the people of Uganda are entitled.

The committees we have set up in these zones have a lot of power. You cannot, for instance, join the army or the police without being cleared by the village committee.

You must get a recommendation from the people in your village to say that you are not a rogue. Hence, the soldiers who are joining us from other armies will have to be referred back to their villages for recommendation. The same applies to the police.

Another important aspect of the committees is that they should serve as a citizens' intelligence system. If I go to address a rally in Semuto, Kapeka or Nakaseke, I shall first

meet the muluka and gombolola committees in the area. They will tell me whether the Muluka chiefs are thieves, or the hospital personnel are selling drugs, or whether there are soldiers in the area who are misbehaving. They are thus able to act as watchdogs for the population and guard against the misuse of power.

The second point in our programme is the security of person and property. Every person in Uganda must be absolutely secure to live wherever he or she wishes. Any individual or any group of persons who threatens the security of our people must be smashed without mercy.

Security

The people of Uganda should only die from natural causes that are beyond our control, but not at the hands of fellow citizens who continue to walk the length and breadth of our land freely. When we were in Nairobi during the peace talks, it was a very painful experience sitting in a room with criminals across the table. I was advised that being a leader, you have to be diplomatic.

Therefore, the security of the people of Uganda is their right and not a favour bestowed by any regime. No regime has a right to kill any citizen of this country, or to beat any citizen at a road block. We make it clear to our soldiers that if they abuse any citizen, the punishment they will receive will teach them a lesson. As for killing people – if you kill a citizen, you yourself will be killed.

People in Bulemezi call me Yoweri or Mzee wa Kazi. Now, these Excellencies, and honourable ministers and high-ranking military personnel, and what have you went to Luwero. Can you imagine what they did? We were told that they had transferred the person who had killed the people in Luwero to another station! Can you imagine? Someone kills 100, 50 or even two people and you say you have transferred him to another area? It was suggested that the solution to some of our problems would be for Kampala to be completely demilitarized.

The third point in our programme is the question of the unity of our country. Past regimes have used sectarianism to divide people along religious and tribal lines. But why should religion be considered a political matter? Religious matters are between you and your god. Politics is about the provision of roads, water, drugs, in hospitals and schools for children.

Case for unity

Take the road from here, Parliament Buildings, to Republic House. This road is so bad that if a pregnant woman travels on it, I am sure she will have a miscarriage! Now, does that road harm only Catholics and spare Protestants? Is it a bad road only for Moslems and not for Christians, or for Acholis and not for Baganda? That road is bad and it is bad for

everyone.

All the users of that road should have one common aspiration: to have it repaired. How do you become divided on the basis of religion or tribe if your interests, problems and aspirations are similar? Don't you see that people who divide you are only using you for their own interests not connected with that road? They are simply opportunists who have no programme and all they do is work on cheap platforms of division because they have nothing constructive to offer the people.

Our Movement is strong because it has solved the problem of division: we do not tolerate religious and tribal divisions in our Movement, or divisions along party lines such as UPC, DP, UPM and the like. Everyone is welcome on an equal basis. That is why you find that when our army goes to Buganda, the people there call it "amagye gaffe, "abaanabaffe". When it goes to the West, it is "amahegaitu", "abaanabaitu": which means that wherever the NRA goes, it is called 'our army', 'our children'. Recently, Buloba was captured by our army, and the commander in charge of the group was an officer called Okecho. He comes from Pakwach in West Nile.

Therefore, the so-called division between the north and south is only in people's heads. Those who are still hoping to use it are going to be disappointed. They ought to dig a large grave for such aspirations and bury them. Masindi was captured by our soldiers led by Peter Kerim: he, too, is from West Nile. Dr. Ronald Batta here, who is from Madi, has been our Director of Medical Services for all these years in the bush.

There is, in philosophy, something called obscurantism, a phenomenon where ideas are deliberately obscured so that what is false appears to be true and vice versa. We in the NRM are not interested in the politics of obscurantism: we want to get to the heart of the matter and find out what the problem is. Being a leader is like being a medical doctor. A medical doctor must diagnose his patient's disease before he can prescribe treatment.

Similarly, a political leader must diagnose correctly the ills of society. A doctor who does not diagnose his patient's disease adequately is nothing but a quack.

In politics we have also got quacks – and Uganda has had a lot of political quacks over the past two decades or so. I also want to talk about co-operation with other countries, especially in our region. One of our weaknesses in Africa is a small market because we don't have enough people to consume what we produce.

Regional cooperation

Originally we had an East African market but it was messed up by the Excellencies and Honorable ministers. It will be a cardinal point in our programme to ensure that we

encourage co-operation in economic matters, especially in transport and communication within the East African region.

This will enable us to develop this area. We want our people to be able to afford shoes. The Honorable Excellency who is going to the United Nations in executive jets, but has a population at home of 90 per cent walking barefoot, is nothing but a pathetic spectacle. Yet this Excellency may be busy trying to compete with Reagan and Gorbachev to show them that he, too, is an Excellency. These are some of the points in our political programme. As time goes on, we shall expand more on them.

Last appeal

To conclude, I am appealing to those people who are trying to resist us to come and join us because they will be integrated. They should not waste their time trying to fight us because they cannot defeat us.

If they could not defeat us when there were just 27 of us with 27 guns, how can they defeat this army which you saw here? They cannot defeat us, first of all, because we have a correct line in politics which attracts everyone. Secondly, we have a correct line of organisation. Thirdly, our tactics are correct.

We have never made a mistake either in strategy or tactical calculation. I am, therefore, appealing to these people not to spill more blood, especially of the young men who are being misled by older people who should know better." (Emphasis Mine)

Following the swearing in of the President, Legal Notice No.1 of 1986 was issued setting out the new constitutional order. It stated; -

"Legal Notice No.1 of 1986

Proclamation

WHEREAS on the 26th day of January, 1986 , the National Resistance Army, (or the reasons given in the Statement to

the Nation by the Chairman of the High Command of the National Resistance Army and the National Resistance Movement on that day, took over the powers of the Government of the Republic of Uganda and vested those powers in the National Resistance Council:

Now pursuant to such powers I HEREBY PROCLAIM

1. *Chapters IV save Article 24, V and Articles and 3 of the Constitution arc hereby suspended and all appointments and offices excepting public offices held before the 26th day of January 1986, pursuant to the powers contained in those Chapters are hereby terminated with effect from that date.*

2. *(i) The National Resistance Council which shall have supreme authority of the Government is hereby established.*

(ii) The National Resistance Council shall consist of;-

(a) the Chairman of the National Resistance Movement who shall be the Chairman;

(b) the Vice-Chairman of the National Resistance Movement (c) representatives of the National Resistance Movement

(d) representatives of the National Resistance

(iii)The membership of the Council may from time to time, be increased to include representatives of,

(a) Political forces or groups; and

(b) Districts

and such representatives shall be appointed, nominated. Or elected, as the case may be, in such manner as may be pre-scribed by national Resistance Council.

(iv) The National Resistance Council may establish such Committees and sub-committees as it considers; necessary.

3. *The Chairman shall preside at all meetings of the National Resistance Council and in his absence the Vice Chairman shall preside. The Vice-Chairman shall deputize for the Chairman in all his functions and shall exercise such other function as the Chairman may direct.*
4. *There shall be a Secretary to the National Resistance Council who shall be appointed by the Chairman.*
5. *The Military Council is hereby dissolved.*
6. *The President shall be appointed by the National Resistance Council.*
7. *All legislative powers referred to in the Constitution are hereby vested in the National Resistance Council. These powers shall be exercised by the Council through the promulgation of Decrees evidenced in writing under the hand of the President and the Public Seal.*
8. *(i) There shall be a Prime Minister who shall be appointed by the President after he has been vetted by the National Resistance Council or its Committee.*

(ii) The Prime Minister shall be the leader of Government business, and shall perform such other duties as the President may, from time to time, direct

9. *There shall be a Cabinet of Ministers who shall be appointed by the President after they have been vetted by the National Resistance Council or its Committee.*

10. *(i) For the reasons given hereunder, that is to say, previously an Army Council composed of members of High Command, Directors of Departments , Senior Army Officers and Battalion Commanding Officers together with members of the National Resistance Council who were engaged in the armed struggle played an important role as the policy making body in the liberated areas during the struggle and the said members of the National Resistance Council have now become part of the National Resistance Council established by this Proclamation. An Army Council to be known as the National Resistance Army is hereby established consisting of: -*

(a) Members of the High Command

(b) Directors of Departments

(c) Senior Army Officers at the date of this Proclamation and; -

(d) Battalion Commanding Officers of the National Resistance Army

(ii) The National Resistance Council shall seek the views of the National Resistance Army Council on all matters the National Resistance Council considers important

(iii) The National Resistance Army Council may forward its views on any matter it considers important to the National Resistance Council and the National Resistance Council shall take such views into account when making a decision on such matter.

11. Subject to this proclamation all liabilities and legitimate obligations incurred by the Government of the Republic of Uganda before the 26th day of January, 1968 shall continue in full force and effect.

12. No action or other proceedings whatsoever whether civil or criminal shall be instituted in any court for or on account of or in respect of any act, matter or thing done during the continuation of operations consequent upon

or incidental to the said assumption of powers of the Government if done in the execution of his duty or for the defence of Uganda by a member of the National Resistance Army as defined by the Code of Conduct of the National Resistance Army, set out in the Schedule to his Proclamation.

13. (i) Those provisions of the Constitution including Article 64 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency, be void.

(ii) Subject to this Proclamation the operations of the Constitution and the existing Laws shall not be affected by this Proclamation, but shall be construed with such modifications, qualifications and adaptations as are necessary to bring them in conformity with this Proclamation,

14. The National Resistance Movement Government shall be an interim Government and shall hold office for a period not exceeding four years from the date of this Proclamation.

15. (i) Legal Notices Nos, 4 and 5 of 1985 arc hereby revoked.

(ii) This Proclamation shall be deemed to have come into force on the 26th day of January, 1986.

Following the assumption of power by the National Resistance Movement in 1986, the Government expanded the legislative Council by including therein directly elected members. They were originally elected for two years, in 1989. Their term was extended to allow a Constitutional making process to begin. The government then proposed that a new Constitution be enacted, one that would embody the views, aspirations and will of all the people of Uganda. In this regard a Constitutional Commission was established in 1988. It was to be headed by a prominent jurist and Justice of the Supreme Court, Benjamin Odoki, who later become the Chief Justice of Uganda. It is now referred to as the 'ODOKI Commission' and its report bears his name. The terms of reference of the commission as set out in the law that established it may be summarized as follows; -

"…to develop a draft Constitution based on the consensus views… to ensure the widest possible popular consultation. Consultations, ought to educate the people about Constitution and constitutionalism, elicit views from all sections of the people and reconcile opposing positions with a view to developing a consensus and ensure that the people generally both understoodthe constitutional issues and were committed to the views they submitted to the Commission.

The Commission for a period of four years, 1988 to 1992 traversed Uganda and sought views from

all the people of Uganda who were able to give them. Individuals, groups, political parties, academicians, traditions leaders, and all others.

The commission produced a report on 31st December 1992 with analysis and recommendations. Part of that report is listed as No. 11 on the petitioner's list of authorities in Petition No.3, Uganda law Society Vs Attorney General.

I have no intention of reproducing that report here. It is 800 pages long. I will endeavor to reproduce excerpts therefrom as far as they are relevant to the issues before me. As a way of introduction, the report at pages 55 and 56 states thus: -

2.58. *The relative peace and security in most parts of Uganda and the unprecedented freedom of expression and of press have been stressed as offering great hopes for the future. Above all the concrete implementation of the principle of participatory democracy which has given a powerful voice and active participation to the hitherto voiceless and oppressed sections of our society is seen by most people as a tremendous opportunity and new vision for the reconstruction of the nation. Uganda's name abroad has been redeemed. Uganda is no longer the "sick" nation of Africa but rather a country of great promise and opportunities once it succeeds to resolve the fundamental issues of nation-building and democratization*

2.59. Lessons from history, both remote and recent, are the sure guide for the present and the future of our nation. All chapters in the Report give summary historical insights to the topic treated. The aim is to recapture the lessons from our past. It is only such an approach that can assist us to avoid the mistakes and pitfalls which have hindered our unity and development, while identifying the values which have, despite problems, brought us where we are today as a nation.

SECTION FOUR: OBSERVATIONS ON THE NATURE OF PAST PROBLEMS AND FUTURE DIRE TIONS

2.60. From this historical background, we can make observations about the nature of our past problems which should be borne in mind in the current constitution-making process:

a) Uganda's political development has been characterised by authoritarianism dating from the pre pre-colonial period and continuing through colonialism and Independence, inspite of attempts to establish democratic structures.

b) There are groups whose political behaviours have been historically determined and these groups tend to look on all political and constitutional developments, including the current, the constitution-making process, as exercises in power sharing or monopolising power.

c) In the absence of viable political institutions which can successfully mediate between them, groups have always tried and in many cases have succeeded in capturing supposedly national institutions such as parties, legislature, and security forces mainly to serve their own interests.

d) Whenever groups are in positions of strength, they tend to ignore the formally established constitutional rules and attempt to dictate terms which inevitably provoke negative reactions, culminating in instability – coups d'etat, civil war and other forms of conflict.

e) Uganda is characterized by conflicting political and cultural traditions ranging from monarchism, authoritarianism and liberalism, but lacks a culture of constitutionalism.

f) Uganda has been adversely affected by ethno-religious conflicts which have usually led to sectarianism and closed communities.

g) There is no consensus over national political values to sustain political institutions.

h) There are perceived "historic injustices" among some groups, "injustices" which may need to be seen to be set right if such groups are to feel committed to any long term constitutional settlement.

2.61 A new Uganda constitutional order should take into account the following observations about future directions based on its historical background:

(a) The Constitution should provide institutional mechanisms for strengthening national unity taking into account the cultural, religious, regional, gender, class, age and physical diversities of Uganda peoples.

(b) While taking into account Uganda's social, cultural and political diversities, the Constitution should transcend interests of narrow groups.

(c) The Constitution should identify those residual Ugandan values which can serve as firm foundations for the new Constitution.

(d) The new Constitution should make institutional provisions for setting perceived historic injustices right.

(e) There should be efforts to provide for such a balance of forces that no one single socio-political force or institutional structure can manipulate such resources as it has to subvert the Constitution and dominate other groups and structures.

(f) A new Constitutional order should ensure that institutional structures are viable, coherent and integrated to promote a culture of constitutionalism and ultimate socio economic and political objectives which guide future development.

(g) There should be institutional mechanisms for ensuring transfer of power by peaceful and democratic means.

(h) Since the NRM assumed power, institutional frameworks have been established and appear to be gaining legitimacy. There should be serious evaluation of these to see the extent to which they may be integrated into the new constitutional order.

(i) *The new Constitutional order should positively come to terms with Uganda's past and present and respond to its aspiration for the future.* (All Emphasis Mine).

Chapter eleven of the report deals with the analysis and recommendations regarding the legislature. Under Section Three of that chapter the report analyses the view and concerns of the people in respect of their representation in Parliament as follows: -

Section three: Concerns and principles emphasized in the people's views: -

11.27 The experience of the past thirty years has shaped the people's concerns about the legislature and how it should work in future. This experience has also influenced the principles the people have indicated should guide the development of constitutional provisions on the legislature

Concerns of the People

Failure of the legislature to be representative of the people:

11.28 There is concern that the legislature has often not been representative of the people. During much of the time since Independence, appointed - usually self-appointed – individuals or bodies have taken on the powers of the legislature. Even when there have been elected Legislature bodies, the principle of elected representation has been watered down through the addition of numerous appointed members.

Poor quality of representation by members:

11.29 Some elected members of the legislature have been found to be self-seeking and corrupt. Some members have shown little interest in the needs and problems of their electorates once elected. As a result, many people have indicated concern that the principle of recall of members of the legislature be fully established.

Lack of accountability – extension of term of office:

11.30 Our post-independence legislatures have extended their terms in office without reference to the people. To be accountable to the people it represents, the legislature must face regular elections.

Lack of accountability - "crossing the floor":

11.31 The tendency of elected members of the multi-party legislature to ignore the choices made by the electorate in terms of party affiliation has been a matter of grave concern expressed in the people's views

Domination by the military:

11.32 The armed forces have on several occasions ignored the right of the 'people to choose their own representatives and usurped the role of the legislature through coups d'etat. This has marginalised the people- It is in large part as a result of this concern that there is considerable debate about the future role of the armed forces in the legislature.

Manipulation by the executive:

11.33 The executive arm of government has often dominated and manipulated the legislature by undermining opposition groups, dictating the work programme of the legislature and ignoring laws and other decisions made by it.

Lack of acceptance of the role of the opposition

11.34Where the governing party has felt threatened by an opposition group, it has been difficult for the opposition to play a constructive role.

Excessive centralization of legislature power:

11.35 Since the abolition of semi-federal arrangements of the 1962 Constitution, there has been too much centralization of legislative power. The result has been inability of local decision –making bodies to develop to develop laws and other policies reflecting local needs.

The report, following the analysis above made the following recommendations under Chapter Eleven:-

Length of Terms, Summoning Meetings, Number of Sessions and Dissolution

Terms of Parliament

11.110 The people's views expressed great concern about the legislature in Uganda usurping the people's powers by extending its term of office without reference to the voters. It was almost unanimously proposed that Parliament should have a term of five years, with many saying it should not be possible

to extend the term under any circumstances. Others accepted the necessity for some provision for unforeseen circumstances where it is not possible to organise general elections at the time required. Although similar provisions in both the 1962 and 1967 Constitutions have been abused, there is some support for the necessity for inclusion of some such provision in the fact that the constitutions of many other countries do so.

11.111. If there is to be such provision, the people's interests must be safeguarded by strict limits on both circumstances where an extension is permitted and its maximum length. So while extensions might be open during a time of war or declared state of emergency, it should only be where it is clear - that elections are not possible. In some situations of war or emergency there may not be major impediments to holding elections. The maximum period of extension should be constitutionally fixed at one year.

11.112 Recommendations

(a) Parliament should have a term of five years.

(b) The normal term may be cut short by a vote of Parliament

(c) The normal term may be extended for a period not exceeding one (1) year, when there exists a state of emergency or a state of war but only when the circumstances are such as to prevent a normal election from taking place.

Dissolution of Parliament

11.117. The people's views expressed reservations about giving the President powers to dissolve Parliament. Such powers are open to abuse in times of political crisis and would tip any balance between the organs of the State too much towards the executive. Most people giving views on the issue indicated that Parliament should never be dissolved except at the expiry of its term.

11.118 Recommendation

Parliament should be dissolved only at the expiry of its normal term, with the President taking the formal steps to dissolve it. (Emphasis Mine)

Chapter twenty-eight of the report deals with safe guards and amendments of the new Constitution. This chapter appears to be the one most relevant to the issues before us and I am constrained to reproduce it in *extenso.*

SAFEGUARDS AND AMENDMENT OF THE NEW CONSTITUTION

28.1 The Independence Constitution of 1962 was suspended in 1966 by the then Prime

Minister contrary to its provisions. An interim Constitution was hurriedly put in place within two months without consulting the people. The following year the Constitution of 1967 was promulgated by Parliament without ample consultation of the people. Since then, successive governments have suspended parts of that Constitution and added to it amendments which suited them without reference to the people.

28.2. In their views submitted to us, people have been quick to connect the political instability, social turmoil and violence which have been experienced in Uganda since the 1966 crisis to the manner in which successive regimes have arbitrarily dealt with the national Constitution without consulting the people. To the successive regimes, the Constitution has not enjoyed the respect, significance and a sense of sacredness which are due to it.

28.3 During the Constitutional debate, the vast majority of Ugandans expressed the belief that unless the new Constitution being made is effectively safeguarded both by the political and military leaders and by the people of Uganda generally, there would be little meaning in wasting a lot of resources, both human and financial, to its making. They contributed important proposals on the subject of safeguards and amendments of the new Constitution. The Commission is convinced that the issue of safeguards and amendment of the new Constitution is one of the most important aspects of the new Constitution. It has served as one of the important guiding principles in all the recommendations we have made on every aspect of the new Constitution.

28.4 This chapter is divided into four sections. The first discusses the importance the people attach to the subject. The second section examines the concerns expressed and the principles emphasized in relation to safeguards and amendment of the constitution. The third section assesses people's proposals on a range of safeguards for the new Constitution and gives our recommendations on them. The final section concentrates on the manner suggested for the amendment of the Constitution and offers the Commission's recommendations on it.

SECTION ONE: THE IMPORTANCE OF SAFEGUARDS IN PEOPLE'S VIEWS

Nature and Importance of Safeguards

28.5 A constitution provides the rules and principles by which the people of a country agree to be governed. Its authority comes from the people. It should embody the basic political and social values of the people and the state. *It should identify the tasks to be performed by government and*

formulate principles according to which government functions should be performed. It provides the various organs of state with the necessary powers to enable them fulfill responsibilities effectively and efficiently. It places limits on the exercise of such powers in order to prevent any abuse of power and to protect the individual's rights and freedoms. To command people's respect and support, a national constitution should embodytheir aspirations, values and visions both for the present and a better future.

28.6 Written constitutions become the fundamental law of any nation. A national constitution enjoys a completely special status to any other law and this is normally evident in at least two senses. First, as the source of power and of limits on that power of all government authorities, a national constitution obliges all people to comply with it. Whatever is done by any leader, organ of government or any other person or group should be consistent with the constitution. Anything that is inconsistent with the Constitution should be overruled. The power to overrule such acts or decisions is usually vested in the judiciary and/or any other body set up for that very purpose. The power of the judiciary or the constitutional court to review and strike down laws or decisions which offend the Constitution is of special importance. It obliges all government organs to conform to the Constitution and defends the rights of the individuals and groups against violation by the state organs, other bodies or individuals.

28.7 The second sense in which written constitutions are considered fundamental is in the way they are usually made and the unique manner in which they are amended. In both aspects they essentially differ from other laws.They are often made' using procedures that involve wide consultation of the people or even national referenda or special representatives of the people. They are harder to amend or change because they contain the basic principles of the nation and the basic norms for all governmental institutions.

28.8 Once government authorities and the people as a whole fail to recognise the national constitution as the fundamental and sacred law of the country, that constitution has little value or none at all. A constitution which is overthrown, suspended or amended by government in ways that are contrary to its own provisions quickly becomes a nullity. Such has been the

experience in Uganda since the unfortunate precedent of 1966. The issue of safeguards, therefore, concerns the measures which can be taken to ensure the respect, sanctity and protection of the supremacy of the Constitution.

28.9 Safeguards to a national constitution can be considered under three general aspects. First, the manner in which the Constitution is made is important to its safeguard. A constitution which is made with full involvement of the people is more likely to be respected and defended than one made without consulting the people.

28.10Second, the very contents of the Constitution form an essence of its safeguard. The power of judicial review of unconstitutional acts and decisions protects the sanctity of the Constitution. The distribution of power among the organs of state with adequate checks and balances aims at safeguarding the Constitution. The provisions on amendment procedures of the Constitution emphasize the significance of the basic law. The provisions for the defence of the Constitution bring out the special importance of the Constitution. The provision for special constitutional institutions to check the exercise of power and defend the people's human rights is another important way of safeguarding the Constitution.

28.11Third, constitutions are -specially safeguarded by knowledge of respect, and commitment the people have for their constitution. It is through an acquired culture of constitutionalism that the Constitution can enjoy the full respect due to it.

28.12 From the very beginning of the constitutional debate people recognized and emphasized the importance of safeguards for the new Constitution. They advocated for a dramatic change of attitudes among the leaders and among themselves towards the importance of the Constitution.

Different attitudes to safeguards·

28.13We identified three main sets of attitudes on the issue of safeguards in the views submitted to us. The first was a pessimistic view, very much influenced by constitutional history since independence. The basic position was that it was futile to bother with making a new constitution which would inevitably be both violated routinely by those in power and undemocratically

overthrown. This was a minority viewpoint expressed mainly at the beginning of the constitutional debate. The vast majority of people were soon convinced that it was possible to have a positive change in the future and contributed constructive ideas on that basis.

28.14The second view was that development of adequate safeguards was the first task, and that only if there were assurances on that subject was there any point in proceeding with making the Constitution itself. Again, this view was expressed mainly in the early stages of the debate, after which most people became convinced that a major part of the answer in developing safeguards involved the proper design of the contents of the new Constitution itself, particularly in the way power was distributed.

28.15The third view, which was expressed by the vast majority who commented on the issue, was that Ugandans are quite capable both of developing adequate safeguards as part of the constitution-making process and of making them effective after the Constitution comes into force. In order to find effective and durable remedies for our past problems, however, many people emphasized the need to reflect critically on our past history in order to identify the factors which have undermined constitutionalism and democracy. We need also to identify factors in societies with more positive experience of safeguarding their constitutions which have contributed to that experience.

SECTION TWO: CONCERNS AND PRINCIPLES

28.24 All the concerns expressed by the people on all constitutional issues aimed at eliminating those factors and aspects in the past which have undermined the Constitution and the culture of constitutionalism. Likewise the principles emphasized on all issues were intended to safeguard the new Constitution. We only single out some of those concerns and principles which are directly related to the specific issue of safeguards and amendment of the Constitution.

Concerns of the People

Instability and lack of National Unity:

28.25Many people were deeply concerned that without adequate safeguards

for the new Constitution there would be no assurance of the future stability they yearned for. They were convinced that without stability there could be no development. They noted that other countries have been able to successfully confront great problems in part because of the basic stability fostered by commitment to constitutional order.

28.26There was widespread concern that national unity has been an elusive goal, with many forces at work to encourage people to look to ethnic or religious or other allegiances as more important than the nation. This was seen as a factor in behavior groups which ignore the Constitution in their efforts to get power or hold on to it even that means going against the established constitutional arrangements.

Excessive concentration of power in the executive:
28.27People agreed almost unanimously that the 1967 Constitution had concentrated far too much power in the hands of the executive arm of government, and in particular in lit President. There were no other institutions which could effectively check on executive and presidential power. As a result, those exercising such power had little concern constitutional limits, and tended to feel free to set aside the
Constitution or parts of the Constitution which did not suit their interests.

Politicisation of constitutional office
28.28Concentration of power in the executive was accompanied by a reduction in the independence of constitutional offices such as the Auditor-general, the Electoral Commission and the Judicial Services Commission. Even the independence of the judiciary was sometimes threatened in various ways, including the use of violence. Constitutional officeholders could be appointed and removed by the executive with few controls. They were not guaranteed adequate resources or even sufficient freedom from direction and control.

Militarism:

28.29People were concerned about the early reliance of civilian authorities on military power to resolve constitutional and political disputes. The

military thereby gained an unwarranted role in government and exercised excessive power. Once civilian authorities came to rely heavily on the military to remain in power, it was a relatively small step for the military to believe it could run things better on its own. Having so decided, the Constitution was seen as a minor issue to be largely ignored.

Lack of sufficient accountability of government officials:

28.30Itwas noted by many that government officials, including members of security forces, have often been able to violate the constitution with impunity. Inparticular, where human rights and freedpl11s of people have been ignored and no action taken against offenders, the standing of the Constitution has been damaged.

Weak civil society:

28.31 Itwas recognized by many people that far too much power and resources were concentrated in the suite and its institutions. The ordinary person remained weak and powerless in comparison. There have not been strong and autonomous civil organisations to act as powerful checks on the state and as guarantors of constitutional stability.

Ease with which constitutions can he changed:

28.32Quite apart from the numerous times constitutions - or parts of them - have been abrogated and suspended without lawful authority, people were concerned that it has been too easy for the government of the day change, the Constitution. As soon as a government happens to have support of two thirds of all the members of Parliament, it is in position to change whatever suits it without regard for minority opinion. Disregard of significant minority opinions was seen as a divisive influence in a country of diverse peoples and interests.

28.33Governments have shown little or no interest in helping the people grow to understand and love their Constitution. Knowing little or nothing-about it, people have had little interest in protecting it.

Principles Emphasized by the People.

Sovereignty of the people, and supremacy of the constitution:

> *28.34 People wanted assurances that in future it would be generally acknowledged that the Constitution and all authority under it derive from the people. The Constitution must therefore recognise that all authority and power in the state derive from the people. Sovereignty of the people is not to be seen as something granted by the Constitution; rather, it is the basis of the Constitution and the Constitution should give due recognition to that fact. In general, power under the Constitution must be exercised in the interests of the people.*
>
> *28.35 It follows from the principle of people's sovereignty that the law through which the people authorize the arrangements for their governance should be accorded the highest possible respect. The people in the views submitted to us, have made it clear that they want to be assured that the Constitution is treated as the fundamental law, supreme to all other laws and to all persons. Any law which is contrary to the Constitution must be illegal. This principle should extend to acts by the executive, the legislature and the judiciary, as well as those of other groups and individuals. It will be important that there are mechanisms for enforcing the supremacy of tile Constitution. Action should be provided for to deal with anyone who ignores the people's interests by seeking to abrogate or violate the Constitution.*

Distribution of power among institutions which act as checks on one another:

> *28.36The people submitting views on the issue agreed that the national government should be composed of a number of institutions each with clearly delimited power and all of which act as checks on one another. No single institution should have sufficient power to unlawfully and unconstitutionally dominate and silence other institutions.*
>
> *28.37The constitutionally recognised institutions of government should extend beyond the three traditionally recognised organs of state (legislature, executive and judiciary) to other specialised and*
> *independent bodies. Anybody carrying out responsibilities which could be politically*

sensitive should be given constitutional protection so that it cannot be interfered with for political reasons. Such bodies should include the Electoral Commission, the Judicial Services Commission, and many others discussed in other chapters of this Report.

Popular participation transparency and accountability:

28.39Government would be under more pressure to deal with the people in accordance with the Constitution and more accountable for its actions if people were able to participate fully in their own government. Hence people wanted to see local level governments continue to operate to the village level but with increased powers, responsibilities and resources. They also wanted guarantees of regular and affair elections from the village to the national levels.

The people should always be consulted and involved in any major constitutional process.

28.57The third implication is that where the people's representatives in the Constituent Assembly cannot reach a reasonable degree of consensus on matters of controversy in the draft Constitution, the issue should be referred back to the people for a final decision. This can be done through a referendum. In this way, the people can be satisfied that decisions on all major issues concerning the contents of the new Constitution originate with them. We recommended so in the mentioned Interim Report.

28.58The unprecedented degree of involvement of the people in the constitution making process to date has ensured that people generally believe that a democratic constitution can only emerge from themselves. We are convinced that this belief is the strongest safeguard of a national constitution. This belief once sustained and encouraged by proper action should in turn foster people's preparedness to later defend the Constitution.

Sovereignty of the People and Supremacy of the New Constitution

28.59We have already discussed the closely related principles of sovereignty of the people and supremacy of the Constitution. They are the ultimate basis for all safeguards and so should themselves be enshrined in the Constitution.

28.60As to sovereignty of the people, it is necessary that the principle be given due recognition not only by a bare statement but also by provisions that give it full effect. As to the bare statement, it should make it clear that state organs should not

take to themselves powers which the Constitution does not clearly vest in them, for the people retain ultimate power. As to provisions which give effect to the principle, the powers of the people to recall elected representatives and the reference of matters of controversy to decisions of the people in referenda are important examples.

28.61Turning to the question of supremacy of the Constitution, it must be clearly provided that the Constitution is superior to all other laws and customs, and that all acts of the executive and other governmental bodies must be consistent with it. As discussed in Chapter Sixteen (Judiciary), the courts, and in particular the High Court, should be given responsibility for ruling on questions as to the interpretation and application of the Constitution. In doing so, the court will be determining whether or not the supremacy of the Constitution has been challenged, intentionally or otherwise. The courts should have clear powers to make rulings on the issues and to make orders preventing continuations of breaches and providing for other remedies where breaches of the Constitution have occurred.

28.62. In carrying out their vitally important roles in relation to the Constitution, the law courts should seek to give full effect both to the spirit and the letter of the Constitution. In so doing, they will find the
people's expressed concerns and the principles they have emphasized and contained in our Report particularly useful. This Report together with the documents containing the original submissions of the people should be made use of by the judiciary in aspects which concern it.

> *(c) a flexible Constitution usually undermines the growth of a culture of constitutionalism since such a Constitution cannot be usefully studied in schools due to frequent changes;*
>
> *(d) once people are not assured that the principles under which they have chosen to be governed will remain intact they are likely to lose interest in their Constitution.*

28.101 Therefore, it is not surprising that the majority of people proposed that the Constitution should be amended through national referendum. Others proposed that

the alterations should be effected by a two thirds majority of Parliament with the approval of two thirds of the District Councils. Some people were satisfied with only two-thirds majority of Parliament. There were also proposals for periodic review of the Constitution after a specified period of between 10 to 25 years. They were virtually no views recommending the extreme positions that the provisions of the Constitution should be unalterable or that they should be amended by a simple majority in Parliament.

28.102 We agree with the views of the people that Parliament should have power to amend the Constitution but that the procedure for amending the Constitution should be rigid. Constitutionalism can better be secured if the procedure for amending the Constitution is made more demanding than for ordinary legislation. Secondly, since the people have participated in making the new Constitution which reflects their values, wishes, interests and aspirations, it should not be changed without consulting them. They should continue to be involved in the evolution, growth and development of the Constitution. Thirdly, there is a need to take the greatest care and serious consideration before amendments to the Constitution are made. They should not be effected merely to meet political expediency. Proposals for amendment should be published and the public given adequate opportunity to debate them.

Amendment by referendum

28.104We accept in principle that the procedure for amending the new Constitution should be rigid in order to promote a culture of constitutionalism, to protect the supremacy of the Constitution, and to safeguard the sovereignty of the people and the stability of the country.

28.105. Amendment by referendum would satisfy the above objectives and it would provide one of the highest forms of rigidity or encroachment. It would ensure that amendments receive the popular approval of the population. However we think that submitting every proposed amendment to a referendum may be too cumbersome and expensive and it may even be too difficult to obtain popular approval of desired constitutional charges. This procedure, therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and political system. The provisions declaring the supremacy of the Constitution are the

foundation of constitutionalism and the entire constitutional order. They are basic to the character and status of the Constitution and shouldnot be altered without the consent of the people.

28.106 The provisions on the political system the basic to the new political order. They have been the most hotly debated and they have serious implications for the democratic governance of the country. The people should have the ultimate power to decide on how they should be governed.

28.107 Recommendation

The following provisions in the Constitution should not be amended unless the proposed amendment has been approved by a national referendum:-

(a) provision on the supremacy of the Constitution;

(b) provisions on referendum on political system;

(c) provisions prohibiting and one-party state.

Amendments Requiring Approval of District Councils

28.108People in their views emphasised another method of involving the people in the amendment of the Constitution by requiring, approval or consent of the District Councils after Parliament has passed the amendments. Through this method the people in the districts being represented by their local leaders share with the national Parliament the responsibility of effecting fundamental changes in the Constitution. It is a procedure which is common in federal constitutions. It promotes national acceptance of amendments and may also protect minorities. We agree with this method which can greatly promote national unity while at the same time adequately catering for our diversity.

28.109 The provisions which should be governed by this method of amendment include those guaranteeing the people their sovereignty, and those providing for the defence of the Constitution. The people should be involved in the alteration of these provisions to prevent the government of the day disregarding the Constitution or the people. The provisions describing the character of the State of Uganda, its form of government, its districts, capital and official language should not be amended without the approval of the districts because they have an interest in these provisions which affect their well-being. Other provisions which should require,

approval of districts include those on human rights and freedoms, representation of the people, the executive, the National Council of State, the judiciary, local government, defence and national security, taxation, traditional leaders, and amendment of the Constitution.

28.110. Recommendation

Provisions in the Constitution relating to the following matters should not be amended unless a Bill seeking to amend any of them has been passed by a vote of not less than two thirds majority of all members of parliament and it has been ratified by the District Councils of at least two thirds of the districts of Uganda:

Safeguards and Amendment of the new Constitution (Page 743)

(a) the sovereignty of the people;

(b) the defence of the Constitution;

(c) representation of the people - establishment and independence of the Electoral Commission and the right to vote;

(d) the Republic as the form of government;

(e) the boundaries of districts;

(f) the territorial boundaries;

(g) the Capital of Uganda;

(h) executive authority of Uganda;

(i) election of the President;

(j) term of office of the President;

(k) removal of President;

(1) declaration of war;

(m) emergency powers of the president;

(n) the National Council of State;

(0) human rights;

(p) Local Government system;

(q) authority to raise armed forces;

(r) taxation;

(s) amendment of the Constitution;

Amendment by Absolute Majority

28.111Most of the provisions of the Constitution should be capable of being amended by Parliament alone provided the prescribed majority is realised. There

would be provisions which deal mainly with the structural formation of the state institutions and not the foundation, or human social values of the socio-political order. A special majority of two thirds of all members of Parliament should he required to pass a constitutional amendment. Such amendments, however, should not be done in a hurry. People should be informed of any proposed amendment and allowed time to discuss it through the media and offer theirviews to their elected members of Parliament.

Following the Odoki report, a draft Constitution was tabled before the Constitution Assembly on 18th May 1994.

The people of Uganda had elected from amongst themselves, delegates, to represent them in the Constituent Assembly. The National Resistance Council remained as the Country's legislative body and did not debate the draft Constitution

I have not found it necessary to reproduce excerpts of the debate on the draft Constitution, here. I may, however, have to refer to it in the resolution of some of the issues before us.

Suffice it to say, the draft was debated for a period of 29 months. Most of the Articles were passed by consensus. A number of modifications were made to the draft following the debates, but even then, after wide public consultations had been made.

On the 8th of October 1995, the eve of the 42nd anniversary of Uganda's independence, a new Constitution was promulgated, replacing the 1967 one. Since its promulgation, the Constitution has been amended three times as follows:-

- *The Constitution (Amendment) Act, 2000, Act No.13 of 2000 which commenced on 15th September, 2000;*
- *The Constitution (Amendment) Act, 2005, Act No.11 of 2005 which commenced on 30th September 2005; and*
- *The Constitution (Amendment) Act, 2005, Act No.21 of 2005 which commenced on 30th December 2005.*
- *The Constitution (Amendment) Act, 2015, Act No.12 of 2015.*

The first amendment, the Constitution (Amendment) Act, 2000, Act No.13 of 2000 provided for the repeal and replacement of Article 88 of the Constitution; amended Article 89; repealed and replaced Article 90;

amended Article 97 and inserted a new Article 257 A. The amendment Act was however successfully challenged in the Supreme Court case of Ssemogerere and Others -vs- Attorney General, Constitutional Appeal No.1 of 2002.The court noted that the creation of Article 257

A in the Constitution, now Article 258 in the 2000 revised edition, was inconsistent with Article 88 of the Constitution, which provides for the quorum of Parliament when voting on any question.

The second amendment is the Constitution (Amendment) Act, 2005, Act No. 11of 2005. The objectives of this amendment were to:

- *amend the Constitution in accordance with Article 261;*
- *distinguish Kampala as a capital city of Uganda and to provide for its administration and for the delineation of its boundaries;*
- *provide for Swahili as a second official national language of Uganda;*
- *provide for the Leader of the Opposition in Parliament under the multi-party political system;*
- *remove the limits on the tenure of office of the President;*
- *create the offices of Prime Minister and Deputy Attorney General;*
- *provide for the independence of the Auditor General and to provide for procedure for his or her removal;*
- *provide for the creation of special courts to handle offences relating to corruption;*
- *establish and prescribe the functions of a Leadership Code Tribunal;*
- *provide for the control of minerals and petroleum;*
- *provide for the holding of referenda generally;*
- *make miscellaneous repeals to the spent provisions; and*
- *provide transitional provisions having regard to the amendments made to the Constitution,*

The third amendment is the Constitution (Amendment) (No.2) Act, 2005, Act No.21 of 2005. The objectives of this amendment were to:

- *provide for Kampala as the capital city of Uganda;*
- *provide for the new districts of Uganda;*
- *provide that subject to the existence of regional governments the system of local government in Uganda shall be based on a district as a unit of administration;*
- *provide for the creation of regional governments as the highest political authority in the region with political, legislative, executive, administrative and cultural functions and to provide for the composition and functions of the regional governments; provide for grants for districts not forming regional governments; replace the Fifth Schedule to provide for details relating to regional governments; and*

- *amend Article 189 to recognise the functions and services of regional governments.*

The preamble to the Constitution has remained unchanged it states: -

WE THE PEOPLE OF UGANDA:

> *RECALLING our history which has been characterised by political and constitutional instability;*
>
> *RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;*
>
> *COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;*
>
> *EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;*
>
> *NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:*
>
> > *DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.*
>
> *FOR GOD AND MY COUNTRY.*

This preamble sums up all that I have endeavored to narrate above. In this preamble and in the whole Constitution the people of Uganda, emphasized the Country's history, acknowledging sadly that it has been characterized by political and Constitutional instability. Lest we forget. My attempts to recount the Constitutional history was t0 re-echo the people's cry, in the preamble to the Constitution.

We must always recall our history. *"Lest we forget"*. Indeed, lest we forget our people, the brave, who shed blood in battle, who were killed, starved or jailed during the period when we were under colonial rule. Those who struggled for our independence and endeavored to bring us together as a nation state.Those who were killed in the lost counties.Those who were killed at Nakulabye and those that fell during the Battle of Mengo.Those who lost their lives and those who spent long days in prison during the state of emergency.Those who were deported from their homes to distant places because they dared to speak out.Those who lost their lands, properties and livelihoods unjustly to the powerful and greed government officials.Those who were killed during the murderous regime of Idi Amin and the years that followed his rule.Those who lost their lives in a bid to overthrow the regime of Idi Amin and never saw its aftermath. Those who were killed, jailed, tortured simply because of their ethnicity, religion, political beliefs or simply for no reason during

the dark days of our history. Those who lost their lives so that we may have peace and stability during the civil war that ended in 1986. This is our history; the history the people of Uganda were recalling in the preamble to their Constitution.

This is what the preamble refers to when it calls us to "recongnise our struggles against the force of tyranny, oppression and exploitation."

In this Constitution, unlike any other, the people are sovereign and affirm their sovereignty and their inalienable right to determine the form of government they want through their Constitution. In this regard, the Constitution itself is not supreme, it simply embodies the supremacy of the people who through an armed struggle captured power from tyrants and dictators and vested it into themselves, and set out their will in the Constitution. They are the ones who gave Parliament the power to make laws, the Judiciary to adjudicate on cases and the Executive to pass and implement policies. The Constitution did not make the people, they made it, themselves.

Each and every provision of the Constitution of this Country ought, by necessity, be understood and interpreted with the knowledge of our history and the spirit set out in its preamble and the National Objectives and Directive Principles of State Policy enshrined therein.

Sovereignty of the constitution.... vox populi, vox dei (latin, the voice of the people is the voice of god) and the doctrine of basic structure (togikwataako)

Articles 1 and 2 provide as follows; -

Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this Article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this

Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

In this regard, *Articles 259* and *260* and *261* provide as follows;

259. *Amendment of the Constitution.*

(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament—

(a) the sole purpose of which is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter.

260. Amendments requiring a referendum.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this Article shall not be taken as passed unless it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this Article are—

this Article;

Chapter One—Articles l and 2;

Chapter Four—Article 44;

Chapter Five—Articles 69, 74 and 75;

Chapter Six—Article 79(2);

Chapter Seven—Article 105(1);

Chapter Eight—Article 128(1); and

(h) Chapter Sixteen.

261. Amendments requiring approval by district councils.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this Article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been ratified by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda.

(2) The provisions referred to in clause (1) of this Article are—

this Article;

Chapter Two—Article 5(2);

Chapter Nine—Article 152;

Chapter Eleven—Articles 176(1), 178, 189 and 197.

The question is whether or not the above Articles permit the amendment of any of the provisions of the Constitution, and whether Parliament has the authority to amend the Constitution at will.

In Yaniv Roznai entitled "Unconstitutional amendments; A study of the Nature of Constitutional Amendments Power." A thesis submitted to the Department of Law at the London School of Economics for the degrees of Dr of Philosophy, London 2014.

On this subject Roger Sherman, an American Congressman in the 19th Century wrote;

"The Constitution is the act of the people and ought to remain entirely. But the amendments will be the act of state Governments. Again all authority we possess is derived from that instrument, if we mean to destroy the whole and established a new Constitution we destroy the basis on which we mean to build. (Annals of U.S Congress (1789, 735). (Sic)

Another American John Calhoun in his study. "Discourse on the Constitution and Government of the United States, published in 1857 wrote:

"If an amendment is inconsistent with the character of the Constitution and ends for which it was established or the nature of the system or radically changes the character of the Constitution or the nature of the system then the amendment power transcends its limits." (Sic)

But the most appealing argument to me is that of Otto Bachof (1951): -

"Above positive law exists natural law, which limits even constitutional legislation. A constitution is valid only with regard to those Sections within the integrative and positivist legal order that do not exceed the predetermined boarders of a higher law. An amendment that violates "higher law" would contradict both natural law and the constitution and it should be in power of the courts to declare such amendment as unconstitutional and void"

A number of democratic countries have accepted the doctrine of basic structure expressly or by implication. In India, the Supreme Court in Minever vs Union of India (AIR 1980 SC 1759) unanimously held that a law that removed all limitations on Parliament's amendment power, was unconstitutional. The Court explained that;-

"if by constitutional amendment, Parliament were granted unlimited power to amendment, it would cease to be an authority under the constitution but would become supreme over it, because it would have power to alter the entire constitution including the basic structure and even put an end to it by totally changing its identity."

In Bangladesh, the Supreme Court in Anwar Hossain Chowdhury vs Bangladesh 41 DLR 1989 App Div 169 while striking down a Constitutional amendment that abolished the judicial review

jurisdiction of the Supreme Court said:-

"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament… Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

In the same case, Judge Shehebuddin reasoned that, the power to make a Constitution belongs to the people alone. The power vested in Parliament to amend the Constitution is derived from the Constitution and therefore such power is limited. He named a number of principles that cannot be removed from the Constitution by way of amendment, which include the people's sovereignty, supremacy of the Constitution, democracy, unitary state (in as far as it related to Bangladesh) separation of powers, fundamental rights and judicial independence which he contended are structural pillars of the Constitution, and therefore, beyond the amendment power of Parliament. Where Parliament transgresses its limits, it is in the power of the Court to strike down such an amendment.

In Bangladesh Italian Marble Works Ltd vs. Bangladesh (2006) 14 BLT (Special) (HCD) 1. The Supreme Court while annulling the Constitutional (Fifth Amendment) Act, 1979 which had been enacted to ratify, confirm and validate Martial law proclamations, regulations and orders held that:-

Parliament may amend the Constitution but it cannot abrogate it, suspend it, or change its basic feature or structure… The enabling power to amend cannot swallow the Constitutional fabrics. The fabrics of the Constitution cannot be dismantled even the Parliament, which is a creation of the Constitution itself. While the amendment power is wide it is not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy."

In Kenya, the basic structure doctrine was accepted when the Court in Njoya vs Attorney General and Others (2004) LLR 4788(HCK) held that: -

Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained." (Sic)

While discussing the doctrine of basic structure Justice Albie Sachs of the South African Constitutional Court in Executive Council of Western Cape Legislature Vs the President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) noted as follows: -

There are certain fundamental features of Parliamentary democracy which are not spelt out in the

Constitution but which are inherent in its very nature, design and purpose. Thus, the question-has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."(Emphasis mine)

Needless to say, the doctrine of basic structure has not yet attained universal acceptance. It was rejected in Tanzania, when the Court of Appeal reversed the Judgment of the High Court that had upheld it in *Attorney General vs Christopher Mtikila (Civil Appeal No. 45 of 2009).*

It has not been fully accepted in Pakistan or even in South Africa where it has been alluded to but not adopted.

The Supreme Court of Sri Lanka, also rejected it because the language in its Constitution permitted expressly any amendment or repeal of any Constitutional provision. The doctrine has also been rejected in Malaysia, where the Court granted Parliament an unlimited power to amend the Constitution.

In Belize, a Commonwealth Country in Central America, its Supreme Court in *Barry M. Bowen vs Attorney General No. 445 of 2008 BZ 2009 SC,* applied the basic structure doctrine. In that case, the Government had come up with the sixth Amendment Bill 2008, which aimed at allowing the government to exploit a recent oil discovery in that country. The bill proposed to exclude petroleum and minerals from the Constitutional protection of property rights. Apparently the Parliament had followed all the required procedures required for the passing of that Constitutional amendment.

The Supreme Court nonetheless held that, compliance with the procedure is not sufficient. The amendment just like any other law must be subject to the Constitution. Any view to the contrary would subject constitutional supremacy to Parliamentary supremacy. Therefore, Parliament's law making powers are limited so that it cannot enact laws which are contrary to the basic structure of the Constitution of Belize which includes the characteristics of Belize as a sovereign and democratic state, the supremacy of the Constitution, the protection of fundamental rights and freedoms that are set out in the Constitution, the limited sovereignty of Parliament, the principle of separation of powers and the rule of law.

The Supreme Court found that, the amendment bill which sought to infringe the citizens' right to

property by obstructing their access to Courts of law violated the principles of separation of powers, the rule of law and the protection of the right to property, thus offending the basic structure of the Constitution. "The Sixth Amendment Act" was declared unconstitutional and void, by the Court.

However, the government was not yet done. In response to the decision of the Supreme Court above, the government proposed another amendment to the Constitution which was quickly passed, as "The Eighth Amendment Act of 2011". It stipulated that, *Section 2* of the Constitution which provides that, this Constitution is the Supreme law of Belize and if any other law is inconsistent with the Constitution that other law shall to the extent of its inconsistency be void, does not apply to a law to alter provisions of the Constitution. In other words, the judiciary was deprived of its power to question a Constitutional amendment law.

"The Eighth Amendment Act" was itself challenged in *British Caribbean Bank Ltd vs Attorney General Belize No. 597 of 2011 (SC)*. The Supreme Court of Belize held that there are implied, in the Constitution limitations on the National Assembly's amendment power so that it cannot destroy or remove the basic structure of the Constitution. The Court found that "The Eighth Amendment Act" was contrary to basic principles of separation of powers and the basic structure of the Constitution. That amendment, too, was accordingly declared null and void.

From the aforegoing, it appears to me clearly that, whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. The classic example is the American Constitution. But there are a host of others. The American Constitution differs in a fundamental way from that of the United Kingdom because each of the two countries has had a very distinct history.

Uganda's Constitutional history is unique and differs in many aspects from that of Kenya and Tanzania, its neighboring countries.

In that regard therefore, the question as to whether in this Country's Constitution, there are indeed express or implied conditions that limit the amending power of Parliament can only be answered by looking at our unique constitutional history which has already been set out earlier in this Judgment.

I have already set out the Constitutional history of this Country *albeit* in brief earlier in this Judgment. I will not repeat it here. Suffice it to state, that our constitutional history serves as a guide, as to whether or not the current Constitution incorporates in it the basic structure doctrine.

The 1962 Constitution appears clearly to have been put together by the British colonialist in collusion with traditional Rulers, politicians and administrators. The contract was between the British, on one hand and the traditional rulers and politicians on behalf of the people, on the other.

The views of the people were never sought directly. The constitutional arrangement was more concerned with putting together a Colonial State, sharing of power and resources. It had nothing to do with the people themselves or their interests

In this regard the basic structure of the 1962 Constitution was the relationship between the federal states, semi-federal states, the territories and the districts. The main basic structure of the 1962 Constitution consisted of the following: -

1. *The federal and semi-federal structure.*
2. *The power sharing between the central government and the federal state of Buganda other than kingdoms and districts*
3. *The limited power of Parliament in respect of the administration of the federal and semi federal states.*
4. *Direct and indirectly elected members of Parliament*
5. The President was ceremonial and unelected.
6. *The Prime Minister had executive powers, was not directly elected but was chosen by the party with majority in Parliament.*
7. *The country was neither a republic nor a monarchy.*
8. *It was neither unitary nor federal.*

This was a constitutional order set up for convenience and appears to have been intended to be an interim measure. Soon it developed cracks, when the President was torn between his Constitutional duty as the President of the country and defending the territorial integrity of his Kingdom of Buganda.

The Constitutional battle between the Prime Minister and the President led to the former abrogating the Constitution in April of 1966 only 4 years after its enactment.

Under the 1962 Constitution, Parliament could not amend or in any way interfere with the Constitutions of the federal states and the territory of Busoga, under its Section 1.

The basic structure of 1962 Constitution could not be changed through a constitutional amendment. Any attempt to do so would have altered the nature of the whole Constitution. In April 1966, the UPC government had a comfortable majority in Parliament sufficient to pass a constitutional amendment, but it did not. The reason, in my view, is that any attempt to change the Constitution by way of amendments that were introduced by the 1966 Constitution would have had the same result as its replacement or abrogation. The amendments would have been so radical as to change the entire nature and character of the Constitution, which power Parliament did not possess. In the result the Prime Minister and his government decided to have the Constitution abrogated and replaced with another one, through an unconstitutional process.

The 1967 Constitution introduced its own basic structure. The Country became a one united republic. The President was chief executive and could appoint the Vice President and cabinet. The federal states were abolished. Members of Parliament were directly elected by the people through a multi-party system.

When Amin took power in January 1971, he suspended the basic structure of the 1967 Constitution, including Parliament, elections of President and distinct councils and practically ruled the Country as a dictator with absolute power. He later declared himself life President and ruled as if there was no Constitution, although most of the constitutional provisions remained in force. Amin's Legal Notice No. 1 of 1971, abrogated the Constitution, when he suspended its basic structures.

Therefore, once the basic structure of the Constitution is removed, suspended or replaced the Constitution ceases to exist even if the rest of the provisions remain operational.

When the NRM government came to power in 1986, it had resolved that the people of Uganda themselves would for the first time fully participate in the making of a new Constitution that is their own. It would have been simpler, cheaper and less time consuming for the Parliament at the time to introduce and pass amendments to the 1967 if it so desired. Again such amendments would have been so radical as to amount to abrogation of the 1967 Constitution.

It was the overwhelming desire of both the Government and the people to enact a new Constitution with its own basic structure, radically different from all the past Constitutions. As far as I can discern, the basic structure of the 1995 Constitution are.

1) *The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.*
2) *The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.*
3) *Political order through adherence to a popular and durable Constitution.*
4) *Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.*
5) *Arising from 4 above, Rule of law, observance of human rights, regular free and far elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.*
6) *Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.*
7) *Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.*

8) *Natural Resources are held by government in trust for the people and do not belong to government.*
9) *Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.*
10) *Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party.*

In this regard, the Odoki Commission recommended as follows (at P.741 28.104 and 28.105);-

> *28.104. We accept in principle that the procedure for amending the new Constitution should be rigid in order to promote a culture of constitutionalism, to protect the supremacy of the Constitution, and to safeguard the sovereignty of the people and the stability of the country.*
>
> *28.105 Amendment by referendum would satisfy the above objectives and it would provide one of the highest forms of rigidity or entrenchment. It would ensure that amendments receive the popular approval of the population. However, we think that submitting every proposed amendment to a referendum may be too cumbersome and expensive and it may even be too difficult to obtain popular approval of desired constitutional changes. This procedure, therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and the political system. The provisions declaring the supremacy of the Constitution are the foundation of constitutionalism and the entire constitutional order. They are basic to the character and status of the Constitution and should not be altered without the consent of the people.* (Emphasis mine)

Parliament, in my view, has no power to amend alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under *Article 3 (4).* This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves.

The rationale expressed above is fortified by the following provisions of the Constitution.

Articles 1 and 2: These Articles establish the foundation of the Constitution upon which all other Articles are archived therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4).

Article 3. This Article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to

> Uganda the Kelsen Theory of pure law.
>
> Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure.

I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test.

I have already set out the views expressed by the people of Uganda during the Constitutional making process in regard to its basic structures earlier in this Judgment where I set out the views of the people of Uganda in respect of the basic structure of the Constitution.

The people made it clear that, Parliament must not be permitted to usurp the sovereignty of the people by extending its term of office. It was also unanimously expressed that Parliament should have a term of five years, with many saying it should not be possible to extend the term under any circumstances. Reference was made to the 1966 Constitution under which Parliament extended its term of five years without having gone through elections. Further reference was made to the regime of Idi Amin where legislative power was vested in him and there were no elections for the entire 8 years he was in power. This is the said history the people of Uganda were determined not to repeat *See: Report of the Constitution Commission 11.110 Term of Parliament* (supra).

Therefore, the principle of free and fair election, held regularly every five years forms one of the basic structure of the Constitution and is beyond the power of Parliament to amend. Any attempt to do so would amount to usurping the sovereignty of the people and the supremacy of the Constitution and this would contravene *Article 1* of the Constitution.

To hold otherwise, would create an absurdity. It would in theory and practice, mean that, Parliament may every five years or seven years as set out in the impugned Act, extend its term without having to go for elections, perpetually! Even worse, it could abolish elections and declare its current members to be members for life!

This is what Idi Amin did when he declared himself life President, at that time all legislative powers of Parliament were vested in him, he was not just the life President he was also the life Parliament. This is what Justice Sachs of the South African Constitutional Court alluded to when he stated that, unchecked amendment powers of Parliament would in principle enable it to give itself "eternal life". *See: Executive Council of Western Cape Legislature Vs The President of The Republic of South Africa* (Supra).

Parliament could even abolish the Judiciary and vest judicial powers in itself! It could repeal the whole Bill of Rights from the Constitution, as long as it has a majority to do so. It could even abolish the Republic of Uganda and in its stead create a Monarchy.

Once the principle is set that Parliament has a right to amend any Article of the Constitution, simply by voting "yes" there would be no limit to their demands. Nothing would stop them from amending the Constitution to provide that they would be Members of Parliament for life and upon death, their Parliamentary seats be inherited by their children. They cannot do so because the Constitution put in place this Court to stop them. Its therefore not prudent to stand by and let our Country's democracy and hard-worn values set out in the Constitution wither on the vine.

Members of Parliament have no power on their own to legislate. The power to legislate belongs to the people of Uganda, who every five years delegate it to some amongst themselves under *Article 1* of the Constitution. This power therefore delegated as it is very limited in both in time and scope.

Clearly, the notion that, Parliament has unlimited power to amend the Constitution does not appeal to right thinking people. The notion that every Article of the Constitution can be amended has no legal basis in our history and in our current jurisprudence.

THE PUBLIC PARTICIPATION QUESTION (SALUS POPULI SUPREMA LEX ESTO) IN LATIN: THE HEALTH, WELFARE GOOD, SALVATION, FELICITY OF THE PEOPLE IS THE SUPREME LAW

To salvage this deabate i will use as an exampale the constitutional petition 2018 we now determin Whether there was lack of public participation in respect of amendments that introduced *Sections 2, 6, 8,* and *10* of the impugned Act, if so whether it vitiated the Act.

I now proceed to determine whether or not a number of procedural irregularities were breached and if so whether they vitiated the process of enacting the impugned Act.

In *Oloka–Onyango and 9 Others versus Attorney General Constitutional Petition No. 8 of 2014* (unreported), discussed the question as to whether or not Parliament while passing legislation may ignore or waive legal requirements. It was held as follows:-

> *"Parliament as a law making body should set standards for compliance with the Constitutional Provisions and with its own Rules. The speaker ignored the law and proceeded with the passing of the Act. We agree with Counsel Opiyo, that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it." (Sic)*

I agree with the above proposition of the law, as clearly set out by that Court. Woth noting however is that public participation in the legislative process is not a privilege granted to the people by Parliament. It is a basic constitutional requirement. All the past Constitutions as already set out lacked legitimacy because they failed to allow the people to participate in the constitutional and legislative process. The Uganda Agreement of 1900 and the Order-in-Council of 1902, were

illegitimate on that basis alone. Similarly, the 1962 Constitution, lacked popular support. When it was abrogated the people did not rise in its defence as they had no attachment to it. It had been made by and for their rulers. The worst example was the 1966 interim Constitution which was enacted without having been seen even by the members of Parliament who passed it and swore allegations to it.

The 1967 Constitution was debated and passed by Parliament which had constituted itself into a Constituent Assembly. The people's participation was extremely limited as already set out above. .

The 1995 Constitution specifically provided for Public participation in the legislative process and the government. This was one of the fundamental changes President Museveni had promised the people in his maiden speech which I have already reproduced above.

The Odoki report (Supra) sets out the recommendations on this aspect at P. 741 as follows: -

Sovereignty of the people and Supremacy of the New Constitution.

> *28.102. We agree with the views of the people that Parliament should have power to amend the Constitution but that the procedure for amending the Constitution should be rigid. Constitutionalism can better be secured if the procedure for amending the Constitution is made more demanding than for ordinary legislation. Secondly, since the people have participated in making the new Constitution which reflects their values, wishes, interests and aspirations, it should not be changed without consulting them. They should continue to be involved in the evolution, growth and development of the Constitution. Thirdly, there is a need to take the greatest care and serious consideration before amendments to the Constitution are made. They should not be effected merely to meet political expediency. Proposals for amendment should be published and the public given adequate opportunity to debate them.* (Emphasis mine)

Counsel for the petitioners submitted that *Sections 2, 6, 8* and *10* of the impugned Act were smuggled into the bill. Those provisions extending the term of Parliament and that of the District Local Councils from five to seven years were neither in the original "Magyezi bill" nor did they emanate from the views and demands of the people. The people, petitioners contend, were never consulted on those amendments.

A number of affidavits were presented putting forward the argument that, the Magyezi bill as first presented did not refer to or contain a proposal to extend the term of Parliament and /or that of Local Governments.

For the sake of brevity I will refer only to the affidavit of by Morris Wodamida Ogenga Latigo dated 12th January 2018, sworn in support of *Petition No. 3 of 2018,Uganda Law Society versus Attorney General*. The paragraphs relevant to this issue are set out in that affidavit as follows:-

1. *That I am an adult male Ugandan of sound mind, a Member of Parliament representing Agago North County Constituency in the tenth (10) Parliament and I make and swear this affidavit in support of the above petition in that capacity .*
2. *THAT on the 27th day of September 2017, I attended the Parliamentary session in which Hon. Raphael Magyezi, Member of Parliament for Igara County West Constituency in Bushenyi District moved a motion seeking leave of Parliament to introduce a Private Member's Bill entitled "The Constitutional (Amendment) Bill 2017".*
3. *THAT prior to the tabling of the said motion, on the 26th day of September 2017, the Rt. Hon. Speaker of Parliament in her communication outlined two notices of motion for leave to introduce Private Members Bills and one of the notices of motion was for "a resolution of Parliament urging Government to urgently*

   constitute a constitutional review commission to comprehensively review the Constitution", which notices she said met the test for inclusion in that day's order paper.

18. *THAT the memorandum of the Constitution (Amendment) (No.2) Bill, 2017 circulated to the members of parliament prior to the first reading laid out the object of the said Bill, and long title of the Bill stated as follows:-*

    "Act to amend the Constitution of the Republic of Uganda in accordance with Articles 259 and 262 of the Constitution/ to provide for the time within which to hold presidential, parliamentary and local government council elections: to provide for eligibility requirements for a person to be elected as President or District Chairperson; to increase the number of days within which the Electoral Commission is required to hold a fresh election where a president election is annulled: and for related matters. "

19. *THAT when I read the memorandum of the said Bill, I established that the substance of the motion for which leave was granted was premised on Hon. Raphael Magyezi's basing the amendment on "the Supreme Court decision in Amama Mbabazi vs Yoweri Kaguta Museveni, Electoral Commission and The Attorney General in Presidential Election Petition No. 01 of 2016."*
20. *THAT in justification of a Private Member's Bill, Hon. Raphael Magyezi presented the said Bill with the view of meeting the time lines set by the Supreme Court even though the Bill touched on the minor recommendations of reforming electoral laws as opposed to the actual reforms needed to govern the conduct of a free and fair election in Uganda.*

22. THAT the Bill which was circulated to the Members of Parliament after publication in the Gazette captured the prayers of Hon. Raphael Magyezi for which leave was granted by Parliament to bring a Private Member's Bill to amend the Constitution, which Bill did not include provisions on extension of terms of Members of Parliament and the current local government councils, and restoration of terms limits for the President.

25. THAT following the Bill circulated among the Members of Parliament and the Speaker's directive, the consultations by Members of Parliament were not required and neither did they address issues of extension of the term of the current Parliament and local government councils.

27. THAT after the consultations I attended the Parliamentary session of 18th December 2017 in which the Constitution (Amendment) (No.2) Bill, 2017 was presented to the House for the second reading.

28. THAT the presentation of the Report of the Committee on Legal and Parliamentary Affairs on the Constitution (Amendment) (No.2) Bill, 2017 was interrupted by several procedural interventions by Members, among which was the Deputy Attorney General's motion under Rule 16 of the Rules of Procedure of Parliament to suspend Rule 201 (2) which requires a report of a Committee on a bill to be debated at least three days after the laying of the report on the Table of Parliament by the Chairperson or Deputy Chairperson, or Member nominated by the committee or by the speaker.

30. THAT in the Parliamentary sitting of Monday 18th December 2017, Hon. Kafeero Robert Sekitoleko, MP for Nakifuma County in Mukono District made an oral notice to the Speaker of his intention to propose amendments to the tenure of Parliament extending it to seven years.

31. THAT I attended the Parliamentary sitting of Tuesday 19th December 2017, and Hon. Monicah Amoding, MP Woman Representative of Kumi and a member of the Committee on Legal and Parliamentary Affairs informed the House that the proposal to amend the term of Parliament and the local government councils was never presented or received by the Committee, which information was ignored.

32.THAT I am aware that during the same Parliamentary sitting of Tuesday 19th December 2017, Hon. Violet Akurut, MP Woman Representative of Katakwi informed the House that consultation with the electorate was not done on the issue of extending the term of Parliament, submitting her personal view on the matter as opposed to representing the

people.

33. *THAT I attended the Parliamentary sitting of Wednesday 20th December 2017, in which Hon. Hellen Kahunde, MP Woman Representative of Kiryandongo prayed to the Speaker to allow the Members go and consult the people on the issue of extending the term of Parliament, which request was ignored.*

34. *THAT in the same sitting of Wednesday 20th December 2017, Hon. Tusiime Michael, MP for Mbarara Municipality in Mbarara District presented the justifications for the proposed amendment to extend the term of Parliament citing court battles facing Members of Parliaments and the time taken preparing for preliminary elections as the five-year term comes to an end.*

38. *THAT I read the Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Constitution (Amendment) (No.2) Bill 2017, and save for the 'proposal to expand the term of President from 5 to 7 years' (at pages 92 -93), the Committee never received any proposal on the extension of the term of Parliament or the local government councils.*

39. *THAT I have read the Rules of Procedure of the Parliament of Uganda, 2017 and I am aware that any proposed amendments to a Bill which are not part of the Report of the Committee to which a Bill was referred may only be considered on notice where the following conditions under the Rules (Rule 133 (4)) are met: -*

(a) where the amendments were presented but rejected by the relevant committee , or

(b) where for reasonable cause, the amendments were not presented before the relevant committee.(Emphasis on all paragraphs is mine)

The reply to this affidavit is contained in the affidavit of Ms. Jane L. Kibirige the Clerk to Parliament deponed to on 22nd March 2018, and specifically in paragraph 13, 15, 16, 28, 30 53, 54, 57,58, 64 as follows:-

13. THAT in specific response to paragraph 10 and 11 of the affidavit of Morris Wodamida Ogenga Latigo, I know that the Rt. Hon. Speaker addressed her mind to a number of procedural issues raised by Members of Parliament including the leader of opposition and in her opinion

found no merit in the issues raised by virtue of her powers as the Speaker of the House.

15. THAT I know that on 27th September 2017, the Hon. Raphael Magyezi a Member of Parliament for Igara County West, Bushenyi tabled in the House of Parliament a motion for leave to introduce a private Members' Bill titled The Constitution (Amendment) (N0.2) Bill of 2017.

16. THAT I know that the object of Bill titled The Constitution (Amendment) (No.2) Bill of 2017 was;

" An Act to amend the Constitution of the Republic of Uganda in accordance with Articles 259 and 262 of the Constitution; to provide for the time within which to hold presidential, parliamentary and local government council elections," to provide for the eligibility requirements for a person to be elected as President or District Chairperson)' to increase the number of days within which to file and determine a presidential election petition)' to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled,' and for related matters."

28.THAT in specific response to paragraph 16 of the affidavit of Morris Wodamida Ogenga Latigo, I know that prior to Hon. Raphael Magyezi, moving the motion for leave to introduce a private Member's Bill, the Rt. Hon, Speaker of Parliament addressed her mind to the protest raised by the leader of opposition and similarly found no merit in the protest as raised.

30.THAT in specific response to paragraphs 19, 20 and 21 of affidavit of Morris Wodamida Ogenga Latigo, I know that the substance of the motion moved by the Hon. Raphael Magyezi was not only premised on the Supreme Court ruling in Amama Mbabazi vs Yoweri Kaguta Museveni Electoral Commission and .Attorney General in Presidential Election Petition No. 1 of 2017 but also other concerns raised which included the eligibility requirement for a person to be elected as President or District Chairperson, being necessary electoral reforms.

53. THAT in specific response to Paragraph 30 of affidavit of Morris Wodamida Ogenga Latigo Morris, I know that the Hon. Kafeero Robert Sekitoleko made an oral notice, in accordance with the Rules of Procedure of Parliament to the Rt. Hon. Speaker of Parliament of his intention to propose amendments to the term of Parliament.

57.THAT in specific response to paragraph 31, 32, 33,34,35,36,37 and 40 of affidavit of Morris Wodamida Ogenga Latigo, I know that the issues raised by the Hon. Monicah Amoding, MP Woman Representative of Kumi, Hon. Hellen Kahunde, MP Woman Representative of Kiryandongo, Hon. Tusiime Michael, MP for Mbarara Municipality in Mbarara District, Hon Joy Atim, MP Woman Representative of Lira were extensively debated in the House and at the conclusion of the debate, a question was to Members in line with Parliamentary procedure and

a decision was taken.

58. THAT in further response to the paragraph 37 of affidavit of Morris Wodamida Ogenga Latigo, I am advised by the Attorneys in the Attorney General's Chambers which information I verily believe to be true that not all amendments in the House of the Parliament should be contained in the Bill and that amendment can be proposed at the time of the debate and later at the Committee stage of the whole House.

64. THAT I know that on 20th December 2017, after another round of lengthy debate on the Report of the Committee on Legal and Parliamentary Affairs on the proposed amendments, Members of Parliament were asked by the Rt. Hon. Speaker of Parliament, in accordance with the Rules of Procedure of Parliament to vote on the second reading of the Constitution (Amendment) (No.2) Bill 2017."

The averments reproduced above, were repeated in the submissions of the respondent, in opposition to the Petitions. Refer also to the Hansard, a copy of which was submitted to Court by the petitioners in *Petition No.1o Prosper Businge and others vs Attorney General.* and the proceedings of Parliament of 21st, 26th, and 27th of September 2017, the proceedings of 3rd, October 2017, 18th December 2017, 19th December and 20th December 2017.

It was not in question that when the Magyezi Bill was first introduced, it did not contain or refer to the extension of the term of Parliament or that of the District Local Councils.

It appears that the above proposal was never presented or received by the Committee on Legal and Parliamentary Affairs at any time. The first time this proposal was presented was on Wednesday 20th December 2017 after Members of Parliament had voted on the second reading of the original Magyezi Bill.

These were the proceedings of Parliament as recorded in the Hansard of that date at page 5247, at which Mr. Tusiime Hon. Member of Parliament Mbarara municipality who tabled the proposed amendment and justified it.

Mr. Tusiime: Thank you very much Madam Chairperson. My proposed amendments ofArticle 61, of the Constitution are as follows:

Amendment 1,

By substituting for clause (2), the following "The Electoral Commission shall hold Presidential, general parliamentary and local government council elections within the first 30 days of the last 172 days, before the expiration of the term of the

President, Parliament or local Government Council as the case maybe" To amend clause (3) by deleting the word "Presidential" appearing immediately after the word "hold"

Justification

This is intended to separate the tenure of the office of the President as provided for under Article 105(1) from the term of Parliament and Local Government Councils, and the election of the President since the presidential term cannot be amended by Parliament alone.

Amendment 2

This is the amendment of Article 77 of the Constitution. Article 77 of the Constitution is to be amended in clause (3) by substituting for the word "five" appearing immediately before the word "years" with "seven years".

Justification

The proposed amendment of Article 77 (3) of the Constitution is intended to increase the term of Parliament from five years to seven years to give Members of Parliament enough time to accomplish parliamentary business for the development of Uganda since five years have been found to be too short for purposes of development.

Madam Chairperson, this is because during the first two years, Members of Parliament are getting acclimatised to parliamentary procedures, conducts and business. Secondly, the other Members of Parliament in the first two years are still held up in courts of law

defending their status. Accordingly, most Members of Parliament settle in the third year to start serious parliamentary business. During the fourth year, Members of Parliament are preparing for primaries within their political parties for another election and the fifth year is all eaten up by the general elections. This means that Parliament has only one year to engage in serious parliamentary business.

Amendment 3

Article 181 is to' be amended in clause (4) by substituting for the word "five" appearing immediately before the word "years" the word "seven".

Justification

The amendment of Article 181 (4) of the Constitution is intended to increase the term of Local Government Councils from five years to seven years to align it with

the tenure of the office of the President and the term of Parliament since Government must act as one.

Amendment 4

Replacement of the Article 289 of the Constitution Article 289 of the Constitution should be amended by substituting for Article 289 the following: Article 289. Term of the current Parliament "Notwithstanding anything in this Constitution, the term of the parliament in existence at the time of this Article comes in into force, shall expire seven years from its first sitting."

Justification

This provision is intended to replace the current Article 289 of the Constitution since it was introduced in 2005 in the Constitution (Amendment) Act, 2005 as a transitional provision and has since served its useful purposes and it is now a spent provision in the Constitution.

In addition, Madam Chairperson, the replacement is intended to provide for the transitional provision to extend the term of the current Parliament from five years to seven years from 2016 to 2023.

Amendment 5

Madam Chairperson, replacement of Article 291 of the Constitution. Article 291 of the Constitution is amended by substituting for Article 291 the following:

Term of the current Local Government Councils

"For the avoidance of doubt, the term of seven years prescribed for Local Government Councils by clause (4) of Article 181 of the Constitution shall apply to the term of the Local Government Councils in existence at the time that clause came into force."

Justification

This provision is intended to substitute for the current Article 291 of the Constitution since it was introduced in 2005 in the Constitution (Amendment) Act of 2005 as a traditional provision and it has since served its purposes and is now a spent provision.

Madam Chairperson, the replacement is, therefore, intended to avoid the transitional provision to extend the term of Local Government Councils from five years to seven

years and to be precise, from 2016 to 2023, I beg to move, Madam Chairperson.

The chairperson: Therefore, honourable members, those are the proposals.

Following a heated debate, the sponsor of the Bill, Mr. Raphael Magyezi, gave a report from the committee of the whole House. The proceedings are set out in the Hansard as follows: -

MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to report that the Committee of the whole House has considered the Bill entitled, "The Constitution (Amendment) (No.2) Bill, 2017" and passed the entire Bill with amendments and also introduced and passed new clauses - amending Articles 77, 181, 29, 291, 105 and 260. I beg to report.

8.57. *MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to move that the report of the Committee of the whole House be adopted.*

8.58. *THE SPEAKER: Honourable members, I put the question that the report of the Committee of the whole House be adopted.*

The speaker then wound up the proceedings as follows: -

THE SPEAKER: Honourable members, I put the question that the report of the Committee of the whole House be adopted.

THE SPEAKER: Honourable members, we shall go for the third reading. I will now invite the Clerk to ring the Bell for 15 minutes. Therefore, I will suspend proceedings for 15 minutes. The bell will be rung and we reassemble.

(House suspended at 8.59 p.m, for 15 minutes)

(On resumption at 9:25pm) the speaker presiding

THE SPEAKER: Honourable members, we are going for third reading. I invite all the Members who are able to sit in the Chamber to come in inside so that we can take the vote. I would like to appeal that you do not make preambles. Just vote because the preambles are taking time. They were done on the second reading. You do not need to do preambles on the third reading. Just vote. Vote either Yes, No or Abstain.

From the above proceedings it can be deduced that the amendments to the Magyezi Bill, were introduced by Mr. Tusiime on 20th December 2017. The proposals were debated and passed on the same day. They were incorporated in the bill which was eventually enacted into *Sections 2, 6, 8* and *10* of the impugned Act without any input from the public.

The Public participation alluded to by the respondent in the affidavits in support of the answer to the Petition had nothing to do with the enactment of *Sections 2, 6, 8* and *10* of the impugned Act, because at the time those consultations took place, the sections mentioned above had not yet become part of the bill. I find that lack of public participation vitiated the impugned Sections of the

Act.

There is no question that *Sections 2, 6, 8* and *10* of the impugned Act were introduced by Mr. Michael Tusiime's amendments extending the term of Parliament from five to seven years and they were passed on the same day they were introduced. No consultation at all was possible or had been done by Members of Parliament, prior t their introduction.

Reading of the Hansard suggests to me that the majority of the members were unaware of the amendments introduced by Mr. Tusiime and even fewer understood them. This appears to have been a well planned ambush, premeditated and executed by a few backbenchers with the tactical support of the Deputy Attorney General and other front benchers. This is evident from the clandestine way the "Certificate of Financial Implications" was requested for and issued without the knowledge of the Clerk to Parliament days before the proposed amendments were revealed to anyone else in Parliament. They were brought up on the floor to Parliament to appear as if they were as a result of the debate, whereas not. Even the Members of Parliament present at the time the amendments were introduced were not availed time to debate the proposed amendments. I find that, there was no public consultation at all in respect of those amendments to the bill. Mr. Mwesigwa Rukutana, the learned Deputy Attorney General, suggested tongue in cheek from the bar, that the Members of Parliament had been able to consult the people through social and electronic media using their newly acquired "tablets" (computer devices). This was evidence from the bar, which has no value. This statement just helps to confirm the level of unseriousness and cynicism of Members of Parliament and the Executive attached to the constitutional duty to consult the people of Uganda upon whom the supreme authority vests, under *Article 1* of the Constitution.

The question now required to determine is whether or not lack of public consultation or public participation would vitiate the process of passing a Constitutional Amendment Act or any other legislation for that matter. The East African Court of Justice in *East African Law Society and 5 others vs The Attorney General of the Republic of Kenya and 4 others Reference No.3 of 2010* found that: -

> *"lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and that in particular, it constituted infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a)."*

lack of people's participation in process of amending the Constitution would vitiate the resulting Constitutional Amendment Act, and I find so. In this case it vitiated the enactment of *Sections 2, 6, 8* and *10* of the impugned Act

It is common ground that the Constitutional Amendment bill as first presented by Mr. Magyezi, the

Hon. Member of Parliament for Igara West constituency, did not include the extension of the term of Parliament and or that of the Local Government councils. Those provisions were introduced at a much later stage during the debate on the floor of Parliament. In this regard, the Certificate of Financial Implications required under *Article 93* of the Constitution to accompany a private members bill was only in respect of the bill as first presented.

Therefore, that certificate did not cover the provisions of *Sections 2,6,8* and *10* at the time it was issued those provisions had not been introduced. There was an attempt to introduce another Certificate of Financial Compliance, to remedy the situation, but it was flawed. It had not been requested for by the accounting officer of Parliament, but rather by one Hon. Gaster Mugoya, a Hon. Member of Parliament on the Committee of Legal and Parliamentary affairs. The Clerk to Parliament, in her testimony in Court, said it was irregular. The provisions of *Article 93* are mandatory. In this case they were not complied with in respect of *Sections 2, 6, 8* and *10* of the Act, which were, as already stated, introduced much later.

It appears clearly to me that the framers of *Article 93* of the Constitution intended to ensure that a private member's bill did not contain any provision that would impose on government any financial obligations including increment or reduction in taxes or any charge on the consolidated fund. In my view the Certificate of Financial Implications must cover the bill as it appears before it is moved, voted into law or assented to by the President. On that account also l would find that *Sections 2, 6, 8* and 10 of the impugned Act are unconstitutional, Parliament having failed to comply with the provisions of *Article 93* of the Constitution in the process of their enactment.

Uganda Law Society, the petitioner in Petition No. 03 contends in ground 1 (e) of that Petition as follows:-

> *"The act of Parliament in proceeding on a private members bill whose effect is to authorize payments of the 10th Parliament and the current local government councils after expiry of their initial constitutional five-year term is inconsistent with Article 93(b) of the Constitution." (Sic)*

While submitting on this ground, Mr. Wandera Ogalo, learned Counsel for the Petitioner in that Petition, argued that the Parliament acted contrary to *Article 93* of the Constitution when it passed the impugned private members bill which bill had the effect of imposing a charge on the consolidated fund.

The respondent in the answer to the Petition denied any wrong doing, and sought to prove that indeed a Certificate of Financial Implications for the proposed bill had been issued by the Minister responsible for finance in that respect.

In her affidavit in support of the answer to the Petition the Clerk to the Parliament, Ms. Jane

Kibirige deponed thus: -

"That I know that thereafter Hon. Raphael Magyezi, then laid on the table of Parliament the Constitutional (Amendment) (No.2) Bill of 2017 accompanied by a certificate of Financial Implications as required under the provision of Section 76 of the Public Financial Management Act, 2015 and Rules of procedure of Parliament"

The said afore mentioned certificate was annexed to the affidavit. It reads as follows:-

Certificate of Financial Implications

(Made under Section 76 of The Public Finance Management Act 2015),

THIS IS TO CERTIFY that the Bill entitled, THE CONSTITUTION (AMENDMENT) BILL, 2017, has been examined as required under Section 76 of the Public Finance Management Act, 2015 (as Amended). I wish to report as follows:

(a)Background:

In accordance with Articles 259 and 262 of the Constitution of the Republic of Uganda, on the 27th September, 2017, Parliament granted leave to Hon. Raphael Magyezi (MP) to introduce the Constitution Amendment Bill, 2017.

The amendment of the Constitution of the Republic of Uganda is also premised on the Supreme Court decision in Amama Mbabazi Vs Yoweri Kaguta Museveni, Electoral Commission and Attorney General in Presidential Election Petition No. 01 of 2016.

(b) objective of the Bill.

The objective of the Bill is to amend the Constitution of the Republic of Uganda;

- *(i) To provide for the time within which to hold presidential, parliamentary and local government council elections under Article 61;*
- *(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102(b) and 183(2)(b);*
- *(iii) To increase the number of days within which to file and determine a presidential election petition under 104(2) and (3) and;*
- *(iv) To increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled under Article 104(6).*

(c) Expected outputs and the Impact of the Bill on the economy.

The proposed amendments to the Constitution will strengthen the Constitution's provision of Article 1 which gives the people of Uganda the absolute right to determine how they should be governed and Articles 21 and 32 which prohibit any form of

discrimination on the basis of age and other factors.

As a result, discrimination will be eliminated and this will strengthen the provisions of Equality and Freedom in the Constitution and provide a non-discriminatory environment for all Ugandans in terms of leadership aspirations.

In addition the amendment is expected to provide for the key recommendations of the Supreme Court ruling in Presidential Election hence strengthening the Electoral process and fairness.

(d) Planned Expenditure by major components over the MTEF period:

The planned expenditure will be accommodated within the Medium Term Expenditure Framework for the Ministries, Departments and agencies concerned.

(e) Funding and budgetary implications

There are no additional financial obligations beyond what is in the Medium Term Expenditure Framework and thus the Bill is budget neural.

(f) Expected benefits/ savings and/or revenue to Government:

i) Enhance democracy of Ugandans;

ii) Strengthen the provisions of Equality and Freedom in the Constitution of the Republic of Uganda; and

iii) Strengthen the electoral process in Uganda.

Submitted under my hand this 28th day of September, 2017.

Matia Kasaija (MP)

Minister of Finance, Planning and Economic Development

Received by: Ambanyira Joshua

Date: 29/9/2017

There is nothing in the above Certificate relating to the extension of the term of Parliament. This certificate is dated 28th September 2017. It was received at Parliament on 29th September 2017. It was laid before Parliament on 3rd October 2017. The amendment in respect of extension of the term of Parliament was proposed, debated and passed on 20th December 2017.

Therefore, the Certificate of Financial Implications referred to above did not relate to or cover the amendment introduced by Mr. Tusiime. There was another Certificate of Financial Implications, which was introduced in evidence during the cross examination of Ms. Jane Kibirige, the Clerk to Parliament. It was admitted as exhibit P1. Interestingly or perhaps strangely, this Certificate had not been put in evidence at all earlier by the respondents. It only appeared during cross-examination of the Clerk to Parliament in Court during the hearing.

That Certificate was exhibited together with a letter dated 18th December 2017, written by one Mugoya Kyawa Gaster (MP) and addressed to the Minister responsible for finance. It reads as follows: -

> "*18th December, 2017*
>
> *Our Ref: POU/GEN/2017*
>
> *The Minister of Finance, Planning and*
>
> *Economic Development*
>
> *Kampala*
>
> *Dear Hon.*
>
> *RE: REQUEST FOR A CERTIFICATE OF FINANCIAL IMPLICATIONS FOR A CONSTITUTION AMENDEMENT PROPOSAL EXPANDING THE FIVE-YEAR TERM OF PRESIDENT, PARLIAMENT AND LOCAL GOVERNMENT TO SEVEN YEARS.*
>
> *As you may be aware the legal and Parliamentary Affairs Committee of Parliament, while considering the Constitution amendment (NO.2) Bill 2017 (The Magyezi Bill), came up with a number of recommendations among which is that the Parliamentary and Local Council tenure of Office be expanded from the current five years to seven years.*
>
> *While Parliament has jurisdiction to amend the Parliamentary and Local Government tenure of office, an Amendment for the Presidential term requires a referendum to align the latter tenure with the former*
>
> *The Purpose of this letter therefore is to request for issuance of a Certificate of financial implications given the above proposal for the extension of the above tenure(s).*
>
> *Mugoya Kyawa Gaster (MP)*
>
> *BUKOOLI COUNTY NORTH-BUGIRI*
>
> *c.c: Attorney General*
>
> *c.c: Government Chief Whip"*

Apparently in response to the said letter, a Certificate of Financial Implications was issued by the Minister responsible for Finance, Mr. Matia Kasaija (Mp) on 19th December 2017. There is no indication as to when the Certificate was received at Parliament and by whom. The spaces for receipt and date are blank. Interestingly, although the letter is dated 18th December 2017 it bears a rubber stamp of the office of the Deputy Secretary to the Treasury, indicating that it was received at

his office on 17th December 2017 a day before it was written. I could have dismissed this as a mere discrepancy in dates resulting from an inadvertent error, but I cannot. This is because on the same letter is a hand written insertion marked "(1)" to Acting Permanent Secretary to the Treasury. It reads.

"Ag PS/ST. Please handle urgently. I have to sign before end of today 16/12".

The letter is initiated and not fully signed. I have no doubt in my mind that it was initiated by the Minister responsible for Finance, as that is the person to whom it was addressed and the only one above the Permanent Secretary/Secretary to Treasury who could direct him as he did. This is the only reasonable inference I could make.

the discrepancies apparent on the face of this document were apparent. A letter written on 18th December, was received by the Minister on or about 16th December, and was forwarded to and received by the Deputy Permanent Secretary on 17th December and the request set out therein was prepared and signed by the Minister on 19th December and was laid on the table of Parliament on 20th December in respect of a motion that until then had not been presented. These facts are not just interesting they are disturbing revealing as they do the fallacy of an ill and shabby attempts to conceal the obvious.

The proposals contained in the amendment brought by Mr. Tusiime, to extend the term of Parliament and that of District Local Council were not contained in the Report of the Committee of Legal and Parliamentary Affairs Committee, otherwise they would have been part of its recommendations.

Ms. Jane Kibirige testified in Court, and stated that as the Accounting Officer of Parliament she is the only one who could have originated a letter requesting for a Certificate of Financial Implications. She did not write the letter in question.

There was nothing in the Hansard, to indicate that before Mr. Tusiime proposed the amendment as he did, similar proposals had earlier been made and adopted as recommendations of the Committee of Legal and Parliamentary Affairs upon which Mr. Gaster Mugoya could have based his letter. The letter did not satisfy the requirements of *Section 76* of the Public Finance Management Act and those of *Article 93* of the Constitution. The letter requesting for a Certificate of Financial Implications was written by a person without authority to do so a prankster I would call him. The Certificate issued in response to the letter was therefore in my view invalid. It also appears to have been a forgery or an afterthought and a very poor one at that.

Therefore the amendment to the bill, as introduced by Mr. Michael Tusiime, was and remains invalid, null and void, Parliament having proceeded upon it and passed it without having first obtained a valid Certificate of Financial Compliance as required by the law. With no hesitation in finding that, the Tusiime amendment to the bill contravened *Article 93* of the Constitution.

The question on Retroactive application of Act 1 of 2018

Whether *Sections 2, 6, 8* and *10* of the impugned act are unconstitutional in so far as they were applied retroactively

Hobbes theory of social contract appears to me to have been more suited to a feudal system than a democracy. It is quite evident from the Constitution itself that the people through the Constitution are supreme. The Executive, the Parliament and the Judiciary and other state organs and agencies are not supreme but they are subject to the people through the Constitution. It seems to me that the relationship between the people and the Parliament is that of principal and agent. The people appoint agents through an election process with specific mandate set out in the Constitution. The people retain the power to determine how they are governed. Parliament, therefore, has no absolute power to legislate in any way it desires even if it has an absolute majority because legislative powers remain vested in the people. The majority in Parliament must exercise power within the confines of the Constitution, bearing in mind that they do not legislate for themselves or for the Political Party to which they belong, but for all the people the living and those yet unborn. The individual interests of each Member of Parliament must, therefore, take the back seat in regard to constitutional amendments.

In all Constitutions Uganda has had since independence the people have given Members of Parliament a mandate of only five years. Every five years, the mandate expires and has to be renewed by the principal, through an election.

The last time the people renewed the agency of each and every individual member of the current Parliament was during the 2016 general elections. The agency of the President was also renewed at the same time for the same period. The Constitution provided so. The President, all political party candidates, independent candidates campaigned and sought the mandate of the people for five years on the basis of their respective five years' programmes.

All the manifestos for all political parties presented their five years' programmes to the people prior to the general elections. This was the basis of their campaign upon which they sought from their principal the people of Uganda a fresh five year mandate in Parliament. The same applied to all independent candidates. The NRM manifesto in this regards states: -

> *"In February 2016, the people of Uganda will participate in yet another important general election. It is now a democratic tradition in Uganda to hold elections every five years so that the people exercise their right to choose their leaders at all levels — Local Government, Parliament and President.*
>
> *Having been overwhelmingly elected in 2011, the NRM is now seeking the renewal*

> *of the electoral mandate to continue serving the people with diligence and dedication. Therefore, it is presenting itself and her candidates for President, Parliament, Local Government, Youth, Women, People with Disabilities and Older People's Councils — to the people of Uganda.*
>
> *In this manifesto, the NRM lays out the policies and programmes, which will guide the NRM Government over the next five years following its reelection by the people of Uganda.*
> *Consolidate the establishment of the rule of law*
> *Increase people's participation*
> *Empower women and the youth*
> *Promote freedom of speech and worship*
> *Hold regular free and fair elections, and consolidate of equity"* (Emphasis mine)

Having been elected on a five-year contract, Members of Parliament could not, and had no power to extend their own term of office for an extra two years, as the mandate given to them in 2016 was for only 5 years. More importantly, neither the members of Parliament nor the President have any political agenda approved by the people for the extra two years.

While determining a similar issue Karokora JSC in *Ssemogerere and 4 others vs Attorney General; Constitutional Appeal No.1 of 2002,* firmly put is as follows:-

> *"It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution. It is the Constitution, not the Parliament nor Executive nor Judiciary which is supreme. Each of these organs can only exercise the jurisdiction conferred on it by the Constitution. None can confer 0n itself jurisdiction not authorised by the Constitution."*
> *Under 1995 Constitution, independence of organs of state must go with responsibility and accountability. Each of these organs must be transparent and accountable in their operations. Under Articles 1 and 2 people are sovereign and exercise their sovereignty through the Constitution which is Supreme Law or Uganda and has a binding force on all authorities and persons throughout the country."(Sic)*

We are bound by the above decision and I also share the sentiments expressed by the learned Justice of the Supreme Court. This position of law has not changed. I find that Parliament by enacting *Sections 2, 6, 8* and *10* of the Constitution Amendment Act 1 of 2018 and providing in that law that they would operate retroactively contravened *Articles 1* and *2* of the Constitution.

The question of Reasonableness and justification

Whether Parliament acted reasonably and was justified when it introduced Sections 2, 6, 8 and 10 of the impugned Act.

Parliament having been irrational and as such in total contravention of Articles 1, 2(1) and 2(2) and 8A of the Constitution. Irrational because, the amendment of the Constitution, extending the term of Parliament to 7 (seven) years was brought in bad faith, the justification for the amendment had nothing to do with the principles of national interest, and common good of the people of Uganda. The amendment appears to have been based solely on the self interest of members of Parliament.

The amendment was not proposed by the people. It was not discussed in the select Committee and was not mentioned in that Committee's Report to the House. It did not form part of the original draft bill. It did not form part of the bill that was published in the gazette and presented to Parliament. The justification was stated by Mr. Michael Tusiime to be:-

> *"Because during the first two years, members of Parliament are getting acclimatised to parliamentary proceeds, conducts and businesses.*
>
> *Secondly, other members of Parliament in the first two years are still held up in Courts of law defending their status. Accordingly most members settle in the third year to start serious parliamentary business. During the fourth year, members of Parliament are preparing for primaries within their political parties, for another election and the fifth year is all eaten up by the general elections. This means Parliament has only one year to engage in serious parliamentary business."*

This justification for the extension of the term of Parliament has absolutely nothing to do with the will and aspirations of the people of Uganda. It is bluntly in the self interest of the Members of Parliament and as I have already stated, it is irrational. The people of Uganda did not elect Members of Parliament for them to go and learn Parliamentary rules and procedures for two years. That is why the law provides for minimum qualification for Members of Parliament.

Mr. Tusiime appeared to suggest that Members of Parliament are either unknowledgeable or unqualified. I do not accept that our Members of Parliament are unknowledgeable or unqualified. All Members of Parliament are well qualified. The majority have post graduate qualifications. It would not be an exaggeration to state that, Parliament has a concentration of the best brains in this Country, almost in all disciplines. Some Members of Parliament have been in the House for 10 years or more. It cannot therefore be true that the same people require two years to study and understand Parliamentary rules and procedure.

In 1962, Members of Parliament were able to debate intricate issues and pass legislation without precedents. From the reading of the Hansard of 1962-1967 and 1967 to 1971, excerpts of which I

have reproduced earlier, the level of debate, the language, the ethics and etiquette was only comparable to that of British House of Commons. I am hesitant to say the same of the current Parliament. Perhaps it was for this very reason that Mr. Tusiime moved the motion that he did. If that be the case, probably a Parliamentary pre-entry aptitude examination would have remedied the mischief. There is no absurdity in supposing that had Parliament passed legislation tightening the qualifications of its members, the Constitution would have in this respect been left intact and the ends of justice would have been met.

There was no reasonable justification as to why Members of Parliament would amend the Constitution to grant themselves two more years on top of their current five years simply to get acclimatised to Parliamentary procedure, conduct and business. Having done so, for the learned Deputy Attorney General to simply insist that, the amendment was the reflection of the will of the people, whom the Members of Parliament had consulted, using 'Ipads'.

The reason why Parliament has to give justification for the passing of a law is the legal requirement that the law must be rational and its enactment must be desirable. In the case of a constitutional amendment law, it must also be in national interest and for the common good of the people as provided for under *Article 8A(1)* which provides that:-

> *"Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy."*

Mzolo, Nkosinathi a South African Author, in his essay "*The Rule of law, the principle of legality and the test for rationality: a critical analysis of the South African jurisprudence in the light of the separation of power"* noted as follows:-

> *"…the Constitution of the Republic of South Africa provides that all actions will only be valid if they comply with the rule of law as a constitutional value thereof. However this is not to imply that other values of the constitution like transparency, openness and accountability are less important than the rule of law but most litigation has occurred under rule of law, hence why the focus of this thesis is on the rule of law. Under this legality principle, there are a lot of principles like the principle of authority, but rationality appears to be the most significant and the courts have focused mostly on it. In defining what legality rationality is, our courts have pronounced that it is a legal safety-net applicable to every exercise of public power but more particularly where no constitutionally defined right has been violated, it protects individuals against the abuse of power…"*

The amendment introduced into the bill, by Mr. Tusiime was not rational, not justifiable, and was not based on national interest and the common good of the people of Uganda as required by the Constitution.

The framers of our Constitution, in their wisdom, anticipating that such bizarre circumstances may arise in future, granted power to this Court to guard the gates of justice and to defend the Constitution from any such affront. We are now required to do so. With a sword in one hand and scales of justice in the other, this Court stands guard at the gates of justice to declare as I do that: - the extension of the term of Parliament and that of the District Local Councils from 5 to 7 years as provided for retroactively, under *Sections 2, 8, 6* and *10* of the Constitution (Amendment) Act (Act 1 of 2018) is null and void *abnitio* and has no effect.

Question of the Re -introduction of Presidential term limits

Whether or not *Section 5* of the impugned Act, which reintroduced into the Constitution, a term limit for the President and entrench the same is constitutional

The Hansard which is annexture 'F' to *Petition No. 10 of 2018, Prosper Businge & 3 others vs Attorney General*, sets out the proceedings of Parliament on 20th December, 2017 that gave birth to *Section 5* of the impugned Act as follows:-

> *"MR NANDALA-MAFABI: I want to move an addition of a new clause. Madam Chairperson, since you allowed hon. Michael Tusiime to raise an amendment, I want to bring an amendment to Article 105 of our Constitution to introduce term limits -[Members: Aye] - thank you. I want to say that a person shall not hold office as President for more than two terms. In addition to that, this should take effect from the next Parliament. We do not want to count this Parliament; we want this one to be entrenched as (f) in chapter 5 under amendment - entrench it as chapter 7, Article 105 (I) and (2). I beg to move."*

This amendment coming on the same day the bill was passed into law had no input from the public. It was not accompanied with a Certificate of Financial Implications and as such contravened *Article 93* of the Constitution.

It is contended by the petitioners that, the amendment also directly amended *Article 260* which stipulates as follows:-

> *260. Amendments requiring a referendum.*
>
> *(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this Article shall not be taken as passed unless—*
>
> *(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and*
>
> *(b) it has been referred to a decision of the people and approved by them in a referendum.*

(2) The provisions referred to in clause (1) of this Article are—

(a) this Article; (Emphasis mine)

(b) Chapter One—Articles l and 2;

(c) Chapter Four—Article 44;

(d) Chapter Five—Articles 69, 74 and 75;

(e) Chapter Six—Article 79(2);

(f) Chapter Seven—Article 105(1);

(g) Chapter Eight—Article 128(1); and

(h) Chapter Sixteen .

Article 260 being an entrenched Article cannot be amended by Parliament without first being approved by the people in a referendum. Since the words of *Article 260* are plain and clear I will not belabour its interpretation.

During the debate the learned Deputy Attorney General warned Members of Parliament that the proposed amendment would require a referendum under *Article 260* to no avail. Having been passed and realising that it was unconstitutional a futile attempt was made to present the amendment as a separate clause under *Article 105*. I say futile because, *Section 5* of the impugned Act by implication, attempts to amend *Article 260* without the amendment bill first being referred to a decision of the people in a referendum. I accept the submissions of Mr. Mabirizi, that such amendment, also referred to a colorable legislation is unacceptable. This was the holding by the Supreme Court in *Ssemogerere & others Attorney vs General Constitutional Appeal No. 1 of 2002* in which:-

> *"In the instant case the parliament transplanted the nullified provision of section 121 of the Evidence Act see Major General David Tinyefuza Vs Attorney General (supra) and into section 5(2) of the Act 13/2000.*
>
> *Whereas Parliament had powers under Article 259 of the constitution to amend any provisions of the Constitution, I agree with Mr. Lule (SC)'s submission that the amendment brought about by section 5(2) of the Act 13/2000 had the effect of amending Articles 1, 2(1) (2), 28, 41, 44 (c) and 128 (1) of the Constitution by implication/infection. A number of decided cases from common Law Jurisdiction illustrate amendments by infection*."

Further, Karokora JSC went on to state that:-

> *"In my view, if it was to be otherwise, Parliament could amend any provisions of the Constitution, including the entrenched provisions without complying with the prescribed procedure in chapter 18 of the Constitution as long as it avoided mentioning them in the*

amending Act.

Now, the question is whether Act 13/2000 amended Articles 1 and 2 of the Constitution. Article 1 of the Constitution provides:-

"1. All powers belong to the people who shall exercise their sovereignty in accordance with this constitution. Article 2 of the Constitution provides: -

"2 (1) the Constitution is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

The provisions of these Articles are very clear. It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution. It is the Constitution, not the Parliament nor executive nor judiciary which is supreme. Each of these organs can only exercise the jurisdiction conferred on it by the Constitution. None can confer on itself jurisdiction not authorised by the Constitution."

In the above cited appeal, the Supreme Court upheld the minority decision of the Constitutional Court and re-echoed with approval of the Judgment of Twinomujuni JA when he stated that:-

"The above amendment section (5) (2) of Act 13/2000) which amended Article 97 of the Constitution can only survive in a jurisdiction where parliament, like in United Kingdom, is supreme... In Uganda today, the amendment amounts to a coup against the sovereignty of the people and the Supremacy of the Constitution. It cannot exist side by side with Articles 1 and 2 in the same constitution. It contravened the two Articles and Parliament alone cannot pass such amendment unless it first consults the people in a referendum in accordance with chapter 18 of the constitution. I would hold that although section 5 (2) of the Constitution (Amendment) Act 13/2000 did not expressly and specifically name Articles 1 and 2 of the Constitution as being amended, yet it had the effect of repealing or varying the Articles and therefore it amended them by necessary implications"

In this particular case, the impugned *Section 5* of Act 1 of 2018, did not just amend *Article 260* of the Constitution by effect, infection or impliedly. It amended it directly by introducing therein a new clause 105(2). In *Ssemogerere and Another vs Attorney General (Supra)* on this very point, Order JSC stated as follows:-

"In the instant case the effect of Article 97 (2) and (3) as amended by section 5 of Act 13/2000 is to restrict the citizens' access to information in the hands of Parliament subject

to the absolute discretion of Parliament to release or not to release the information. In my view the provisions of section 5, conflict with the right of access to information, guaranteed by Article 41. They are, therefore, null and void.

Act 13/2000 expressly amended Article 41 by the introduction of the new clauses (2) and (3) to Article 97. Part of the appellant's case is that other Articles of the Constitution were amended by implication or infection. These are Articles 1, 2(1) and (2), 28, 44 (c), 128 (1), (2) (3) and 137 (3). The respondent's contention is that these Articles were not amended, just as Article 41 was not amended, because the preamble to Act 13/2000 did not specifically state that they were to be amended.

Amendment of the Constitution is provided for by Article 258 of the Constitution, the provisions of which are to the effect that the Constitution can only be amended if an Act of Parliament is passed for that purpose; the Act has the effect of adding to, varying or repealing any provision of the Constitution; and the Act has been passed in accordance with the provisions of Chapter Eighteen of the Constitution. To me, it follows that if an Act of Parliament has the effect of adding to, varying or repealing any provisions of the Constitution, then the Act must be said to have amended the affected Article of the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary, or repeal a provision of the Constitution. It is immaterial whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution or not. It is the effect of the amendment which matters."

In the same case Kanyeihamba JSC who delivered the lead Judgment held:-

"In my opinion, the requirements of Chapter Eighteen are mandatory and cannot be waived, not even by Parliament. Consequently, and with the greatest respect, the majority of the learned Justices of the Constitutional Court erred in law in holding that those provisions could be waived and that in any event, they were not essential to validating any constitutional amendment. Be that as it may, it is apparent that Parliament failed to comply with the Constitutional provisions when attempting to amend by implication or infection Articles 2(1), 28, 41(1), 44(c), 128(2), (3) and 137(3). Any amendments to Articles 2(1), 44 and 128 need to be referred to a decision of the people for approval by them in a referendum. The amendment of the Articles 28, 41(1) and 137(3) need to be passed by two-thirds majority on each of the second and third readings of the bills. Thereafter, a bill must be accompanied by the certificate of the Speaker to the effect that it has been passed in accordance with the provisions of Chapter Eighteen. Since the respondent has persistently

denied that any of these Articles and clauses were amended, the Attorney General was hardly in a position or mood to show that these provisions were properly amended and indeed, in my opinion, he failed to do so.

Regarding the provisions which the respondent admits to have been expressly amended, namely Articles 88, 89, 90 and 97, it is my view that their amendment failed to comply with the provisions of the Constitution in that the bill effecting their amendment should have been accompanied by a certification by the Speaker of Parliament indicating that the bill had complied with the provisions before the Presidential Assent. In my opinion since the respondent failed to prove that the Constitution was complied with, the amendment failed to become an Act of Parliament and consequently, cannot be regarded as part of the Constitution."

Needless to point out that this is a matter that has been determined already by the Supreme Court in the above cited cases. I agree entirely with the above decision, in any event I am bound to follow the decision of the Supreme Court, as provided for Under *Article 132 (4)* of the Constitution.

I am constrained to go beyond the letter of the impugned legislature, because it is desirable to do so in the circumstances of this case since the process of enacting the impugned Act is being challenged. The impugned Bill as presented by Raphael Magyezi did in fact list *Article 260* being one of those that it had directly amended. However, *Article 260* did not appear in the final bill that eventually became the law. Instead the Nandala Mafabi amendment was placed under *Article 105* of the impugned Act. The Clerk to Parliament during cross- examination, did state that a bill must reflect exactly what is set out in the Hansard and the first Parliamentary Counsel cannot amend or alter that record. At page 5263 *of the Hansard of 20th December 2017.*It is recorded as follows;-

"REPORT FROM THE COMMITTEE OF THE WHOLE HOUSE

8.57

MR RAPHEAL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to report that the committee of the whole House has considered the Bill entitled "The Constitution (Amendment) (No.2) Bill, 2017" and passed the entire Bill with amendments and also introduced and passed new clauses- amending Articles 77, 181, 29, 291, 105 and 260. I beg to report."

It is apparent for the above excerpt that the Magyezi bill listed *Article 260* as one of those that had been amended. Why the same did not eventually appear in the impugned Act, is self evident. It was

removed by the Attorney General for the reasons he gave on the floor of Parliament. That remained a hollow and futile attempt to conceal that what is obvious to the legal mind.

There is no doubt, therefore, that *Article 260* was amended by the impugned Act either directly or indirectly or both.

Therefore that *Section 5* of the impugned Act is unconstitutional as it contravened Article 260 of the Constitution and I hold so.

QUESTION of Whether or not *Sections 3 and 7* of the impugned Act which removed the 75 year age limit of the President and lowered age limit of District Chairpersons from 35 to 18 years is unconstitutional.

Although the thrust of the original Magyezi bill, as set out in its preamble, and the justification that followed later, was to amend *Articles 102 (b)* and *183 (2) b* of the Constitution, the constitutionality of those amendments as subsequently set out in *Sections 3* and *7* of the impugned Act was only challenged in *Petition No. 5 of 2018, Hon. Karuhanga Kafureeka Gerald & 5 Others vs Attorney General* and *Petition No. 10 of 2018, Prosper Businge & 3 others vs Attorney General.*

All the other Petitions challenged the constitutionality of the entire process of enacting the impugned Act they did not directly challenge *Sections 3 and 7.*

The petitioners contended in Petition No.5 of 2018 paragraph 14(d) thereof as follows:-

> "*(b)That Section 3 of the Constitution (Amendment) Act, 2017 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as President of the Republic of Uganda is inconsistent with and in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.*
>
> (*d*) *That Section 7 of the Constitution (Amendment) Act, 2017 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as a district chairperson is inconsistent with and in contravention of Articles 1, 3, 8A, 79, 90, 94, and 259 of the Constitution.*"

In reply therein to the respondent in his answer to the petition replied in paragraph 17(d):-

> *"(b) The Respondent denies that Section 3 of the Constitution (Amendment) Act, 2018 which lifts the minimum and maximum age qualification of a person seeking to be elected as President of the Republic of Uganda is inconsistent with and in contravention of Articles 1,3, 8A, 79, 90 and 94 of the Constitution of Uganda.*
>
> (*d) The Respondent denies that Section 7 of the Constitution (Amendment) Act, 2018 which lifts the minimum and maximum age qualification for a person seeking to be elected as*

district chairperson in inconsistence with or in contravention of Articles 1,3, 8A, 79, 90, 94 and 259 of the Constitution of Uganda.

I have found nothing to suggest, let alone prove that Parliament cannot, through the established constitutional process, vary the qualifications of the President or that of the District Chairperson. The qualifications of the President and those of Chairpersons District local governments do not in my view form part of the basic structure of the Constitution which I set out earlier in this Judgment. I, therefore, accept the submissions of the Hon. Learned Deputy Attorney General that *Sections 3 and 7* of the impugned Act are not inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

The people of Uganda, through their Constitution, should be able to freely, whenever it is absolutely necessary to do so, vary the qualification of their leaders. These qualifications include but are not limited to citizenship, age, and academic qualifications. The same ought to apply to the disqualifications of the same leaders. It may be, for example, found necessary in future to require every Presidential candidate to be computer literate, fluent in both English and Swahili and at least two local languages the list is endless.

The framers of the Constitution did not and for good reason, find it necessary to entrench the provisions that relate to qualifications and disqualifications of the President and /or members of Parliament. I have read the Odoki report excerpts of which I have produced earlier in this Judgment. Nowhere in the report did the people of Uganda, suggest, propose or debate, the age limit of the President. This issue appears for strange reasons to have sprung up during the Constituent Assembly debate.

Be that as it may, it eventually found its way into the Constitution. For that reason alone, I would not regard it one of the basic structures of our Constitution.

The Magyezi bill, as first tabled in Parliament, covered two specific areas in the Constitution. The first was *Article 102* and *183* in respect of the age limits for the President and Chairpersons of District Local Councils, the second was in respect of *Articles 61, 104* in respect of the recommendations of the Supreme Court in *Amama Mbabazi vs Yoweri Kaguta Museveni and Others; Supreme Court Election Petition No. 1* of 2016.

None of the petitioners presented any serious challenge to the constitutionality of the original bill as first presented. I have already found that it was not in- contravention of or inconsistent with *Articles 1, 2* and *8A* of the Constitution. There was evidence that a Certificate of Financial Implications was properly obtained and was indeed available before the motion to introduce the said bill was proceeded with upon in Parliament. It was suggested by the Petitioners that, the

Supreme Court's directions were issued to the Hon. The Attorney General and not to anyone else and as such only him could have initiated a constitutional amendment bill in compliance thereto.

This argument does not appeal to me in the least. If the Hon. The Attorney General was to neglect his duty or simply went to sleep, would the Country grind to a constitutional stand still? I do not think so. That is why in their wisdom, the framers of the Constitution provided for private members bills.

In *Greenwatch vs Attorney General & NEMA; High Court Civil Suit No. 140 of 2002* the High Court directed the Attorney General to initiate a law to regulate the importation, manufacture and use of plastics. The Attorney General, to my knowledge, has never brought such law. The impact of plastics on the environment and on the lives of Ugandans is a mess. In my view, nothing would stop any Member of Parliament from sponsoring a private members bill to bring into effect the order and recommendation of the High Court in the above cited case in fact there was an attempt to do so.

The only serious issue raised against the original Magyezi bill is that, it was vitiated by the introduction of the *Tusiime* and *Nandala Mafabi* amendments, extending the term of Parliament and that of the District Local Councils, and the reintroduction and entrenchment of the Presidential term limit, which I have already dealt with earlier in this judgment.

Further, that the entire process of conceptualising, consulting, debating and enacting the whole of the impugned Act was inconsistent with and in contravention of *Articles, 1, 2, 3(2), 8A, 93, 160* and the spirit of the Constitution

I will now proceed to determine whether the impugned Act may be saved by severing therefrom *Sections 2, 5, 6, 8, 9, 10* and retaining *Sections 1, 3, 4* and *7.* I have found no reason why the impugned *Sections 2, 5, 6, 8, 9* and 10 cannot be severed from the impugned Act the same having been declared unconstitutional and retain remaining sections. This is possible, because, *Sections 2, 5, 6, 8, 9*and *10* were introduced later into bill. It follows therefore that *Sections 1, 3, 4* and *7* which constituted the original bill would be able to still stand on their own, after the impugned *Sections 2, 5, 6, 8, 9* and 10 which were introduced later have been removed.

However, I have to consider all the pleadings and submissions in respect of the procedural and substantive issue raised and determine whether or not they vitiated the impugned Act as whole rendering it unconstitutional, the above notwithstanding.

In his affidavit in support of the petition Ssemujju Ibrahim depones as follows: -

15. *THAT on the 26th day of September, 2017, the Speaker of Parliament, the Rt. Hon. Rebecca Alitwala Kadaga, contrary to the ruling of Deputy Speaker, amended the order paper to include a motion by Hon. Raphael Magyezi that sought leave of Parliament to introduce a private member's Bill to amend the Constitution to among others amend Article 102(b) of the Constitution to remove the age limit. (See copy of the Hansard dated September 26th 2017 hereto attached as Annexture "E".*

16. *THATthe decision of the Speaker of Parliament to amend the Order Paper to include a motion by Hon. Raphael Magyezi that sought leave of Parliament to introduce a private member's Bill was inconsistent with and in contravention of Rules 8, 27, 29, 174 of the Rules of Procedure of Parliament, Article 94 of the Constitution of Uganda.*

17. *THATshadow Minister for Constitutional Affairs Hon. Medard Lubega Sseggona asked the Speaker why Hon. Raphael Magyezi's motion that was submitted on September 21st 2017 was being placed on the Order Paper first ahead of Hon. Patrick Nsamba's which was submitted on September 18th and met all the requirements first, something the Speaker ignored. (See copy of the Hansard dated September 26th 2017 hereto attached as Annexture "E").*

In reply thereto, Jane Kibirige the Clerk to Parliament stated in her affidavit in support of the answer to the petition as follows: -

11. *THATin specific reply to paragraphs 12, 13, 14, 15, 16, 28, 29, 30, 31 of the affidavits of Ssemujju Nganda, Munyagwa Mubarak, Odur Jonathan, Gerald Karuhanga and Winfred Kizza I know that under the provisions of Rule 24 of the Rules of Procedure of Parliament of Uganda the Speaker of Parliament has the authority to determine the order of business of the House.*
12. *THAT in further response to paragraph 16 of the affidavit of Hon Ssemujju Nganda, paragraph 12 of the affidavit of Munyagwa I know that the provisions of Rule 165 of the Rules of Procedure of Parliament which provides for the functions of the House Business committee are subject to Rule 24.*
13. *THAT in specific reply to paragraph 17 of the affidavit of Ssemujju Nganda I know that according to the Rules of Procedure of the Parliament of Uganda a motion for introduction of Private Members' Bill takes priority over a motion such as that which the Hon. Patrick Nsamba proposed to move.*

What transpired in Parliament is set out clearly in the Hansard, copies of which are annexed to the affidavits of the petitioners in Petition No. 5 of 2018.

"MOTION SEEKING LEAVE OF PARLIAMENT TO INTRODUCE A CONSTITUTIONAL AMENDMENT BILL TO AMEND THE CONSTITUTION

THE SPEAKER: Honourable members, I indicated earlier that these motions are not for substantive debate; they are just seeking leave.

MR SSEGGONA: Thank you, Madam Speaker. I rise on two points of procedure. The first -

THE SPEAKER: Honourable members, can you take off your bandanas.

MR. SSEGGONA: Thank you, Madam Speaker. Earlier on, I rose on a point of procedure and you over ruled me – I agree that my procedural point was premature.

Madam Speaker, this is the greatest test in our lives as Members of Parliament. Members of this House petitioned you on various dates, seeking for your indulgence to be placed on the Order Paper, and you clearly read out the order of presentation of these motions and the notices. The notice and motion of Hon. Nsamba was the first in time. Your office received both the notice and the motion accompanying the notice before the notice presented by Hon. Raphael Magyezi.

Madam Speaker, this is a difficult time for us as a Parliament. Earlier, I asked whether it would not be procedurally correct that you deal with the first motion and we deal with the motions in their order of presentation.

The second procedural question, – and maybe for avoidance of doubt – arises out of rule 26 of our Rules of Procedure. Rule 26(1) states thus:

"(1) The Clerk shall send to each Member a copy of the Order Paper for each sitting -

(a) in the case of the first sitting of a meeting, at least two days before that sitting.

(b) in the case of any other sitting, at least three hours before the sitting without fail."

We received the Order Paper without this particular motion and when we appeared here, Madam Speaker, you used your power to amend the Order Paper. My understanding, and this is where I seek your procedural guidance, is that you can only amend and issue an Order Paper a minimum of three hours before the sitting and without fail.

Why am I very insistent on this, Madam Speaker? Apart from my own reputation as a Member of this House and the institution of Parliament, I am more deeply concerned about my Speaker and I insist, my Speaker. You have sailed us so well so far. However, this time, we are concerned that you are being stampeded by Members –(Interjections)- if I am one of them, I apologise – to have their business added onto the Order Paper, contrary to the manner stipulated by the rules. I seek your guidance.

THE SPEAKER: Honourable members, when this matter began, I was out of the country. The Speaker presiding then, on the Floor of this House, informed you that I had received these notices and the motions and that a date would be appointed. That was before I came back. So, you received notice.

MR SSEGGONA:We did not have this motion on the Order Paper, Madam Speaker. Actually, the presiding Speaker was categorical that we would never be ambushed. If we could not be ambushed by anyone else, how about our very own? I think we are moving the wrong way.

MR SSEKIKUBO: Thank you, Madam Speaker. As you are aware, I am a seconder of the motion by Hon. Patrick Nsamba and our motion is for a motion for a resolution of Parliament urging Government to urgently constitute a constitutional review commission. This was moved under rule 47 of our Rules of Procedure.

Our motion and notice were received on 18 September 2017. You are aware that the motion you are giving space now to come before ours was only submitted on 22 September 2017, four days after our motion and notice were submitted to your office and the office of the Clerk.

Madam Speaker, rule 26(3) provides thus, and I would like you to listen to this, Members: "The Clerk shall keep a book to be called Order Book in which he or she shall enter and number in succession all matters intended for discussion at each meeting." If that book can be brought here, it will show how our motion was brought in first, four days before hon. Magyezi brought in his notice and motion.

Madam Speaker, we pray for your fairness. We are all backbenchers in this matter and even our motion is ready for debate. We are not even seeking leave but we are ready for debate. Allow us just a few minutes to move our motion -

THE SPEAKER: Hon. Ssekikubo, you will move your motion. I also want to remind you that under our rules, Bills take priority.

MR SSEKIKUBO: Yes, Madam Speaker. However, at this stage, it is still a motion. There is no Bill yet on the Floor of Parliament. It is a mere motion."

Following this exchange, the Speaker adjourned the house to Wednesday 27th September at 2.00 p.m. The relevant part of the proceedings of Parliament on that day are set out in the Hansard as follows: -

"MOTION SEEKING LEAVE OF PARLIAMENT TO INTRODUCE A PRIVATE MEMBERS' BILL ENTITLED, "THE CONSTITUTIONAL (AMENDMENT) BILL, 2017"

THE SPEAKER: Honourable members, before the motion is moved, I would like to reiterate

that what is happening here is only seeking leave. There is no amendment being done today. It is a question of seeking leave to bring a Bill. When the Bill is printed, gazetted, brought here for first reading and sent to the committee, that is when the process will start. For now, this is just seeking leave.

MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Thank you. Madam Speaker, I beg to move a motion under rules 47, 110 and 111 of the Rules of Procedure of Parliament seeking leave of this House to introduce a private Members' Bill under Article 94(4)(b) of our Constitution for a Bill entitled, "The Constitutional (Amendment) Bill, 2017."

From the above proceedings, it is evident that the Rt. Hon Speaker of Parliament erred when she proceeded with the motion of Mr. Magyezi, on 27th September 2018 instead of proceeding with the motion of Mr. Nsamba which had been received earlier as required by the Rules of Parliament.

She also erred when she amended the order paper to specifically introduce therein and include the motion of Mr. Raphael Magyezi without sending the same to Members of Parliament at least three hours before the sitting. Rule 26(1) clearly stipulates that, this requirement must be fulfilled "at least three hours before the sitting without fail" I find that this mandatory requirement was not complied with.

This Court has held before in *Oloka-Onyango & others (supra*) and the Supreme Court in *Ssemogerere vs Attorney* (Supra), that Parliament must comply with its own Rules. This is not without a history which is referred to in the Preamble to the Constitution.

In view of our Constitutional history especially what transpired on 15th April 1966, when Parliament enacted an interim Constitution without having debated it or even seen it, the 1995 Constitution requires Parliament, while conducting its business, especially passing any legislation to comply strictly with all the legal procedures set out in the law and with its Rules that is the ratio decision of the *Oloka-Onyango and Others Vs Attorney General (Supra)* in which an act of Parliament was declared unconstitutional on account of Parliament having failed to comply with its own Rules and Procedures. See also: *Paul Kawanga Ssemogerere and Others Vs Attorney General Supreme Court Constitutional Appeal No.1 of 2012 (supra)* specifically page 57 of the Judgment of Odoki CJ.

In this case it failed to do so, even when the Rules set out were couched in mandatory terms and the members had brought to the attention of the Speaker the specific Rules that Parliament was required to comply with.

It was submitted for the petitioners and by Mr. Mabirizi as set out in his Petition and on paragraphs 146, 147, 148, 149 and 150 of his affidavit in support of his Petition that Parliament erred when it failed to observe Rule 201(2) of its own Rules, which requires that: -

> *"(2) Debate on a report of a Committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker."*

It was further submitted that, during the debate, the learned Deputy Attorney General, Hon. Mwesigwa Rukutana, moved a motion to suspend that Rule, which motion was not seconded. They asked this Court to find that Parliament, failed to comply with the said Rule of procedure during the enactment of the impugned Act in the result that said Act is a nullity.

I have perused the Hansard, specifically the proceedings of the 18th December 2017. The excerpts relevant to this issue are reproduced below.

> *10.56*
>
> *THE CHAIRPERSON, COMMITTEE ON LEGAL AND PARLIAMENTARY AFFAIRS (Mr .Jacob Oboth): Madam Speaker, I beg to lay on the Table a copy of the main report before I make the presentation, which is accompanied by the minutes of the proceedings of the committee.*
>
> *THE SPEAKER: Honourable members, take your seats. The practice of Parliament _*
>
> *MR. OBOTH: Madam Speaker, I also beg to lay on the Table copies of stakeholders , submissions.*
>
> *Madam Speaker, this is the report on the Constitutional (Amendment) (No.2) Bill, 2017, which was read for the first time, on the 3rd October 2017, and subsequently referred to the Committee on Legal and Parliamentary Affairs for scrutiny.*
>
> *Madam Speaker, by the time this matter was referred to our committee, it was under rule 110 of our old Rules of Procedure, which is now rule 120 of the new Rules of Procedure. The reference made to rule 110 is the same in wording with rule 120.*
>
> *Madam Speaker, since this report was uploaded on the iPad, could you guide me on whether I should read it verbatim or go to the main observations and recommendations? I seek your guidance.*
>
> *THE SPEAKER: Just a minute. Hon. Karuhanga, what is your procedural point? The rest of you sit down.*

MR KARUHANGA: Thank you, Madam Speaker. My point of procedure is specifically on rule 201(2) of the new Rules of Procedure. Rule 201(2) provides that, "Debate on a report of a committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker ."

Madam Speaker, the procedural point I am raising is specifically from rule 201 (2). The chairperson of the committee laid the report a few minutes ago and the rule instructs that once the report of the committee on a Bill is laid on the Table by the chairperson or deputy chairperson or a Member nominated by the committee or by the Speaker, the debate shall ensue three days later.

Madam Speaker, the coining of this particular rule is mandatory in nature. The language here is "shall". I would like to believe that when we were passing these rules, a situation like this had been anticipated and the curing of it was well coined to stop any mob justice of sorts that may ensue.

Therefore, I would like to believe equally that this was intended to allow us, as Members, to deal with all the issues and objections, to analyse, study, assess and consult because we represent the people of Uganda so that when we come here, we speak for Ugandans and not ourselves (Applause)

THE SPEAKER: Honourable members, ever since the Ninth Parliament, we agreed to use less paper and that is why we bought you iPads. Last week, on Thursday, I directed the Clerk to upload all these reports on your iPads so this rule does not apply.

THE DEPUTY ATTORNEY-GENERAL (Mr Mwesigwa Rukutana): Madam Speaker, I beg to move that for the elaborate reasons you have given, rule 201 of our Rules of Procedure of Parliament be suspended so that we can proceed with the debate - (Interjections)

THE SPEAKER: Order! Please take your seats first.

MR. RUKUTANA: With the establishment of e-communication, when Members of Parliament were availed with iPads, the rule no longer serves any useful purpose. This is because that rule was intended to ensure that Members of Parliament take note of what is coming on the Floor. For that reason, Madam Speaker, I beg to move, under rule 16 of the Rules' of Procedure of Parliament, that rule 201(2) be suspended. (Interjections)

THE SPEAKER: Order! Honourable members, I would like to remind you about rule 88 of the Rules of Procedure of Parliament: your conduct in this House.

MR. SSEKIKUBO: Thank you very much, Madam Speaker. I rise on a point of procedure. This House is guided by rules and we hold these rules dear because any House without rules is bound to hit trouble.

Madam Speaker, it is for that reason that when we are debating these matters, whichever side of the political divide you are, we should listen to one another. (Applause)

However, you all know that once a Member raises a point of procedure, it is also proper that a Member is listened to. I am raising a critical matter and I raise it in accordance with rule 154(1) of the Rules of Procedure of Parliament. The rule provides that, "Except as provided by these rules in respect to the Business Committee, Appointments Committee and the Budget Committee, a Member shall not belong to more than two Committees ...

This goes down to the root of the reports we make before this House, Madam Speaker. In regard to rule 154(1); the first rule on page 149 of the Rules of Procedure. I beg your pardon, Members. Let us reach there together; do not worry, we shall reach there. It is rule I54(1), page 149. It says, "Except as provided by these rules in respect to the Business Committee: Appointments Committee, and the Budget Committee, a Member shall not belong to more than two committees ...

Madam Speaker, I have herewith the report of the Committee on Legal and Parliamentary Affairs, chaired by hon. Oboth. However, the Members who signed the report - it is fatal that Members who belong to other committees were imported to this committee. For what reasons - you may have wanted to have the majority on the committee but the moment you endorse a report when you are not a Member of the committee, it is fatal to the report - (Interjection). I am mentioning it here but I would like to agree with Members that once you do that, the findings of the report become fatal.

Madam Speaker, in my hand is the list of Members of the Committee on Defence and Internal Affairs, where the said Members participated in party activities and got stationary from the committee. To our surprise, they appended their signatures to this report. The Members under contention include hon. Lilly Akello and hon. Akampurira Prossy Mbabazi who both sit on the Committee of Defence and Internal Affairs.

> *Members here can bear me witness that before they went for a retreat in Entebbe, we were together inspecting Katuna and Mirama Hill and they participated as Members of the committee. To that extent, I would like to request hon. Tumwebaze, who has been vocal, to challenge me on this.*
>
> *Madam Speaker, with that, how do we proceed with this report that has mercenaries that were brought to append their signatures? These members belong to the Committee of Defence and Internal affairs but appended their signatures to the report.*
>
> *Madam Speaker, this is the procedural matter I would like you to look at. I beg to lay on the Table the list of members who sit on the Committee on Defence and Internal Affairs. The rule is very clear that you cannot belong to more than one committee. Therefore, this report cannot proceed to be debated. I rest my case."*

According to the Hansard, the debate went on without the motion raised by the Deputy Attorney General having been seconded or voted upon. It appears from the record that the Rt. Hon. Speaker of Parliament had at the time the motion to suspend *Rule 201(2)* was moved, ruled that, she had already given the notice required under *Rule 201(2)* to members electronically through their Ipads (hand held computers).

Rule 201(2) has been reproduced above. It is couched in mandatory terms. It requires that Members of Parliament to be given sufficient time to read and internalise a report of a committee on a bill before debating on it. Again we have to go back to our history and remind ourselves that, Parliament ought not to be stampeded into passing any law and more so Constitutional Amendment Bill.

I observe that this rule is not one of those that cannot be suspended. However, this rule was not suspended as the motion which sought to suspend it was not seconded by anyone as required by *Rule 59*, of the Rules of Procedure of Parliament which stipulates thus; -

> *"59. Seconding of motions*
>
> *(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.*

The Speaker of Parliament with all due respect failed to apply Rule 201(2) which is mandatory. I accept the submission of Counsel in this regard that "laying on the table" means physically

presenting the bill on the table of Parliament and does not include sending an electronic copy to members. I note that, Parliament amended and adopted new Rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore, the submissions of the Hon. The Deputy Attorney General on the floor Parliament that when the Members of Parliament were availed with Ipads Rule 201 no longer serves any useful purpose has no legal basis.

I therefore, find that, Parliament while passing the impugned Act, failed to comply with *Rule 201(2)* of its Rules of Procedure, which is mandatory. I find that failure contravened *Article 94(1)* of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018.

The petitioners also submitted that, Parliament contravened *Rule 154(1)* of its Rules of Procedure when it allowed members belonging to other committees of Parliament to sit on its Committee on Legal and Parliamentary affairs and when those members were permitted, signed the report of that committee, regarding the impugned bill now Act 1 of 2018.

Rule 154(1) provides as follows:-

> *"(1) The House shall have Standing Committees and Sectoral Committee as provided in this part of Rules."*

Rule 154(2) (1) provides as follows: -

> *"(1) Except as provided by these rules in respect to the Business Committee, Appointment Committee, and the Budget Committee, a Member shall not belong to more than two Committees."*

And Rule 155(2) provides as follows: -

> *"(2) Except as provided by these rules in respect of the Business Committee and the Budget Committee, a member may not be a Member of more than one Standing Committee."*

What transpired in Parliament during the debate on this issue, is set out in the Hansard, of Wednesday 18th December 2017 as follows: -

> *"MR SSEKIKUBO: Thank you very much, Madam Speaker. I rise on a point of procedure. This House is guided by rules and we hold these rules dear because any House without rules is bound to hit trouble.*
>
> *Madam Speaker, it is for that reason that when we are debating these matters,*

whichever side of the political divide you are, we should listen to one another. (Applause)

However, you all know that once a Member raises a point of procedure, it is also proper that a Member is listened to. I am raising a critical matter and I raise it in accordance with rule 154(1) of the Rules of Procedure of Parliament. The rule provides that, "Except as provided by these rules in respect to the Business Committee, Appointments Committee and the Budget Committee, a Member shall not belong to more than two Committees."

This goes down to the root of the reports we make before this House, Madam Speaker. In regard to rule 154(1); the first rule on page 149 of the Rules of Procedure. I beg your pardon, Members. Let us reach there together; do not worry, we shall reach there. It is rule 154(1), page 149. It says, "Except as provided by these rules in respect to the Business Committee, Appointments Committee, and the Budget Committee, a Member shall not belong to more than two committees."

Madam Speaker, I have herewith the report of the Committee on Legal and Parliamentary Affairs, chaired by hon. Oboth. However, the Members who signed the report - it is fatal that Members who belong to other committees were imported to this committee. For what reasons - you may have wanted to have the majority on the committee but the moment you endorse a report when you are not a Member of the committee, it is fatal to the report – (Interjection). I am mentioning it here but I would like to agree with Members that once you do that, the findings of the report become fatal.

Madam Speaker, in my hand is the list of Members of the Committee on Defence and Internal Affairs, where the said Members participated in party activities and got stationary from the committee. To our surprise, they appended their signatures to this report. The Members under contention include hon. Lilly Akello and hon. Akampurira Prossy Mbabazi who both sit on the Committee of Defence and Internal Affairs.

Members here can bear me witness that before they went for a retreat in Entebbe, we were together inspecting Katuna and Mirama Hill and they participated as

Members of the committee. To that extent, I would like to request hon. Tumwebaze, who has been vocal, to challenge me on this.

Madam Speaker, with that, how do we proceed with this report that has mercenaries that were brought to append their signatures? These Members belong to the Committee of Defence and Internal Affairs but appended their signatures to the report.

Madam Speaker, this is the procedural matter I would like you to look at. I beg to lay on the Table the list of Members who sit on the Committee on Defence and Internal Affairs. The rule is very clear that you cannot belong to more than one committee. Therefore, this report cannot proceed to be debated. I rest my case.

THE SPEAKER: Honourable members, this morning, hon. Ssekikubo objected to the names of two of the Members of the House on grounds that they belong to more than one sessional committee. I have had time to check the records and these are my findings:

On 29 November 2017, on the Floor of this House, the Government Chief Whip designated the following Members to serve on the standing committees and others to sessional committees:

1. *Hon. Herbert Kabafunzaki, Rukiga County, ICT sectoral committee*
2. *Hon. Prossy Akampurira, Rubanda County, Legal and Parliamentary Affairs Committee*
3. *Hon. Taban Idi Amin, Kibanda County North, Legal and Parliamentary Affairs Committee*
4. *Hon. Rose Lilly Akello, Kaabong, Legal and Parliamentary Affairs Committee*
5. *Hon. Suubi Asinde, Iganga, Legal and Parliamentary Affairs Committee*
6. *Hon. Caroline Kamusiime, Rukiga County, Legal and Parliamentary Affairs Committee*
7. *Hon. Grace Watuwa, Namisindwa, East African Community Affairs*
8. *Hon. Jane Avur Pachuto, Pakwach, Committee on Foreign Affairs*
9. *Hon. Robert Kasule, Nansana Municipality, Legal and Parliamentary Affairs Committee.*

On the same day, the Government Chief Whip again nominated the same Members to the following standing committees:

1. *Hon. Herbert Kabafunzaki, Committee on HIV/AIDS*
2. *Hon. Prossy Akampulira, Committee on Rules and Privileges*

3. *Hon. Rose Lily Akello, Kaabong, Committee on Rules and Privileges*
4. *Hon. Suubi Asinde, Iganga, Committee on Government Assurances*
5. *Hon. Caroline Kamusiime, Rukiga, Committee on Government Assurances*
6. *Hon. Grace Watuwa, Namisindwa, Committee on Local Government Accounts*
7. *Hon. Jenifer Pachuto, Packwach, standing Committee on Budget*
8. *Hon. Taban Idi Amin, Kibanda North, standing Committee on Local Government Accounts*
9. *Hon. Robert Kasule, Nansana Municipality, COSASE.*

On the same day, the Opposition Chief Whip, Hon. Ibrahim Ssemujju nominated hon. Robinah Ssentongo of Kyotera to the sessional Committee on Health and to the standing Committee on Local Government Accounts.

Honourable members, the question was put on all these names and was accepted on the Floor of this House. (Applause)

I have inquired as to why the honourable member went out with the Committee on Defence and Internal Affairs and I have been told that she had been facilitated to go for a site meeting with that committee before she was nominated to the Committee on Legal and Parliamentary Affairs. Having received the money, she felt obliged to go and fulfill that obligation.

Honourable members, this is an issue of accountability. You have been complaining here that Members receive money and do not go for the trips. By the way, honourable members, those that are saying that she should return the money, remember that Members are free to attend any committee as long as they do not vote.

I know that on the Appointments Committee, I have had several Members coming to sit and listen in. The right of the members to attend cannot be fettered. They cannot vote but they can attend; so she was lawfully on that committee because you accepted it on 29 November, 2017. (Applause)

MR NIWAGABA: Madam Speaker, I move under rule 86 (2) of our Rules of Procedure to give notice to the House that we, on the Opposition side, shall move a substantive motion tomorrow to challenge that decision because of the available matters of evidence in our possession, including attendance sheets and signatures of the Member in issue in respect of committee meetings.

The Hansard shows that when this Member was designated to the Committee on Legal and Parliamentary Affairs, she was not formally withdrawn first from the committee, where she was earlier allocated. Therefore, we will move a substantive motion to challenge that decision based on the rules and the evidence we have.

I, therefore beg, Madam Speaker that you allow us space tomorrow at a time to be given by you for us to present that substantive motion.

THE SPEAKER: What is the motion about because you are talking about the decision of the Speaker?

MR NIWAGABA: To review your decision, Madam Speaker -

THE SPEAKER: Which decision?

MR NIWAGABA: Through rule 86(2) of our Rules of Procedure; the ruling you have just made.

THE SPEAKER: I am restating what you did on 29 November 2017. That is what you agreed to in this House.

MR NIWAGABA: Madam Speaker, the evidence we have is contrary to your ruling. We cannot appeal against your decision but your decision can be reviewed by the House when we bring it here

THE SPEAKER: Take it to the Committee on Rules, Privileges and Discipline. On 29 November 2017, this House, in my absence, decided that those Members are moving to those committees; so it cannot be under rule 86.

MR SSEGGONA: Madam Speaker, I think with your permission, you have a duty to guide. In light of Rule 86 (2) of our Rules of Procedure, if I am not satisfied with your decision, where do I go? I am asking the Speaker because I know she knows.

THE SPEAKER: Honourable members, this is a decision of the House not of the Speaker. You sat here on 29 November 2017 and took that decision; so it is not the Speaker's decision. That rule is not applicable.

MR SSEKIKUBO: Madam Speaker, in my possession is a set of evidence and it is not my strong point to put back a matter that you seem to have taken a position on. However, if I could be allowed to draw your attention to particular facts in relation to this matter -

THE SPEAKER: Hon. Ssekikubo, that is an issue for the Committee on Rules, Discipline and Privileges. If she has misconducted herself, take her to that committee."

From the above excerpts, it is very clear that some Members of Parliament who were not originally on the Legal and Parliamentary committee when the impugned bill was sent to it for consideration, later joined it while they were still Members of other committees.

With all due respect, to the Rt. Hon. Speaker, her Ruling that the issue should be treated as simply indiscipline had no legal justification. It is clear from the excerpts above that some members who signed the Legal and Parliamentary Affairs Committee report in respect of the impugned bill which was later enacted into law, were not legally members of that committee. This is a legal matter that has an impact on the validity of the process of enacting legislation. It is not an issue of discipline.

I am, however, unable to find that, in ordinary circumstances failure to comply with Rule 155 of the Rules of Procedure of Parliament, would vitiate the proceedings of a Parliamentary committee in view of the provisions of Article 94 (3) of the Constitution which provides that:-

(3) The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings.

In this particular case however, the said members who were not entitled to seat of the Legal and Parliamentary Affairs Committee not only participated but also voted and signed the report. Article 94(3) does not in my view extend to voting as this would go to the root of decision making. In this particular case, the committee's opinion was split in the result that dissenting members had to issue a minority report. Members of the committee had to vote. Only members could do so. See: Rule 193 and 201 of the Rules of Parliament reproduced in the judgment of my sister Elizabeth Musoke JCC.

Invariably a minority report is as a result of numbers. It could as well be that in absence of all persons not entitled to participate, the minority would perhaps have constituted the majority. For this reason alone, I find that non-compliance with Rule 154(1) Parliament vitiated the whole process of enacting the impugned Act.

It was again submitted for the petitioners that Parliament offended Rule 72 of its rules also known as "the Subjudice Rule" when it proceeded to hold a debate on issues that were pending before a Court of law touching on the impugned bill, now Act 1 of 2018.

I have perused the pleadings. I have not found any evidence to prove that there was a pending suit or Court proceeding at any time during the debate in respect of the impugned Act. On the Court record before me I have not been able to find any Court pleadings, proceedings or any other evidence by affidavit or otherwise to support this contention. I would have expected to see an affidavit by the Registrar of the concerned Court confirming that there were indeed civil or criminal proceedings pending before Court at the time, but no such evidence was availed. I am unable to find that the Parliament violated Rule 72 of its Rules.

Mr. Male Mabirizi, the petitioner in Petition No. 49 of 2017 contended in paragraphs 175,176,177 ,178 and 180 of his affidavit in support of the Petition as follows: -

"175. THATit was visible that the 3rd reading of the bill was done contrary to the constitution since

the constitution requires separation of the 2nd reading and the third reading with at least 14 sitting days of parliament, which never lapsed.

176. THAT Iknow that the framers of the constitution were sober in making this requirement in the constitutional amendment and the speaker cannot be allowed to circumvent that intention.

177. THAT the intention was to enable members consult more, rethink and conduct further research about the intended amendment.

178.THAT by the speaker conducting the two readings in the same evening, moreover at night, she committed 'rape' against the constitution since most of the members, who were in parliament from 9.00am in the morning were exhausted by the time of the voting on third reading after 11pm in the night.

180. THAT; Iknow that the failure by the speaker of parliament
to separate the 2nd reading of The Constitutional Amendment Bill
No.2 of 2017 and the 3rd reading by at least fourteen sitting days
of parliament was inconsistent with and in contravention of Article 263 of the Constitution which require Parliament to separate the 2nd and 3rd readings by at least 14 sitting days of Parliament."

It is undisputed and evident from the Hansard of 20th December 2017 that the 2nd and 3rd readings of the impugned Constitution (Amendment) Bill were done on the someday.

In her affidavit in support of the answer to the Petition the Clerk to the Parliament Ms. Jane Kibirige accepts that indeed the 2nd and 3rd readings of the impugned Bill were made on the someday, 20th December 2017. However, she contends in paragraph 39 of the said affidavit that:-

"I have been advised by our legal Counsel in Attorney General's Chambers which advice I verily believe to be true that the statutory period of 14 (fourteen) days between the 2nd and 3rd readings was not applicable to the Constitution (Amendment) No.2 Bill of 2017."

She did not substantiate. The respondent in its address to Court did not provide us with any authorities to back up its advice to Parliament.

This is not surprising, as the respondent's case has always been that the impugned Act did not in any way Amend Article 260, therefore the Provision of Article 263 did not apply. This issue is now moot as I have already found that, Article 260 was amended by the impugned Act, by implication. I have already determined the issues relating to the amendment of Article 105 to which this complaint related. Had I found that the amendment of Article 105 was constitutional, I would have found that the procedure of passing it into law required compliance with Article 263. As l have already stated above that this is all now moot.

The other issue raised by the petitioners is that, Parliament failed to give effect and to comply with the provisions of Article 1, 2 and 8A of the Constitution. It is contended by the petitioners that,

Parliament did not in the entire process of enacting the impugned Act, purposefully and meaningfully consult and involve the people of Uganda. Mr. Ssemuju Nganda a petitioner in Petition N0.5 of 2018, in his affidavit in support of the Petition paragraphs 24 (a), (b) and (c) deponed as follows:-

"24. THAT I am a Member of the Committee on legal and Parliamentary Affairs to which the impugned Constitution (Amendment) Bill was referred to for scrutiny by the Speaker during the sitting of Parliament on October 23rd 2017 with instructions to involve (consult widely) the people of Uganda because in the Speaker's wisdom the matter touched Articles 1 and 2 of the Constitution. (See copy of Hansard dated October 3rd attached hereto and Marked 'J')

That the committee on legal and parliamentary affairs in internal meeting drew a program, and budget for national consultation and divided its members.

That the committee even met the Speaker Rt. Hon Kadaga requesting for funds to carry out consultations and she promised to avail the same.

That I was shocked when the vice chairperson of the committee on legal Hon. Robinah Rwakojo hastily called another internal meeting and proposed that we retreat in Entebbe to write a report on the Bill before consultations were done contrary to the ruling of the Speaker of October 3rd 2017."

In reply to the above Ms. Jane Kibirige the Clerk to Parliament deponed in her affidavit in support of the answer to the Petitions as paragraphs 28, 29, 30 and 31 as follows:-

"28. That I know that Rt. Hon. Speaker of Parliament then referred the Constitution (Amendment) (N0.2), Bill 2017 to the Committee on Legal and Parliamentary Affairs of Parliament and informed Members of the House that owing to the fact that the proposed amendments touched on Articles 1 & 2 of the Constitution, the people were to be consulted on the proposed Bill to see their views.

29. That in specific reply to paragraphs 1, 2, 3, 15(a), 16(a) of the affidavits of Ssemujju Nganda, Munyagwa S. Mubarak, Ssewanyana Allah, Odur Jonathan, Gerald Karuhanga and Winifred Kizza I know that the process leading to the enactment of the Constitution (Amendment) Act, 2018 was preceded by wide public consultations both by the Committee of Legal and Parliamentary Affairs of Parliament and individual Members of Parliament.

That I know that the consultations were carried out in accordance with the provision of Articles 38 and 90 of the Constitution so that the civic participation of the people is exercised directly by themselves or indirectly by their elected representatives and civil society, interest groups were afforded an opportunity to present their views on the bill.

That I now that under the auspices of Article 90(3) Parliament consulted the public on the proposals

made in the Constitution (Amendment)(No2), Bill, 2017 as exemplified by-

(i) the consultations done by the committee on legal and Parliamentary Affairs of Parliament during bill scrutiny which extended invitations to all interested parties to appear before it to give their views on the proposal in the Bill.

(ii) the request by the Clerk to Parliament, who, through both print and electronic media, invited the general public to provide written memoranda on the contents of the Constitution (Amendment) Act, 2017; and

Parliament facilitation of Members of Parliament to consult their constituents on the proposals made in the Bill."

I have already discussed the relevance and importance of public participation in the constitutional process, specifically in respect of a Constitution Amendment. I have already stated that, in my humble view, public participation is one of the basic structures of our Constitution. Public participation, therefore cannot be wished away or taken lightly by Parliament.

Parliament was certainly well aware of this constitutional requirement when, the Speaker, herself on October 3rd 2018, cautioned Members of Parliament to comply with Articles 1 and 2 of the Constitution in the process of enacting the impugned Act. She stated at page 4791 of the Hansard of the Tenth Parliament on Tuesday, 3rd October 2017 as follows: -

"THE SPEAKER: Honourable members, the Bill is sent to the Committee on Legal and Parliamentary Affairs. However, I would like to remind you, honourable members, that this matter touches Articles 1 and 2 of the Constitution; people must be involved in this deliberation. Thank you." (Emphasis mine)

The affidavits of Jane Kibirige, Margret Muhanga Mugisha, James Kakooza, Moses Grace Balyeku, Lokeris Samson, Henry Musasizi Ariganyira, Ongalo Obote Clement Kenneth, Tumusiime Rosemary Bikaako and the submissions of Counsel for the respondent in this regard all point to the fact that the respondent considered public participation to be a key constitutional requirement in the passing of the impugned Act. The question this Court is required to determine is whether or not the people of Uganda effectively participated in the entire process of enacting the impugned Act as required or envisaged under Articles 1, 2 and 8A of the Constitution.

On Wednesday 27th September, Mr. Raphael Magyezi, The Hon. Member of Parliament representing Igara County West, Bushenyi District, moved a motion seeking leave of Parliament to introduce a private members bill under Article 94(4) b of the Constitution, entitled "The Constitution (Amendment) Bill, 2017. On Wednesday 20th December 2017, that bill was passed into law by Parliament, and on 27th December 2017, it was assented to by the President.

From the beginning to end, the whole process took 85 days including weekends and public holidays. The bill was before Parliament on the following days 27th September, 3rd October, 18th December, 19th December and 20th December 2017 a total of 5 (five) days. The bill was read out for the first time on 3rd of October 2017. It was then referred to the Committee on Legal and Parliamentary Affairs for scrutiny. The report of that committee was received by Parliament on 18th December 2017, debated on that day, and also on the following day 19th December 2017. It was subsequently passed into law on 20th December 2017.

The Committee on Legal and Parliamentary Affairs therefore was able to scrutinize the bill, seek views of the people of Uganda, involve them in the process and write a report including a minority report in 75 (seventy five) days. That is two and half months including weekends and public holidays considering that it may have taken the committee at least 15 (fifteen) days to put together the information and data gathered and to write both reports, then the time spent collecting views for Ugandans could not have been more than 6o (sixty) days taking into account weekends and public holidays. I do not consider, two months to be sufficient time for Parliament to seek views of Uganda taking into account the following facts:-

The information provided by Electoral Commission on its official website indicate that in 2016 General Elections, there were,

Registered voters - 15, 277, 198

Parliamentary Constituencies - 290

Number of Districts - 112

Sub –Counties – 1, 403

Parishes – 7, 431

Villages – 57, 842

In addition to the above, there are a number of Constitutional and statutory bodies, different categories of interest groups, at all levels including, the women, the youth, persons with disabilities, workers, the Armed forces, Political parties including those not represented in Parliament. There are also other established and organised interest groups that include Civil Society Organisations Community Based Organisations, established churches and Moslem faith Council and organsiations, the academia, Ugandans living in the Diaspora, Professional Associations, students and student organizations, among others. The Legal and Parliamentary Affairs Committee report set out the list of the stake holders it was able to consult at page 4 as follows:-

1. Hon. Raphael Magyezi (MP) Igara West
2. Equal Opportunities Commission
3. Ministry of Justice & Constitutional Affairs

4. The Rt. Hon. Prime Minister of the Republic of Uganda;
5. Uganda Law Reform Commission;
6. The Electoral Commission:
7. The National Resistance Movement Party
8. The Democratic Party;
9. The Conservative Party;
10. Dr. Mwambutsya Ndebesa
11. Justice Forum -JEEMA
12. Professor Tarsis Bazana Kabwegyere
13. Leader of the Opposition (LOP)
14. Uganda Local Government Association (ULGA)
15. Uganda Association of Uneducated persons (TUAUP)
16. Cpt. Ruhinda Maguru Daudi II
17. University School of Psychology
18. Mr. George W. Bakka
19. Mr. Gilbert Mutungi
20. Mr. Moses Mfitumukiza
21. Mr. Egole Lawrence Emmy
22. Fr. Peter Bakka
23. Mr. Langoya Alex
24. Mr. Owachgiu Richard
25. Maj. Gen. Rtd. General Jim Muhwezi
26. FRONASA Veterans
27. Society for Justice and National Unity (SoJNU)
28. Prof. Venansius Baryamureeba
29. Prof. F. E Ssempebwa
30. Mr. Peter Mulira
31. Hon. Amanya Mushega
32. Dr. Tanga Odoi
33. Kick All Age Limits Out of the Constitution (KALOC)
34. Centre for Information Research and Development
35. Hon. Kenneth Lubogo
36. Masindi District Local Government Council
37. Mr. Fred Guweddeko

38. Buganda Region NRM Youth Voluntary & Advocacy Mobilizers (BREVOM)
39. Guild Presidents' Forum on Governance (GPFOG)
40. Mr. Gabula Sadat
41. Kampala Business Community Informal Sector (KBCIS)
42. Kampala Arcades Traders Association (KATA)
43. Wansanso Kibuye Co-operative Saving & Credit Society Ltd
44. Kampala Operational Taxi Stages Association (KOTSA)
45. Kampala Tukolebukozi Timbers Association (KATUTA)
46. Nakivubo Road Old Kampala (Kissekka) Market Vendors Ltd
47. Uganda Mechanics and Engineering Association
48. Urban Community Vector Control Group (UCOVEC)
49. Uganda Markets & Allied Employees Union (UMEU)
50. Hon. Thomas Tayebwa.
51. St. Balikuddembe Market Stalls, Space & Lock Up Shops Owners Association Ltd
52. Uganda Printing and Publishing Corporation
53. Minister of Finance, Planning and Economic Development

These above are the only stakeholders who were able to present their views to that committee. They are 22 individuals and eight Government ministries, commission or agencies including the Rt. Hon Prime Minister in his official capacity, four political parties, the leader of the opposition Parliament and one District Local Government. The rest appear to be a collection of obscure and amorphous groups, that include Fronasa Veterans, Uganda Association of uneducated person, Kick all Age limit out of the Constitution and others.

With all due respect to the members of the committee referred to above, for them to suggest that the above persons and groups are the stake holders representing the whole of the people of Uganda as envisaged under *Article 1* of the Constitution, in view of our past history, is unfortunate to say the least. I must state here that I have restrained myself from using a stronger language. I say so because of the Electoral Commission statistics from the 2016 General Election I have reproduced above. Since the number of persons consulted as individuals were only 22, it means that it represents about 0.0001375% of the registered voters. Even if all the 455 Members of Parliament were added to this list of those assuming they were all consulted and debated the motion, which they did not, the percentage of people consulted in relation to registered voters would still be less than one percent. They would be 0.8194 percent to be exact of the voters registered in 2016.

I am alive to the fact that the passing of a bill into law does not require the input of every individual Ugandan, or even every Member of Parliament. However, every bill requires public participation

that is purposeful, well intended and meaningful. What happened in this case appears to have been just window dressing, even then a very clumsy one.

The framers of our Constitution, the people of Uganda, were not contended with simply the right to vote in a free and fair election as the only expression of their will. They expressly provided in the Constitution for a wider role in the democratic process by people. In *Articles 1, 2* and 8A of the Constitution, the people reserved for themselves a role in the legislative process as had been echoed by President Museveni in his maiden speech on the steps of Parliament on January 29th 1986, which I have reproduced earlier in this Judgment.

The same sentiments were repeated by the people of Uganda during the Constitution making process as set out in the Odoki Report (Supra). This was a complete departure from the past when only Parliament and the President (during Amin's regime) had the unquestionable power to legislate. Parliament having abused that power in 1966, 1967, 1971, and 1979, the people in 1995 Constitution decided to retain that power themselves under Articles 1, 2 and 3 of the Constitution and only to delegate part of it to Parliament under Article 79.

Since Uganda and the Republic of South Africa have both gone through a history of tyranny and oppression, it is pertinent that I reiterate the words of Ngcobo J, of the Constitutional Court of South Africa who wrote the lead Judgment in *Doctors for life international and other the Speaker of National Assemble and other CCT/12/05* wherein he stated as follows: -

> *115. In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*

> *116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.* (Emphasis mine)

Neither the Constitution nor any other law prescribes the nature and scope of public participation. Parliament is granted the discretion to determine how best to fulfill this Constitutional requirement. This Court however, under *Article 137*(3) (b) is clothed with the power to determine whether any act or omission by any person or authority contravened the Constitution. I must emphasize here that the word "omission". It appears to me here that we are dealing with the issue of Parliamentary omission. It is quite evident, in my humble view, that the Constitution may be violated by omission of any person or authority. In this case we are dealing with Parliament as an authority established by this Constitution, having failed to permit, facilitate, ensure and carry out meaningful public participation in the process of amending the Constitution.

We can only use and apply an objective test to determine the above question. Parliament on its part set out its own subjective test and declared that it had complied with the constitutional requirement of public participation when it received presentation from 53 individuals and groups listed above and when it paid money to Members of Parliament to go out and consult the people on the impugned bill. This Court under Article 137 has the final say as to whether or not the Parliament passed the Constitutional public participation test. Left on its own it is apparent Parliament will tend to use a subjective standard as is evidenced by the affidavit of Jane Kibirige in reply to the Petition *No. 49 of 2018 Male Mabirizi vs Attorney General,* already reproduced above.

What is required is for this Court to determine parameters of an objective standard of public participation in the legislative process without being intrusive or crossing the Constitutional boundary of separation of powers.

The Constitution gives us a guide to the objective test, when in Article 20 it provides that: -

> *"20. Fundamental and other human rights and freedoms.*
>
> *(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.*
>
> *(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."*

The rights of citizens to participate in democratic process is a social, economic and political right.

Parliament has a duty to uphold and promote this right. Therefore, in my humble view, there is no limitation to the right to participate in the legislative process except as provided for under Article 43(2) (c) of the Constitution. It provides: -

> *"43(2)(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."*

The only limitation, therefore, that Parliament can impose on the people's right to participation in the legislative process is:

> *"What is acceptable and democratically justifiable in a free and democratic society or what is provided in this Constitution."*

The Supreme Court discussed in detail the meaning and scope of *Article 43(2)* in *Onyango Obbo & Another vs Attorney, Supreme Court Constitution Appeal No.2 of 2002.* I will not endeavor to rephrase all that was stated in that decision but rather I have reproduced what *Mulenga JSC* stated:-

> *"It is common ground that the protection of the right to freedom of expression is subject to Article 43,*
>
> *The provision in 43 (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudices" the public interest. It follows, therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided*

> *in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society."(Emphasis mine)*

The above provides the broad principle. However, in practice Parliament has to apply the well known and established subjective test of research in the process of actualising the people's right to public participation. The process of public participation in my humble view is required to pass the SMART test. That is, it has to be Specific, Measurable, Attainable, Relevant and Time bound. I will now endeavor to apply this test to facts before us.

I now proceed to apply the facts before to ascertain whether or not they pass the objective SMART test.

The respondent in a bid to prove that there was indeed sufficient public participation during the process that led to the enactment of the impugned Act, filed 8 affidavits deponed to by the following persons:-

1. Mugisa Margaret Muhanga
2. Jane Kibirige
3. James Kakooza
4. Moses Grace Balyeku
5. Lokeris Samson
6. Henry Musasizi Ariganyira
7. Ongalo Obote Clement Kenneth
8. Tumusiime Rosemary Bikaako

For clarity and posterity, I am constrained to reproduce the evidence adduced by each of the above witnesses in their endeavor to prove that the people of Uganda participated in the debate that led to the enactment of the impugned Act 1 of 2018.

The relevant parts of the affidavit of *Margaret Mugisa Muhanga reads as follows:-*

> *9. That in specific response to paragraph 10 of the affidavit of Prosper Businge and related paragraphs 3 & 4 of Herbert Mugisa, 4 and 5 of Thomas Mugara Guma and 3,4& 5 of Pastor Vincent Sande, I went to my constituency and held numerous*

consultative meetings regarding the proposed constitutional amendments in 15 sub counties in Burahya county with, inter alia, the district councilors youth leaders, sub county Chairpersons and the general population of Burahya County on various dates.

10. *That on 5th October, 2017 a consultative meeting was held with youth leaders in Burahya County , Kabarole District, A copy of the minutes of meeting held on 5th October 2017 and pictures of my constituents who attends the meeting are attached hereto and marked as annexture 'A' & 'B'.*
11. *That on 7th October 2017, I held consultations with sub-county leaders regarding the proposed amendments in the Constitution (Amendment) (No.2) Bill of 2017 and it was agreed and resolved that the people of Burahya County would be consulted and sensitized through radio talk shows and their views about the age limit debate popularly termed "Gikwateko, Togikwatako" sought . A copy of the minutes of the meeting held with sub county leaders on 7th October 2017 are attached hereto and marked as Annexture 'C'.*
12. *That on 2nd November 2017 I held further consultative meetings with LCIII Chairperson of each sub county within my constituency including Karago town council, Busoro, Karambi, Karangura, Kasenda, Kijura town council Bukuku, Ruteete, Kicwamba, Harugongo, Hakibaale, Mugusu and Kabende sub county and among others in Kabarole District. A copy of the minutes of the meeting held on 2nd November 2017 and the attendance list are hereto attached and marked as annexure 'D'.*
13. *That I know that in all the sub counties that I went to, save for a few opposing voices, the overwhelming majority of my constituents feely, willingly and openly expressed their support for the Constitutional (Amendment) (No.2) Bill of 2017.*
14. *That I hereby stated that consultations in Burahya county were conducted peacefully with no interference and on 19th of December 2017 when the August House convened and the debate was called, I voted yes in support of the Constitutional amendments with the full mandate of the people of Burahya county, Kabarole District.*

The relevant parts of the affidavit of Jane Kibirige *the Clerk to Parliament reads as follows:-*

32. That I know that on the 18th of December 2017 the August House reconvened after the consultations with the general Public and I also know that Constitutional (Amendment) (No.2) Bill of 2017 was read in Parliament for the second time. A copy of the Hansard depicting the proceedings in parliament date 18th, 19th& 20th December are hereto attached and Marked 'D', 'E' and 'F' respectively.

33. That I know that the Rt. Hon. Speaker of Parliament then invited the Chairperson on the committee on Legal and Parliamentary Affairs to respond to queries raised by the August House why the committee considered two issues i.e. the term limits and the issue of adjusting the term of the President and Parliament that were not originally in the Constitutional (Amendment) (No.2) Bill of 2017 presented by Hon. Raphael Magyezi.

34. That I know that the Hon. Jacob Oboth, the Chairperson, of the committee on legal and Parliamentary Affairs then made his presentation to the House and he informed the House that the Committee gathered the views from the consultation process and submissions from their inter alia the Leader of Opposition and her team, the Rt. Hon. Prime Minister, Civil Society.

35. That in specific response to paragraph 26 of the affidavit of Ssemujju Nganda, the Chairperson of the committee on Legal and Parliamentary Affairs categorically stated on record to the House, that there was nothing in the Report of the committee on Legal and Parliamentary Affairs that the committee did not get through the process of consultation and consideration of Bill.

36. That in further response to paragraph 26 of the affidavit deposed by Ssemujju Nganda, I know that Chairperson of the committee on Legal and Parliamentary affairs cited an example of the Prof. Fredrick Ssempebwa, who was quoted in both the majority and minority report, having made persuasive submissions before the committee on the presidential term and age limits.

37. That I know that in specific response to paragraph 24 (c) of the affidavit of Hon. Ssemujju Nganda I know that it is not true that the Vice Chairman of the committee on Legal and Parliamentary Affairs of Parliament acted contrary to the directive of the Rt. Hon. Speaker of Parliament to carry out national consultations.

James Kakooza on his part deponed as follows:-

3. *THAT I know that when the Constitutional (Amendment) No.2 Bill 2017 was first tabled and read in Parliament, the Rt. Hon. Speaker of Parliament granted all Members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995.*
4. *THAT I know that Parliament dispatched Ug. Shs. 29,000,000/= (Twenty nine million shillings) to the Bank accounts of each Member of Parliament to facilitate the consultation process.*

5. *THAT when I received the said facilitation, I proceeded to draw a program for the consultation meetings to be conducted and I proceeded to my constituency, Kabula County, prepared a program and run radio announcements calling upon the people of Kabula County Constituency to attend the consultative meetings.*
6. *THAT I held consultative meetings in each and every Sub county (Gombolola) within my constituency including Kasagama Sub county, Kaliiro Sub-county among others in Lyantonde District.*
7. *That in all the Sub-counties that I went to, save for a few negative responses, the overwhelming majority of my constituents freely, willingly and openly expressed their support for the Constitutional (Amendment) No.2 Bill 2017.*
8. *That I conducted the last consultations with the District leadership where the District council even passed a resolution supporting the amendment of the Constitution.*
9. *That I know that the consultations in Kabula Constituency were conducted peacefully with no interference in the form of beatings arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence forces (UPDF).*
10. *That on the above basis, when the Bill was presented on the floor of Parliament, I voted YES as advised by my constituents.*

Lokeris Samson, sets out the facts relating to this issue in his affidavit as follows:-

3. *THAT in the month of October 2017, the Rt. Hon. Speaker of Parliament dispatched all Members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995; as contained the Constitutional (Amendment) No.2, Bill, 2017.*
4. *THAT Iknow that Parliament through the Parliamentary Commission facilitated the consultation process of each Member of Parliament.*
5. *THATon the 25th October, 2017 I proceeded to my constituency, Dodoth East, where I made a program with my Political Assistant with the object of how to consult the Community in my Constituency by way of physical contact with the Public of consultative meetings, rallies at sub counties and at the kraals.*
6. *THAT Ithen proceeded to conduct several consultative meetings.*
7. *THAT I first held meetings with the Elders and clan leaders, these were at Oyoro, Lotem, Kathile south and Kalapate sub counties.*

8. *THAT Ilater proceeded to Morulem, Moruita and Lolelia kraals, that at each of these meetings I explained to the People in my Constituency the matter of Constitution Amendment.*
9. *THAT I made the Electorate and all the Public understand the proposed amendments to the age limit presidential terms, how the amendment was being initiated and undertaken through the guidance of the Constitution.*
10. *THAT Imet the NRM structures comprising of officials from the village level to the constituency level, I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views*
11. *THAT Icarefully explained to them the purpose of the consultations a majority of them advised that I should support the Constitutional (Amendment) Bill No.2 of 2017.*
12. *THATat each of these meetings I let them vote on their views the majority of them agreed that we should proceed and amend or 'Touch it.*
13. *THAT Ialso met the elected leaders in the Constituency including Councilors at all levels such as LC 1 Chairpersons and all Local Councils Executives up to the District level including the LCV and as I had done before with the other groups, I took them through the proposed amendments and yet again, they with an overwhelming majority advised me to second and vote for the proposed amendments.*
14. *THAT in reply to the allegations of alleged beating, torturing of people, using tear gas and firing of live bullets in an attempt to disperse people as stated in the Affidavit of Hon Winfred Kizza at Paragraph13(x) and (y), I know that the consultations in Dodoth East were conducted peacefully with no interference in the form of beatings, arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence Forces (UPDF).*
15. *THAT I further know, in these consultations I had held two meetings with Hon Akello Rose Lilly the Kaabong Woman Member of Parliament where nobody was beaten tortured and or arrested as alleged.*
16. *THATwhen we returned to Parliament against the overwhelming recommendations of my people I voted YES as advised by them.*

Moses Grace Balyeku, deponed as follows on this issue of public consultations.

3. *That on 3rd October 2017, the Rt. Hon. Speaker of Parliament granted all members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995 as contained the Constitutional (Amendment) No.2 Bill, 2017.*

4. That I know that Parliament dispatched Ug. Shs. 29,000,000/= (Twenty nine million shillings) to the Bank accounts of each Member of Parliament to facilitate the consultation process.

5. That on the 17th October, 2017 I proceeded to my constituency, Jinja Municipality West, I prepared a program and run radio announcements calling upon the people of Jinja Municipality West constituency to attuned the consultative meetings.

6. That I then proceeded to conduct several consultative meeting as follows:-

a) *THAT Ifirst met the youth groups in Jinja Municipality West on 18th October, 2017 at Bax Conference Hall and I carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

b) *THAT the next day on 19th October, 2017 I met the NRM structures comprising of officials from the village level to the constituency level (District level), I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views and eventually, by show of hands, majority of them agreed that we should proceed and amend or 'Touch it' as it was commonly referred to.*

c) *THATthe next day, I met 'bodaboda' cyclists and taxi drivers in my constituency at Nalufenya and yet again, I took them through the interpretation of the relevant provisions of the Constitution and the proposals in the Constitutional (Amendment) No.2 Bill, 2017 and although a few of them said no, the majority of them agreed to the proposed amendment.*

d) *THAT on the following day, 21st October, 2017, I met another group of youths from Jinja West at Main Street Road Open area and I thoroughly explained to them the purpose of the consultations and they all agreed and thanked me for taking their views and they also told me to support the Constitutional (Amendment) No.2 Bill, 2017.*

e) *That on the following day, 21nd October, 2017, I met the elected leaders in the Constituency including Councilors at all levels such as L.C.1 Chairpersons and all Local Councils Executives upto the District level including the LCV and as I had done before with the other groups, I took them through the proposed amendments and yet again, the overwhelming majority advised me to the proposed amendments.*

f) *The next day on 23rd October, 2017, I met elders and members of the markets within my constituency including Jinja Central market, Amber court market, Mpumude market and Rubaga market and I still explained to them the purpose of the consultations and*

the proposed amendments to the Constitution especially on Art. 102(b) and save for a few exceptions, the bigger number told me that I should go ahead and support the proposed amendments.

7. *THATon 24th October, 2017, I held a press conference with all my agents and media groups and disclosed to them how my consultations had been peaceful and informed them that the people of Jinja Municipality West had fully endorsed the proposals in the Constitutional (Amendment) No.2 Bill, 2017.*
8. *THAT I know that the consultations in my Constituency Jinja Municipality West were conducted peacefully with no interference in the form of beatings, arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence Forces (UPDF).*
9. *That the above basis, when the Bill was presented on the floor of Parliament, I voted YES as advised by my Constitutes.*

Henry Musasizi Ariganyira, filed an affidavit in which he deponed as follows: -

5. *That I know that following the Right Honourable Speaker's directive, I with other Political mobilisers conducted consultative meetings in my Constituency about the Constitutional (Amendment) (No.2) Bill of 2017.*
6. *That I know that our consultative methodology involved public meetings in the four sub counties of Rubanda East and Nineteen parishes and four wards.*
7. *That I know that all meetings were conducted peacefully without any interference from the public or security forces.*
8. *That I know that people were given chance to express their views about the proposed amendments and they overwhelmingly supported the amendment.*
9. *That I know that these consultations were made between 30th October, 2017 and 6th November 2017.*
10. *That I know that radio announcements were run on voice of Kigezi, Kabale from 20th of October , 2017 as a tool of mobilization inviting people for consultative meeting.*

Ongalo Obote Clement Kenneth, on his part deponed as follows:-

6. *That I know that following the Right Honourable Speaker's directive, I with other Political mobilisers conducted consultative meetings in my Constituency about the Constitutional (Amendment) (No.2) Bill of 2017.*
7. *That I know that on the 2nd November 2017, I received UGX 29,000,000/= as facilitation*

and proceeded to my Constituency to consult the electorate.

8. *That I know that after meeting with relevant stakeholders i.e. RDC, DPC, DISO, LCV Chairperson, District Councilors LCIII Chairpersons and various party leaders, it was agreed that consultations be done at sub county level and be open to the general public.*
9. *That I immediately placed announcements on three Radio stations that serve Kaberamaido i.e Delta FM, Soroti Radio, Dwanwa, Kaberamaido and Dokolo FM informing the public about the consultation program which were aired from 4th*to *7th November, 2017.*
10. *That I know that my team and I carried out consultations between 5th November , 2017 and 10th November , 2017 in the six sub counties that form Kalaki constituency and received overwhelming support in favour of the amendment of the Constitution.*
11. *That I know that all meetings were conducted peacefully without any interference from public or security forces*
12. *That I know that people were given a chance to express their views about the proposed amendments and they overwhelmingly supported the amendment.*

Tumusiime Rosemary Bikaako, stated as follows in his affidavit.

1. *That I know that the Rt. Hon Speaker issued a directive to all Members of Parliament to consult in their respective constituencies and the Parliamentary Commission facilitate every Member of Parliament with finances to carry out consultations within their respective constituents.*
2. *That my consultation approach involved first, meeting with the smaller groups of people and thereafter I organsied and held a bigger meeting involving the entire population of Entebbe Municipality.*
3. *That I then proceeded to conduct several consultative meetings as follows:-*
    a) *That I met with the people with disabilities at Kiwafu ward in Entebbe Municipality and carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*
    b) *That I met the youth leaders at Kiwafu ward in Entebbe Municipality West and I carefully explained to them the purpose of the consultations and although a few of them said no, the majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

c) *That I met the Local Council I and II Chairperson as well as the NRM councilors at central ward in Entebbe Municipality and I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views and eventually, by show hands, majority of them agreed that we should proceed and amend.*

d) *That I met the elderly people at Katabi ward in Entebbe Municipality and I carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

e) *That I met with religious leaders at central ward in Entebbe Municipality West and I carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

4. *That after meeting with the above mentioned groups, I together with the party leadership and other agents organised and held another meeting at the Children's park in Entebbe Municipality to get views and consensus of the people in Entebbe Municipality*
5. *That I know in all the meetings conducted, save for a few opposing voices, the overwhelming majority of my constituents freely, willingly and openly expressed their support for the Constitutional (Amendment) No.2 Bill 2017.*
6. *That I know that all consultative meetings were conducted peaceful and without any interference from the public or security forces and on 19th of December 2017 when the August House convened and the above debate was called, I voted yes in support of the Constitutional Amendments) with the full mandate of the of Entebbe Municipality in Wakiso District.*

The above is the total sum of the evidence adduced to rebut the evidence of the petitioners that there was no sufficient public participation envisaged under *Articles 1, 2* and *8A* of the Constitution. I have carefully studied the evidence and I have applied to it a quantitative test. I find that the nature, extent and depth of consultation is unascertainable. It cannot even be ascertained whether or not these consultations took place at all except for Hon. Margret Muhanga who attempted to attach photographs unauthenticated as they were and some minutes of a meeting. The rest simply were stories that would not pass as sufficient evidence in a Court of law. Even if the averments were true, they related to very few people in relation to country's population and demography.

Applying the qualitative test, I find that only 7 out of 455 Members of Parliament who were on the Roll call, when the bill was passed were proved to have consulted the people in some way.

The number of constituencies in which consultations were made appears to have been only 7 out of 290 constituents representing 2.41% of the total.

- Obote stated that he consulted in six Sub-counties
- Tumusiime consulted only in Entebbe Municipality
- Muhanga on her part consulted in 15 sub-counties
- Lokeris he consulted in only one constituency and does not mention the number of sub-counties.

Out of total of 1,403 sub-counties, consultations were carried out in 25 of them representing 1.8% of the total sub-counties.

In terms of demography it was Moses Balyeku and Margret Muhanga who stated that they had consulted the youth in his constituencies. Lokeris showed he consulted some elders. Kakooza consulted in 3 sub-counties in Kabura constituency. Moses Balyeku stated he consulted Jinja Municipality according to his affidavit.

Out of the 290 Constituencies in the Country, with a voting population of 15,277,198, I find that the percentage of the people consulted, was so negligible almost meaningless as to amount to the public participation envisaged under the Constitution.

Perhaps I should apply the facts before me to another test, that was first expounded upon by Lord Diplock in *Donoghue v Stevenson [1932] All ER Rep 1.* That of a reasonable man. It has since evolved into that of a 'reasonable person.' The test is: - Can a reasonable person presented with the facts before me conclude that, the people of Uganda participated in the process of enacting the Constitution (Amendment) Act, Act 1 of 2018?

The concept of a reasonable person can be traced way back to the Roman law, the figure of *bonus Paterfamilias,* used by Romans jurists to define a legal standard. It belonged to a family of hypothetical figures in law that include "the right thinking member of society, the officious by-stander, a fair minded and informed observer, among others. The learned author Percy Henry Winfred while discussing the consent of a reasonable man observed that: -

> *"He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules, nor has he the prophetic vision of a clairvoyant. He will not anticipate folly in all its forms but he never puts out of consideration the teachings of experience. . ."*

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

The question I ask myself again is whether any ordinary reasonable Ugandan with attributes set out above can positively state that the public reasonably and adequately participated in the legislative

process that resulted in the enactment of Act 1 of 2018. In determination of this question, I am persuaded by the decision of *South African Constitutional Court in Doctors for Life* (Supra) in which Ngcobo J, while discussing a similar concept stated: -

> *"In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable." (Emphasis mine)*

Taking all the above into account, I am unable to find that an ordinary reasonable person in Uganda, would consider that the people of this Country were availed sufficient opportunity, time, information and resources to meaningfully participate in the process that led to the enactment of the impugned Act.

I find further that Parliament did not act reasonably and diligently to ensure that the National Objectives and Directive Principles of State Policy are attained, specially the democratic principle 11 (i) which stipulates as follows: -

> *"(i)The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance."*

This principle is part of the provisions of the Constitution under *Article 8A* already reproduced above. I cannot explain the principle of active/actual public participation in better words than those used by Ngcobo J, in *Doctors for Life* (Supra) when he stated that:-

> *"Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of*

> *openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."*

Applying the above principle and the tests set out above I can only find that, Parliament failed to ensure and encourage active participation of all citizens of Uganda at all levels in the process that led to the enactment of the impugned Act, contravened *Article 8*A of the Constitution.

This Court has a right and duty under *Article 137* of the Constitution, to ensure that the law making process is observed and adhered to by Parliament as the Constitution prescribes. Where Parliament, by omission, fails to meet the conditions required by the Constitution for the law making process, this Court has a duty to say so and to declare the resulting law invalid.

I find that Parliament failed to encourage, empower and facilitate active public participation of all citizens in the process of enacting the impugned Act in contravention of *Articles 1, 2* and *8A* of the Constitution and this omission vitiated the whole of the impugned Act.

Question on Whether the Police and Army intervention vitiated the whole process in the passing the impugned Act

The others issues for me to determine are 5, 6(a), 6(d) and 6(f). These issues have already been reproduced above.

Broadly, they seek an answer to the question whether during the process of enacting the impugned statute the Members of Parliament and public were subjected to violence, intimidation and restrictions, inside and outside Parliament by the Uganda Police Force and the Army in contravention of the Constitution. Further, whether the said violence, intimidation and restrictions vitiated the whole process of enactment of the impugned Act.

I have had the opportunity of reading in draft the Judgments of their Lordships on this Coram in regard to this issue. They have extensively discussed the issue above and concluded that: - although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result. I agree, however. I only wish to add as follows: -

That the actions of some Members of Parliament prior to and during the process of enacting the impugned Act created an environment that precipitated and eventually led to the intervention of

both the Police and Army.

I have found no evidence to prove let alone to suggest that, the Police and Army planned to initiate and perpetuate violence and intimidation against the Members of Parliament and the public in order to influence the results of the debate on the impugned Act. From the evidence on record, it is likely and indeed probable, that neither the Police nor the Army would have had a reason to do what they did had the Members of Parliament conducted themselves in an orderly, professional and honourable manner outside and inside the chambers of Parliament during the process that resulted into the enactment of the impugned Act.

However, in view of our history, the hasty intervention of the Army was uncalled for. There was no evidence whatsoever requiring its intervention, as the police force in Uganda is equipped and professional enough to evict unarmed people from a building that is not even on fire. Our history requires that the Army be kept out of partisan politics.

During the constitutional making process the people expressed a view that, the Army must be kept out of politics. I have already reproduced the excerpt of the Odoki report in this respect earlier in this Judgment. The Uganda Police is subject to the law and must at all times treat citizens with respect and dignity. Article 44(a) of the Constitution provides:

> *Notwithstanding anything in this Constitution, there shall be no derogation from the enjoymentof the following rights and freedoms—*
>
> > *44(a) freedom from torture and cruel, inhuman or degrading treatment or punishment.*

The petitioners have set out in their affidavits wide ranging allegations against the Police, accusing them of brutality and torture.

Degrading treatment of citizens by Police is unconstitutional and unacceptable. Even if the persons being arrested are really suspected of any criminal activity, they ought to be treated with respect and their presumption of innocence must be protected. It is in my view, an extremely serious matter when individuals and state agencies violate with impurity non-derogable rights.

We know from the Bible that more than 2000 years ago, a Roman citizen enjoyed certain rights and could not be subjected to cruel or humiliating punishment. St. Paul being a Roman citizen could not be put in chains or flogged! Any Roman soldier or officer who flogged a Roman citizen was subject to severe punishment. A Roman citizen could not be crucified. St. Paul was beheaded in a dignified mode of execution reserved for only Roman citizens at the time. This fact is set out in the Bible as follows**: -"Acts of the Apostles 24-29 New International Version (NIV)**

> *[24]the commander ordered that Paul be taken into the barracks. He directed that he be*

flogged and interrogated in order to find out why the people were shouting at him like this.

[25]As they stretched him out to flog him, Paul said to the centurion standing there, "Is it legal for you to flog a Roman citizen who hasn't even been found guilty?"

[26]When the centurion heard this, he went to the commander and reported it. "What are you going to do?" he asked. "This man is a Roman citizen."

[27]The commander went to Paul and asked, "Tell me, are you a Roman citizen?""Yes, I am," he answered.

[28]Then the commander said, "I had to pay a lot of money for my citizenship.""But I was born a citizen," Paul replied.

[29]Those who were about to interrogate him withdrew immediately. The commander himself was alarmed when he realized that he had put Paul, a Roman citizen, in chains."

The Constitution demands that citizens of this Country be treated with respect and dignity by all agencies of the State. Again I am constrained to refer to the maiden speech of President when in 1986 he promised Ugandans that no citizen would be beaten b the army (read or the Police) as it had been the norm in the past regimes.

The upholding of the dignity of the citizens is what makes them proud and promotes patriotism. The police in Uganda have no right to frog match Members of Parliament, beat them and humiliate them the way they now routinely do which this Court takes judicial notice of being a notorious fact. This is unacceptable and it must stop forthwith. The Attorney General must ensure that this is brought to an immediate end. Today a Member of Parliament is flogged. Tomorrow it shall be a Minister, then God forbid the Chief Justice. We would have gone through full circle.

I find that the action of Police and Army in forcefully evicting Members of Parliament from the Chambers and arresting them after manhandling them violated the Constitution. In my considered view Speaker of Parliament should simply have adjourned the House to the next day and then the Sergeant at Arms would have denied entry to the members who had been suspended. Members of Parliament who were injured, manhandled or otherwise mistreated are at liberty to institute civil and/ or criminal proceedings in an appropriate Court of law to seek redress.

Having said that, the question is whether the intervention of the Police and the Army in Parliament had the effect of vitiating the entire process of the enactment of the impugned Act. It appears to me, as found by the Hon. the Deputy Chief Justice, that the process was not adversely effected by the violence, intimidation and restrictions set out by the petitioners. I find so because on 18th December 2018 the day when Parliament was besieged by the Police and when Members of Parliament, including the Speaker were prohibited by police from parking their motor vehicles outside the Parliament, the House was so full that the Deputy Speaker who was presiding remarked thus: -

> *"THE DEPUTY SPEAKER: Honourable members, I welcome you to this sitting which looks like a very special one. I am seeing Members that I have not seen in a long time. (Laughter) I should always engage the services of those who mobilised you to do the same always because today is really special. (Laughter) I am even surprised my register is showing 214; it looks like there are more than 214 Members. That means probably the Members who have not been attending do not know that they have to press a button to register. (Laughter)They may want to go back and put their finger print so that we can have the total number of Members properly recorded."*

On Tuesday 19th December 2017, Mr. Robert Kyagulanyi an Independent Member of Parliament representing Kyadondo County East, Wakiso District stated as follows on the floor of Parliament: -

> "*Today, we know that studies have been made and surveys have been carried out. Madam Speaker, I have had the rare opportunity to traverse the whole country and everywhere I have been, from the north, south, from the east to the west, people are saying do not amend our Constitution. These people know what they are talking about, they know what this is about and who is pushing for it. They are not saying do not amend because it a fashionable thing to do, no. It is because they know what will come if this Parliament disregards the popular view and amends this Constitution."*

On 20th December, 2017 when the impugned Bill came up for the third reading, 479 Members of Parliament were present. 315 voted for the Bill, 62 against and 2 abstained. The House was so full that Members were standing in the lobby and the Speaker could not close the doors. I am unable to find that Members of Parliament were prevented from attending Parliamentary proceedings during the debate and voting on the impugned Bill as contended by the petitioners. I am equally unable to find that the Members of Parliament were prevented from consulting the public in view of the above statement made by Hon. Kyagulanyi. Indeed, a careful perusal of the Hansard reveals that, each time a Member of Parliament stood to speak, he or she stated that she or he had consulted the people in one way or the other. I have already held that the nature and mode of public participation fell short of the Constitutional requirement. However, I am not satisfied that the reason for poor public participation was a result of the Members of Parliament having been prevented to do so by the police or anyone else within the precincts of Parliament. Although the opportunity to consult was availed it was purely conceived and was not well utilized.

It is on record that; Parliament did provide each Member of Parliament with Shs. 29,000,000/= (Twenty-nine million shillings) for the purpose of consultations. A few Members of Parliament on their own volition returned the money. I must mention here that they were only 14 members according to the evidence of Jane Kibirige the Clerk to Parliament.

This list did not include Mrs. Betty Nambooze Bakireke. She was not truthful when she stated in her testimony in Court that she did return the money. All she did was to write a cheque which was never cashed. She knew very well at the time she came to Court to testify that, that money had never left her account. She did not appear at all as a truthful witness. I can safely conclude that since Members of Parliament were given money which they accepted they had the freedom to consult the people. All in all, no sufficient evidence was provided to prove that Members of Parliament were prevented by the police from consulting the people.

Before I leave this issue I am constrained to comment on the Shs. 29,000,000/= (Twenty-nine million shillings) given to Members of Parliament. I must state that, it was very disturbing to find out that whereas all Members of Parliament were given this money, almost all of them did not use it for the purpose of facilitating public participation.

Those who attempted to do so, simply held a few meetings and talked to the few they had selected. This is not because they were prevented by the police from consulting. They simply did not bother to consult. I have stated above that this consultation fell short of the required Constitutional standard. It is disturbing to note that the money was given to Members of Parliament irrespective of the location of their constituencies. A Member of Parliament for Kampala Central where Parliamentary Building is located was given the same amount of money as a Member of Parliament for Kisoro, Arua or Kotido hundreds of miles away.

Similarly, Members of Parliament who have no voting rights, being Ex-Officio Members were also given this money although they clearly had no constituencies to consult.

It appears to me clearly that the money was paid to Members of Parliament as a gratification. That money must be accounted for by the Parliament's accounting officer in respect of Members of Parliament with constituencies. In respect of Members of Parliament without constituencies, the money must be refunded or recovered from them through the process established under the law.

Having stated that, I must reiterate what my brothers the Hon the Deputy Chief Justice and Justice Kasule have stated that the Police had no powers to issue directives stopping Members of Parliament and specifically Members of the Opposition in Parliament from consulting the people of Uganda. The Police Officer who issued that directive ought to be brought to account by relevant authorities. This is a free and democratic society, it is not a Police state. The Public Order and Management Act must be implemented subject to the Constitution and in its implementation, the resultant effect must not violate or contravene Constitutional provisions. The act of the Police in issuing the letter in question violated *Articles 1, 2, 23, 29* and *39* of the Constitution.

QESTION on Whether consultations were marred with Police restrictions and violence and if so whether that was inconsistent with and in contravention of Articles 29(1),(a),(d),(e) and 29(2)(a) of

the Constitution.

It was also contended by the petitioners that Members of Parliament were prevented from consulting the electorate by the Assistant Inspector general of Police, who on 16th October 2017 issued a message directing all Police officers to ensure they are not allowed to freely consult. This, Counsel for the petitioners contended violated the Constitution and vitiated the process of enacting the impugned Act. The said Police message is set out in the Judgment of Lady Justice Elizabeth Musoke. I have therefore found no reason to reproduce it here.

Suffice it to say, it was issued by Assistant Inspector General of Police, Mr. Assuman Mugenyi to all Police stations throughout the Country. It required the Police to stop Members of Parliament from moving from one Constituency to another. I agree entirely with the observations and findings of my brother Justice Cheborion that the act of issuing the Police directive mentioned above was unconstitutional for the reasons he has given.

The Police directive was issued in complete and total disregard of the Constitution. The Police appears to have acted and continue to act as if this Country has no Constitution. They assume, quite wrongly that, being a Police officer puts one above the law. The Police has no power to curtail the liberty of Ugandans except as provided for under the Constitution. The Police message does not mention under what law it was issued and how it was to be implemented. It criminalises intent. It goes against every letter and spirit of this Constitution and takes us back to the dark days of the past which I have attempted to set out earlier in this Judgment.

By directing the police to stop the intimidation of persons perceived to be supporting the removal of the age limit without issuing a similar directive in favour of those who were not supporting the age limit removal, the police acted in a partisan manner. In the process it also criminalised an otherwise legitimate political issue. By criminalising a section of the society in this case the people who did not support the removal of the age limit, the Police pursued an extremely dangerous path. This kind of trend is what the Constitution was put in place to stop. The Police directive violated the promise of freedom and liberty the President gave to the people of Uganda in 1986 when NRA took power.

Throughout the early colonial years perhaps up to 1955, the colonial policy discriminated and criminalized all the people of Bunyoro. Many had to change their names, dropping Runyoro names and adapting Kiganda ones. More than three quarters of the population of Bunyoro was killed on starved during the Kabalega war leaving empty land that was later turned into National Parks and Game and Forest Reserves by the colonial government. There was also discrimination against and marginalisation of Catholics during the colonial period.

From 1966 to 1971 there was wide spread criminalization of Baganda and the members of the

opposition Democratic Party and Kabaka Yekka. From 1971-1978 there was criminalization of Acholi, Langi and members of UPC party. Amin's wrath did not spare the Indian community, who were expelled and their property confiscated by government including those of Ugandan citizens of Indian descent.

Almost the whole population of West Nile Region was forced into exile between 1979- 1986 simply because Idi Amin happened to have been born there. Muslims were persecuted, criminalized and discriminated against after the fall of Idi Amin. The Banyarwanda and Banyankole followed suit between 1981- 1986. During this time many DP and UPM supporters were tortured, killed or exiled on that account alone. All the above are notorious facts of our history that I take judicial notice of.

The 1995 Constitution put to an end to this cycle of violence in *Article 21 (1) and (2).*

> *21. Equality and freedom from discrimination.*
>
> *(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*
>
> *(2) Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.*

Under Article 43(2) (a), freedom from political persecution cannot be curtailed in public interest. There is always a danger that, if the Constitution is not strictly complied with our hard earned democracy shall degenerate into authoritarianism, which leads to totalitarianism and dictatorship. Totalitarianism leads to tyranny and oppression both of which inevitably lead into anarchy. This is the trend that our Constitution of 1995 was put in place to stop. It is for this very reason that we must defend every letter of this Constitution and condemn every act that violates it.

I find therefore that the act of the police issuing the said letter contravened Articles 1,2,21,23, 29 and 39 of the Constitution and I hold so.

Having said that, I agree with my brother Cheborion JCC, that no sufficient evidence was adduced to prove the above Police directive unconstitutional as it was, on its own vitiated the whole process of enacting the impugned Act.

QUESTION ON denying the public access to Parliament

I shall proceed to resolve the remaining issues. Issue 7 (a), (c), (e) (g) (iii) relate to the proceedings in Parliament

> *Issue 7 (a) is whether the actions of Parliament preventing some members of the public*

from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No.2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79,208(2),209,211(3),212, of the Constitution.

It was contended and pleaded by Mr. Mabirizi in his affidavit in support of Constitutional Petition No. 49 of 2017, that he was prevented from accessing Parliamentary Chambers during the presentation of the Constitutional Amendment Bill which was in contravention of Rule 23 of the Rules of Procedure of Parliament. The relevant paragraphs in light of the above are 39, 40, 14, 42, 43, 47, 48, 49, 50, 51 and 53.

It was further contended that, the prevention from Parliament was contrary to *Article 79(3)* of the Constitution and II (i) of the National Objectives and Directive Principles of State Policy where Parliament is obliged to promote the democratic principles and democracy which is only accomplished when people participate in the processes.

Rule 23 of the Rules of Procedure of Parliament, 2017 provides as follows:-

"23. Sittings of the House to be public.

1) Subject to these Rules, the sittings of the House or of its Committees shall be public.

(2) The Speaker may, with the approval of the House and having regard to national security, order the House to move in closed sitting."

Rule 230 of the Rules of Parliament, 2017 also provides for admission of the public and press into the House and Committees subject to the rules made by the Speaker.

I find that one of the principles of open participation was indeed violated when the Petitioner was prevented from accessing Parliament during the presentation of the Constitution (Amendment) Bill. People should be able to monitor what their representatives are doing during the Parliamentary proceedings since the same is provided for under the Rules of Procedure of Parliament. However, I do not find that, this omission had any impact on the passing of the impugned Act into law.

QUESTION ON Sitting arrangement in Parliament

Issue 7(c) is *whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.*

It was contended by the petitioners that failure by Parliament to observe its Rules of Procedure was in contravention with above Articles of the Constitution. The above issue was specifically raised by Mr. Mabirizi in his affidavit in support of Constitutional Petition No. 49 of 2017at paragraphs 74, 75 and 76. He relied on the Supreme Court decision of *Ssekikubo and 4 others Vs Attorney General and others Constitutional Appeal No. 01 of 2015,* in which Court interpreted the aspect of

"crossing the floor" which I find inapplicable to the above issue. Rule 9 of the Rules of Procedure of Parliament 2017 stipulates as follows;-

"Sitting arrangement in the House

(1) Every Member shall, as far as possible, have a seat reserved for him or her by the Speaker.

(2) The seats to the right hand of the speaker shall be reserved for the Leader of Government Business and Members of the Party in Government.

(3) The seats to the left hand of the Speaker shall be reserved for the Leader of the Opposition and Members of the Opposition party or parties in the House.

(4) The speaker shall ensure that each Member of Parliament has a comfortable seat."

Rule 82(1) (b) provides that;-

"a Member shall not cross the floor of the House or move around" unnecessarily."

According to the Hansard of the Tenth Parliament of Wednesday, 27th September 2017 at page 4743, the Speaker called upon Honourable Members take comfortable seats, the Members were not in violation of Rule 82(1) (b) as contended by the petitioner of Constitutional Petition No. 49 of 2017. It was within the Speaker's powers to ensure that all Members have comfortable seats as provided under Rule 9(4). At the time the Speaker made this directive, Members of the Opposition had on their own walked out of Parliament. It would have been difficult if that had not been the case. The order was meant to be temporary and indeed when the Opposition Members returned they occupied their seats comfortably. I find that this order of the Speaker did not have any significant implication on the process of enacting the Constitution (Amendment) Act and was not in contravention with *Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the* Constitution as contended.

QUESTION ON Absence of leaders of Opposition during the debate

In respect of issue 7(e), it is clear that the leader of opposition voluntarily exited the House well knowingly that the majority Committee Report was to be presented by the Chairperson of the Legal Affairs Committee.

The Hansard of the same day, reveals that leader of opposition actually came back into the House shortly afterwards and was present during the presentation of the Majority Committee Report.

Therefore, I find no merit in this ground.

QUESTION ON failing to close all doors during voting.

This issue was raised during the parliamentary proceedings by Hon. Katuntu at page 5229 of the Hansard of the Tenth Parliament on Wednesday, 20th December 2017, follows; -

> *"Madam Speaker, I seek your indulgence. Rule 98(4) of the Rules of Procedure reads: "The speaker shall then direct the doors to be locked and the bar drawn no Member shall thereafter enter or leave the House until after the roll call has been taken." All doors are open and Members are moving in and out. I am sorry to have raised this point so that we obey the rules. If the members think that we do not have to obey rules-thank you very much."*

The Rt. Hon. Speaker explained the reason why the doors could not be closed during the voting

> *"SPEAKER: Honourable members ideally I was supposed to have closed the doors under rule 98(4). However, that exists in a situation where all Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore, it was not possible to lock them out and that is why I did not lock the doors. I hope there is nobody in the lobby. Is there anybody who has not voted? We now close the ballot..."* (Hansard Page 5234)

The Speaker explained why the rule could not be complied with. I find that voting when the doors were open offended the Rule of Parliament cited above, however this did not in any way violate the Constitution and vitiate the enactment of the impugned Act. The Hansard of Wednesday, 20thDecember 2017 at pages 5264-5269 indicate that all Members of Parliament who were present and wanted to vote, voted and there is no evidence to the contrary. I find no merit in this ground. The issue is resolved in the negative.

QUESTION ON Continuance in office by the President upon attaining 75 years.

Issue 13 *is whether continuance in office by a President elected in 2016 and remains in office on attaining the age of 75 years which is contrary to Articles 83(1) (b) and Article 102 (c) of the Constitution.*

Mr. Mabirizi contended that, continuance in office by the President on attaining the age of 75 will be contrary to *Articles 83(1) (b)* and Article *102 (c)* of the Constitution, because the President would have ceased to be qualified as it is for Member of Parliament.

Article 83 (1) (b) stipulates as follows; -

> *(b) if such circumstances arise that if that person were not a member of Parliament would cause that person to be disqualified for election as a member of Parliament under Article 80 of this Constitution."*

Article 102 provides as follows; -

> *"Qualifications of the President.*
>
> *A person is not qualified for election as President unless that person is*

(a) a citizen of Uganda by birth;

(b) not less than thirty-five years and not more than seventy-five years of age; and

(c) a person qualified to be a member of Parliament."

The words used in *Articles 83(1) (b)* and *102(b)* are plain and ought to be given their natural and ordinary meaning. Clearly under this Article the age limit of the President applies only at the time of nomination and not otherwise. Had the framers of the Constitution intended that the President and Members of Parliament have same qualifications, they would have stated so but they did not. The factors that disqualify Members of Parliament are not applicable to the President. This is simple and clear. Therefore, I find that, this ground is misconceived and devoid of any merit whatsoever. The issue is resolved in the negative.

In conclusion I find that, all the consolidated Petitions have substantially succeeded.

SUGGESTIVE APPLAUSE

(1) The entire Constitution (Amendment) Act 1 of 2018 is unconstitutional and is therefore null and void. All its provisions ought to be expunged from the Constitution of Uganda.

(2) The petitioners shall be paid by the respondents 2/3 of the costs of this Petition, in respect of only their disbursements, since this matter was brought in public interest. In respect of each Petition Ug Shs. 2o.ooo.ooo/= is awarded on account of professional fees save for Petition No. 49 of 2017 in which the petitioner represented himself and Petition No. 3 of 2018 in which no professional fees were prayed for.

Recommendations

(1) In view of the fact that, there are pending in Parliament a number of motions seeking to introduce Private Members bills proposing a number of Constitutional amendments and in view of the observations of the Committee on Legal and Parliamentary affairs of Parliament that "A number of stake holders" had requested (read recommended) that the Constitution should be amended after the establishment of a Constitutional Review Commission. Further in view of the recommendations of the Supreme Court in *Amama Mbabazi and other Vs Y.K Museveni* (Supra).

There is urgent need for the AttorneyGeneral to bring before Parliament a proposal to constitute a Constitutional Review Commission under the Commission of Inquiry Act Cap 166 detailing therein terms of reference, for amendment of the Constitution.

That Commission be tasked with a duty of seeking the views of the people of Uganda in a period of not less than six months on all proposed amendments and to make proposals to Parliament.

(2) A similar commission of inquiry be set up to investigate, determine and make recommendations regarding the apparent brutality of the Police against the citizens of this Country with a view of seeking a remedy to this mischief.

(3) The Government provides sufficient funds for this purpose.

(4) The Attorney General issues within a period of six months from date hereof guidelines to the Police in their implementation of the Public Order and Management Act and a copy thereof be submitted to this Court.

(5) The Auditor General carries out a forensic audit of Accounts of the 10th Parliament, and a copy of the resultant report be submitted to this Court and to the Minister of Justice and Constitutional Affair.

EXEGESIS OF THE GOSPEL ACCORDING TO KAKURU (A critical explanation or interpretation of a text)

Introduction

Ugandan courts cautiously walk the fine line between politically sensitive cases that do not threaten the political establishment and those that do, risking and perhaps sacrificing the court's legitimacy and credibility in some cases and salvaging it in others. Judicial determination of politically sensitive cases is a question of judicial bravery. This is due to the fact that courts operate in an atmosphere of high political tension, time restrictions and legal restrictions.[1048]

Background of the Age Limit Petition

On the 27th December, 2017, Parliament passed a Bill eliminating Presidential Age Limit and extending Parliamentary Term. The Ugandan Parliament passed an amendment to the Constitution which, among other measures, aims to eliminate the requirement that candidates vying for the presidency be under 75 years of age.

Following this amendment, Karuhanga and five other MPs are challenging a decision by Speaker Rebecca Kadaga to expel them at the height of the debate on the controversial Constitution Amendment Act. The others are MPs Jonathan Odur (UPC, Erute South), Ibrahim Ssemujju (FDC, Kira Municipality), Mubarak Munyagwa (FDC, Kawempe South), Allan Ssewanyana (DP, Makindye West) and Anthony Akol (FDC, Kilak North). Others who filed similar petitions separately are former Presidential Candidate Abed Bwanika, city lawyer Male Mabirizi, the

[1048] Oloka Onyango J, When courts do politics, 258

Uganda Law Society and some private citizens from Toro who are represented by lawyer Prosper Busingye. They all sought to, among other prayers, have the Constitution Amendment Act quashed by the Constitutional Court. Led by Senior Counsel Wandera Ogalo, the parties grudgingly agreed to consolidate the petitions.

The court again by a 4-1 majority upheld the larger Bill applying severally the doctrine of severance to save the repeal of the age limit even though all the justices unanimously found unconstitutional means that were used to stifle the MPs' access to their constituents through the police. A sharp dissent by Justice Kenneth Kakuru, at the Constitutional Court found the entire Act unconstitutional.

An Analysis of Justice Kakurus Consideration

The central issue for determination was whether or not sections 3 and 7 of the impugned Act, which removed the 75-year age limit of the President and lowered age limit of the district chairpersons from 35 to 18, years was unconstitutional.

Historical and Constitutional Background

In contextualizing his dissenting judgement, Justice Kakuru considered what he termed as Uganda's checkered constitutional history. His rationale for recounting the Constitutional history was to re-echo the people's cry, in the preamble to the Constitution which he emphasized we must always recall. *"Lest we forget"*. Justice Kakuru stated that the preamble of the Constitution emphasized the Country's history, acknowledging sadly that it has been characterized by political and Constitutional instability. Lest we forget.

It is indeed important to describe the social, economic and political context which informed Justice Kakuru's judgments. In Uganda, the rule of law was the victim of brutal dictatorships. In 1966, Prime Minister Dr. Milton Obote overthrew the President and suspended the 1962 'independence' Constitution. Obote's government therefore enacted the 1966 Interim Constitution abolishing monarchies and providing for a strong executive. But that was only the beginning of Ugandan dictatorships that would subjugate and arm-twist the judiciary to make decisions favorable to executive will.

In **Uganda v. Commissioner of Prisoners, ex parte Matovu,**[1049] the applicant sought to challenge the validity of the 1966 interim Uganda Constitution and validity of the Emergency Powers (Detention) Regulations of 1966 enacted pursuant to that Constitution. The remarkably executive-minded Matovu court held that a successful, irreversible revolution (backed by the military) had been affected by Obote and thus upheld that Constitution and the constitutionality of the impugned regulations. Dr. Joe Oloka Onyango notes that, in effect, the Matovu Court dressed the patently

[1049]Uganda v. Commissioner of Prisoners, ex parte Matovu,[1966] East African Law Report (Uganda), 514.

illegal actions of the government with a shroud of legitimacy and refused to protect constitutionalism, individual liberties and freedoms.[1050] With that step the descent into dictatorship and utter rejection of the rule of law was swift. Shortly after the 1966 events, the Obote regime enacted the Uganda 1967 Republican Constitution. The Uganda 1967 Constitution also concentrated executive powers in the President without checks and balances.

This civilian dictatorship was replaced in 1971 by the unequaled military dictatorship of General Idi Amin who suspended several significant sections of the 1967 Constitution, particularly those on the supremacy of the Constitution. The embodiment of rejection of any semblance of legality and rule of law was epitomized in Idi Amin's Proceedings Against the Government (Protection) Decree,[1051] which provided that courts could not grant relief in any actions brought against the military government for injuries sustained as a consequence of measures taken to maintain public order and security. There were no cases concerning constitutional law brought before the Courts of Uganda from 1972 until Amin was overthrown by military struggle in 1979.

However, even after 1979, Courts remained subjugated by a strong executive backed by the military. The important case of **Kayira and Semwogerere v. Rugumayo**[1052], Ojok, Ssempebwa & Eight Others, dealt with the patently unconstitutional removal of Professor Lule, the first post-Amin era President. The Court abdicated its constitutional responsibility and held that the case was moot as it had been overtaken by events, namely the appointment of another President, Mr. Godfrey Binaisa, by the powerful National Consultative Council which had control over the military. In turn, Binaisa was removed by a military Council, which then arranged sham elections in 1980 purportedly to return Obote to power. This led to a guerrilla war led by the National Resistance Movement (NRM) of Mr. Yoweri Museveni, the current President.

Upon coming to power in 1986 President Museveni promised a new Constitution for Uganda, one based upon popular will, promulgated by a Constituent Assembly elected by the people themselves. Under the 1995 Constitution, the framers wanted to have a President who would be accountable to the people and greater separation of powers among the three arms of government as system of checks and balances. Whereas under the 1967 Constitution the executive had a role in making laws, the framers of the 1995 Constitution wanted ultimate authority to determine what should become law to lie with the Parliament. The Constitution of Uganda attempts to "tame' the executive. One way to do that was to provide for judicial review within the new Constitution. The Constitution of Uganda provides for an independent judiciary and gives it significant powers to tame parliament and enforce constitutional values. Thus, the Constitution of Uganda provides for constitutional

[1050]Joe Oloka Onyango, JUDICIAL POWER AND CONSTITUTIONALISM IN UGANDA23-25 (1993).
[1051] Uganda Decree No.8 of 1972.
[1052] Court of Appeal Const. Case No. 1 of 1979

supremacy.[1053]The 1995 Constitution of the Republic of Uganda is awash with references to stability. The opening statement of Preamble states that "RECALLING our history which has been characterized by political and constitutional instability." Clearly, there was a desire in Uganda to make a clean and fundamental break with a past which was characterized by military take-overs and dictatorships.

The Constitutional Court of Uganda has been very cautious as it walks the tightrope between social, political and economic realities. The Court hails the Constitution as a dynamic and living instrument and refuses to interpret it in a narrow and legalistic way. It is true that Article 102(b) is not one of the entrenched Articles and the Parliament has power to amend it. However, when contextualized with our history and why the term limit and age limit had been put in place to check a life presidency, the inference gives a different result. In this light the timing for lifting the age limit is crucial and should be taken into consideration. Uganda was poised to hold general elections in 2021 and President Museveni who has been in power for 31 years, would technically be too old run for office again. The lifting of the term limits leads us to a path of dictatorship and life presidency, the very occurrence the promulgators of the 1995 Constitution sought to safe guard against by inserting both the term and age limit clauses.

Basic Structure Doctrine

One of the issues to be considered was the applicability of the Basic Structure Doctrine. It was Justice Kakuru's holding that indeed the Basic Structure Doctrine applies in Uganda. However, he found that the qualifications of the President and those of Chairpersons District local governments do not in my view form part of the basic structure of the Constitution.

The Basic Structure Doctrine is not a rule of law, it is merely a philosophical postulate, a guide to assist the Constitutional Court and any court dealing with appeals in Constitutional matters, when dealing with an amendment or proposal amendment, to determine whether the amendment goes to the root or core of the Constitution and is therefore a no-go area for parliament. The Basic Structure Doctrine (BSD) was enunciated by the Supreme Court of India in one of its most important decisions ever, in the case of **Kesavananda Bharati v The State of Kerala**.[1054]The doctrine is to the effect that a national constitution has certain basic features which underlie not just the letter but also the spirit of that constitution. These features constitute the Inviolable Core of the constitution, and any amendment, which purports to alter the constitution in a manner that takes away that basic structure, is void and of no effect. The rationale of the decision was that an amendment which makes a change in the basic structure of the constitution is not really an amendment but is, in effect,

[1053] Article 2, Constitution of the Republic of Uganda
[1054](1973) 4SCC 225

tantamount to rewriting the constitution, which parliament has no power to do. The court held that as the Supreme Court of the land, it had a limited power to review and strike down amendments which went to the very heart and core of the constitution, by seeking to alter its basic structure. The Basic Structure Doctrine was upheld and relied on in subsequent decisions in India itself, and in many other jurisdictions.

Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. In answering this important question, courts will consider factors such as the preamble to the constitution, national objectives and directive principles of state policy (in countries which have them in their constitutions, such as Uganda), the bill of rights, the history of the constitution that led to the given provision, and the likely consequences of the amendment. Whether or not a judge will find a given Constitutional provision basic or fundamental to the Constitution is a highly charged legal as well as political question.

The Importance of the Basic Structure Doctrine.

The BSD has over the last 45 years assumed a significance way beyond what its proponents may have had in mind. The idea that though parliament has wide powers to amend the Constitution, it powers are unlimited and do not extend to the power to tamper ordo away with clauses which are basic to the structure or essence of the constitution is now considered an important safeguard against the possibility of a party or group having a controlling majority in parliament abusing its majority to erode the essence of the Constitution by doing away with vital clauses which they consider bothersome or inconvenient to their exercise or retention of power, or by introducing provisions that enable them to entrench themselves in power. Ordinarily, a constitution contains provisions for its own preservation. For example, most constitutions prescribe more elaborate procedures for their amendment than are prescribed for ordinary statutes.

However, a time comes when these are not enough to protect the constitution. Such a situation arises when a party has an overwhelming majority of members of parliament and can use its numbers to pass any amendment. In such a situation, the express provisions of the constitution are not enough to protect it. In Kesavananda Bharati (Supra) Sikri, CJ explained the importance of the doctrine in guarding against abuse of parliamentary majorities and warned about the likely consequences of such abuse. He stated:

"...a political party with two-thirds majority in parliament for a few years could so amend the constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the constitution unamendable or extremely rigid. This would no doubt invite extra-constitutional revolution (my emphasis)."

Sometimes where a situation of a majority intoxicated with power threatens constitutional stability, the constitution can still be protected by certain constitutional restraints known as constitutional conventions. These are underlying norms which are not in written law but are nevertheless considered binding and which cannot be easily overridden.

In a country like Uganda express constitutional restraints and those funded on unwritten conventions are easily overridden. Legal revolutions, whereby the existing constitutional order has been overthrown and replaced not in the manner prescribed by the constitution were experienced in 1966, 1971, 1979, 1985 and 1986.The 1995Constitution attempted to prevent such legal revolutions by outlawing the operation of the Kelsenian theory, through Article 3.However, the provision would possibly not prevent a subversion of the purpose of the constitution through a procedurally lawful amendment of the Constitution, with the same result as if the constitution had been overthrown. Which is where the BSD comes in. The 1995 Constitution has its own in-built restraints on power. The President may not have his way, against the wishes of Parliament. But what if Parliament and the President contrive a common mischief, to make nonsense of the Constitution? Then the Judiciary is expected to come in. The BSD comes in handy in this regard, as a tool the Judiciary can employ to prevent self–cantered adulteration of Constitution, where the express provisions of the constitution itself are not usable, for one reason or the other. At that point the BSD provides the last restraint against the erosion of constitutionalism.

Justice Kenneth Kakuru had the most expansive conception of the doctrine, which he construed to cover sovereignty of the people, supremacy of the constitution, political order through a durable and popular constitution, constitutional and political stability based on the principles of unity, peace, equality, democracy, freedom, social justice and public participation. He added the rule of law, observance of human rights, regular free and fair elections, separation of powers, accountability of government to the people, non-derogable rights, the idea that land belongs to the people and cannot be taken away from them by Government without appropriate compensation, the idea that the state holds natural resources in trust for the people, the duty of citizens to defend the constitution, and abolition of the one-party state.

Some of the aspects that Justice Kakuru considers to be part of the basic structure because most are not actually express provisions in the constitution itself, but are derived from the Preamble to the Constitution and the National Objectives and Directive Principles of State Policy. It is not helpful to draw up a list of Articles that constitute the basic structure of the national Constitution. What is "basic" is not the wording of the provisions. It is not the letter of the constitution, but the spirit. To identify the things which constitute the basic structure, you do not just look at express words of the Constitution. You have to look at the spirit of the Constitution, which may not be captured by a

slavish commitment to the express words. The preamble and the National objectives set out at the beginning of the 1995 Constitution cannot be overlooked if you want to appreciate the character of the 1995 Constitution which, the Justices unanimously agreed, is a key consideration in determining the basic structure of the constitution. So, for example, there is no express provision in the Constitution that "there shall be political stability". But can anyone deny that the quest for stability is at the heart of the constitution? Can an amendment that is obviously a recipe for instability pass the test, merely because the Article amended is not an entrenched one under Article 260, but is one that can be amended the ordinary way?

The Basic Structure Doctrine has to be viewed for what it is—a call on the Judiciary to become activist and not constructionist in defending the Constitution. A doctrinaire approach misses the point, by insisting that if the framers of the Constitution had wanted to treat certain Articles as critical, they would have expressly done so, and that what they did not entrench under Article 260 was not deemed critical. In determining whether a provision constitutes the basic structure of the Constitution, its wording is important. However, the wording is not the end of the story. In numerous decisions our own superior courts accepted that the Constitution is a living instrument, which should not be interpreted using a doctrinaire approach. That in constructing the constitution, you are must not look at the state of things at the time it was enacted, but at the present time, but also with an eye to the future.

A proper understanding of the Basic Structure Doctrine, therefore is not that there are certain provisions that parliament can never amend. It is that parliament has not the power to amend the constitution in order to bring about certain results: a fascist state, an autocracy a theocracy and so on. Every Article is amendable, but not in a manner that erodes the underlying purpose of the constitution. Even the bill of rights can be amended, but not in a manner that take away the essence of rights enshrined therein, but so as to introduce new rights or even to impose limitations on the enjoyment of certain rights, so long as the limitations introduced are "reasonable and demonstrably justifiable in a free and democratic society.[1055]

Under the 1995 Constitution, there were in-built mechanisms to ensure that our president would not become a life-president. In 2005 we removed term limits, meaning one can be president until one is 75, so long as he can win an election. The Constitution has now been amended to provide that even after 75 he can continue in office, until nature intervenes. Has the basic structure of the Constitution really remained the same? Or to put it differently, without these restraints how is the Constitution different from the 1967 Constitution? The legal system we operate requires that justice should be blind. But should it be that blind—to the consequences of its adjudication.

[1055] Article 43, Constitution of the Republic of Uganda, 1995 (As amended)

Public Participation

Core to his dissent judgment on the issue of age limit, Justice Kakuru held that there was no public participation in the processes that led to the amendment of constitutional amendment Act No. 1 of 2018, which public participation was very key and without the same, invalidates the amendment. Justice Kakuru was of the view that the 22 people consulted during the constitutional making process, meant that its 0.0001375 per cent of the registered voters who were consulted, a number he said was very small to be a representation of the more than 15 million registered voters.

He added that even if all the 455 MPs were to be consulted and added on the 22 people who were consulted, still the percentage of the consulted people would still be far less. Justice Kakuru further faulted Parliament for having only made public consultations for a period of two months, which in his view was a short period taking into account the more than 15 million registered voters, 290 constituencies, 112 districts, 1,403 sub-counties and 57,842 villages in the country.

This holding stems from Article 1 of the Constitution states that all powers belong to the people who shall exercise their sovereignty in accordance with this constitution.Under, the 1995 Constitution, unlike any other, the people are sovereign and affirm their sovereignty and their inalienable right to determine the form of government they want through their Constitution.[1056] In this regard, the Constitution itself is not supreme, it simply embodies the supremacy of the people. It is quite evident from the Constitution itself that the people through the Constitution are supreme.[1057]

"Historically, all the past Constitutions lacked legitimacy because they failed to allow the people to participate in the constitutional and legislative process. The Uganda Agreement of 1900 and the Order-in-Council of 1902, were illegitimate on that basis alone. Similarly, the 1962 Constitution, lacked popular support. When it was abrogated the people did not rise in its defence as they had no attachment to it. It had been made by and for their rulers. The worst example was the 1966 interim Constitution which was enacted without having been seen even by the members of Parliament who passed it and swore allegations to it. The 1967 Constitution was debated and passed by Parliament which had constituted itself into a Constituent Assembly. The people's participation was extremely limited as already set out above."[1058]

The 1995 Constitution specifically provided for Public participation in the legislative process and the government. Public participation is very vital and important in the constitutional process, specifically in respect of the Constitution Amendment. The Constitutional Court in Oloka–

[1056] Article 1, The 1995 Constitution of the Republic of Uganda.
[1057] Ibid
[1058] Excerpt from Justice Kakuru's ruling.

Onyango and 9 Others versus Attorney General[1059], discussed the question as to whether or not Parliament while passing legislation may ignore or waive legal requirements. It was held as follows: -

"Parliament as a law making body should set standards for compliance with the Constitutional Provisions and with its own Rules. The speaker ignored the law and proceeded with the passing of the Act. We agree with Counsel Opiyo, that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it."

Legislators ought to have warned themselves about the dangers of legislating for their selfish interests or that of their political party. Article 1(4) stipulates that the people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda. The people have conferred their ability to make legislative choices to their elected representatives. This translates to the fact that legislators are mouth pieces for their constituents and not their political parties or themselves. The utter neglect of Members of Parliament in not consulting their constituents in deciding on whether to scrap the age limit or not was an abuse of the constitutional requirement to consult. Public participation is one of the basic structures of our Constitution. The public participation, therefore, cannot be wished away or taken lightly by Parliament. The failure to consult deprived the public of the constitutional right to a fair hearing. The amendment was not Parliament for the peace, order, development and good governance of Uganda as required under Article 79[1060] but rather for the enablement of President Museveni to contest in 2021 General elections for presidency.

Conclusion

There is always danger that if the constitution is not strictly complied with, our hard-earned democracy shall degenerate into authoritarianism which leads to totalitarianism and dictatorship. To borrow the words of Chief Justice Alphonse Dollo, the 1995 Constitution is still in its infancy; it being just a couple of decades old. However, and most unfortunately, before it has sufficiently been tested, or put differently, before the ink with which the promulgation was signed has dried, the Constitution has already been subjected to as many as five amendments. The timing of the scrapping of the term limits and the removal of the age limit show that they were politically orchestrated acts for the pushing of President Museveni's thirst for power and not for the good governance of Ugandans. The Judiciary had a duty to fend back this attack against the constitution, to protect it against being annihilated beyond recognition, Justice Kakuru took on that duty seriously.

[1059]Constitutional Petition No. 8 of 2014(unreported)
[1060] The Constitution of the Republic of Uganda, 1995 (As amended)

GOSPEL ACCORDING TO PROF. EKIRIKUBINZA LIILIAN TIBATEMWA JSC VERBATIM

Background

The brief background to this appeal is that in 2017, Hon. Raphael Magyezi, a Member of the 10th Parliament of the Republic of Uganda, brought a Private Member's Bill (Constitutional Amendment Bill No. 2 of 2017).

The Bill was brought in accordance with Articles 259 and 262 of the Constitution intending to amend Articles 61, 102 (b), 183 (2) (b) and 104 (2) and (3) of the Constitution as well as to implement some of the recommendations made by this Court in Presidential Election Petition No.1 of 2016, Amama Mbabazi vs. Yoweri Museveni. The objectives of the said Bill were:

To provide for the time within which to hold Presidential, Parliamentary and Local Government Council elections under Article 61; To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b); To increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3); To increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential election is annulled under Article 104 (6).

At the second reading of the Bill, two separate motions were moved to amend the Bill. The first motion was to extend the tenure of Parliament and Local Government Councils from five to seven years introduced by Mbarara Municipality MP Michael Tumusiime. The second motion introduced by Hon. Nandala Mafabi sought to reinstate the Presidential term limits.

On 27th December 2017, the Bill was promulgated into law as Constitution (Amendment) Act (No.1) of 2018.

Pursuant to Articles 137 (1), (3) of the Constitution as well as Rules 3, 4, 5 and 12 of the Constitution Court (Petitions and References) Rules, five Constitutional Petitions challenging the validity of specific provisions of the Constitution (Amendment) Act (No. 1) of 2018 were filed in the Constitutional Court. All the said petitions were consolidated.

The issues for determination before the Constitutional Court were as follows:

Whether sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77 (3), 77 (4), 79 (1), 96, 233 (2) (b), 260 (1) and 289 of the Constitution.

And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.

3.Whether sections 6 and 10 of the Act extending the current life of Local Government Councils

from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.

4. If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.

5. Whether the alleged violence/scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.

6. Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as here-under: -

(a) Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.

Whether the passing of sections 2, 5, 6, 8 and 10 of the

Act are inconsistent with and/ or in contravention of Article *93 of the Constitution.*

Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members, is inconsistent with and/or in contravention of Articles 24, 97, 208 (2) and 211(3) of the Constitution.

(d) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/or in contravention of Articles 29 (1) (a), (d),(e) and 29(2) (a) of the Constitution.

(e) Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.

(f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2)(b) of the Constitution.

(g) Whether the Amendment Act was against the spirit and structure of the 1995 Constitution.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.

(a) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

(b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition members of Parliament was in contravention of and/

or inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

(c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.

(d) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some Committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

(e) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.

(f) Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

(g) Whether the action of Parliament in: -

waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded; closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every Member of Parliament could debate on the said Bill;

(iii) failing to close all doors during voting;

(iv) failing to separate the second and third reading by at least fourteen sitting days; are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.

8. Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.

9. Whether the Presidential Assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.

Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and*/ or in contravention of Article 260 (2)(a) of the Constitution.*

Whether section 9 of the Act, which seeks to harmonise the seven-year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 30 *260 (2) of*

the Constitution.

Whether sections 3 and 7 of the Act, lifting the age limit without consulting the population are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 102 (c) of the Constitution of the Republic of Uganda.

Remedies available to the parties

In resolving the above issues, the Constitutional Court made the following declarations and orders:

1. By unanimous decision, the Court declared Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018, which provide for the extension of the tenure of Parliament and Local Government Councils by two years and the introduction of Presidential term–limits unconstitutional.

2. By majority decision of (Owiny–Dollo, DCJ; Kasule, Musoke, Cheborion, JJCC), the Court upheld Sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, on the removal of the age limit for the President and Chairperson Local Council V offices.

As regards costs, the Court awarded professional fees in the sum of Ushs. 20,000,000/= (Twenty million shillings) for three petitions. This was because in Petition No. 3 of 2018, the Petitioner prayed for disbursements only and in Petition No. 49 of 2017, the Petitioner represented himself. He was therefore not entitled to professional fees. In addition, the Court awarded two–thirds disbursements to all the Petitioners subject to tax.

Being dissatisfied with the decision and orders of the Constitutional Court, three (3) appeals vide Male Mabirizi vs. AG (Constitutional Appeal No.2 of 2018), Hon. Karuhanga Gerald and 5 others vs. AG (Constitutional Appeal No.3 of 2018) and Uganda Law Society vs. AG (Constitutional Appeal No.4 of 2018) were filed in this Court.

Issues for determination

At the pre-hearing conference, the parties with the guidance of Court agreed to the following eight issues:

1. Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

2. Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?

3. Whether the learned Justices of the Constitutional Court erred in law and fact when they held

that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?

4. Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?

5. Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?

6. Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?

7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, unjudiciously exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?

8. What remedies are available to the parties?

Before I resolve the issues raised in the appeal, I must state my position on the Preliminary objections brought by the respondent Attorney General.

I have read in draft the decision of my Learned Brother Hon. Justice Paul Mugamba, JSC regarding the said preliminary objections. And for the reasons he has given, I agree that the objections must fail.

I S S U E 1 :

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the Basic Structure Doctrine.

This issue was canvassed only by the second appellant. Counsel based his submissions on two points:

That the Constitutional Court restricted the application of the Basic Structure Doctrine to amendments which require a referendum. That in applying the basic structure doctrine the majority Justices of the Court ignored the significance of the Preamble.

Counsel submitted that the thrust of the Basic Structure Doctrine is that it attempts to identify the philosophy upon which a Constitution is based as opposed to a textual exegesis of the same. He submitted that the doctrine has been instrumental in shaping the Constitutional jurisprudence of different countries across the world. To augment his case, Counsel relied on authorities from across

the globe.

From India, counsel cited Kesavananda Bharati vs. State of Kerala,[1]in which the Supreme Court of India held that: "According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the Constitution or its basic features." He also relied on the case of Minerva Mills v. Union of India, AIR 1980 SC 1789, where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a Constitution.

The appellant also cited the Council of Grand Justices of Taiwan who stated that: "Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing Constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such amendment shall be deemed improper."

Counsel also relied on the Bangladesh authority of Anwar Hossain Chowdhury vs Bangladesh[2]in which the Supreme Court of Bangladesh held that: "Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament… Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

And in South Africa, while discussing the applicability of the basic structure doctrine in Executive Council of Western Cape Legislature vs. The President of the Republic of South Africa and Others[1061]the South African Constitutional Court noted as follows: "There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the Constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them..."

In Kenya, the court of Appeal in the case of Njoya vs. Attorney General and Others[1062] held that: "Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity [of the existing one"

A reading of the various persuasive authorities cited by Counsel leads to the conclusion that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not

[1061]CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).
[1062] (2004) AHRLR 157.

extend to authority to produce an output which alters the country's Constitutional order. The Legislature should not engage in amendments which can be described as a Constitutional replacement. This is because the power to replace a Constitution with a radically different one - belongs to the people.

Counsel argued that the Constitutional Court erred when they limited the application of the basic structure doctrine to amendments which require a referendum and consequently arriving at the decision that S. 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. In his view, such a construction of the doctrine was unduly restrictive. In support of his contention, counsel relied on the case of Kesavananda (supra) where court held that:

"To say that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies

only in the procedure provided for amendment is an oversimplification. In certain Constitutions there can be procedural and or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum etc. Besides these limitations, **there can be limitations in the content and scope of the** power. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly no question of the law-making body being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people."

Counsel for appellant also pointed to the history of a country as a guide to Constitutional interpretation. In this, he associated himself with the finding of Kakuru JCC that every Constitution is a product of historical events that brought about its existence and the question whether the doctrine applies depends on the Constitutional history and the Constitutional structure of each country. The learned Justice also stated, not only that the doctrine applies to Uganda's Constitutional order, but also that Articles such as 1, 2 cannot be amended even through a referendum and that doing so would be tantamount to abrogating the Constitution and therefore a violation of Article 3 (4) which obliges all citizens to defend the Constitution. Kakuru continued to

state that:

"Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the Constitutionality test."

In his postulation that a country's history is a guide to

Constitutional interpretation, counsel also relied on the dissent judgment of Kasule, JA in Saleh Kamba & others Vs. Attorney General & others; Constitutional Petition No. 16 of 2013 where the learned Justice held that in interpreting a Constitution, court ought to take into account the history of a given country. In that case, learned Justice Kasule considered the issue of the basic structure of the Constitution and stated as follows:

Therefore, from the historical perspective, the Constitution is to be interpreted in a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association…

Counsel also relied on Yaakov vs Chairman of the Central Elections Committee for the sixth Knesset EA 1/65 where the Supreme Court of Israel held that: "... There are fundamental Constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the Constitution, that the maker of the Constitution himself is bound by them. Other Constitutional norms, which do not occupy this rank and contradict these Rules can be void because they conflict with them.

In addition to a Nation's history, counsel also pointed to the Preamble of a Constitution as a guide to Constitutional interpretation. He argued that although the key pillars of the 1995 Constitution are reflected and embodied in the preamble to the Constitution the majority Justices of the Constitutional Court overlooked the significance of the preamble. Counsel cited several authorities from other jurisdictions in which courts considered the preamble as part of the basic structure of a Constitution.

In British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, the Supreme Court of Belize invoked the basic structure doctrine to strike down a particular Constitutional amendment which was at variance with the preamble to the Constitution of Belize. The court emphasized that:

The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of the existence.

There is though a limitation on the power of amendment by implication by the words of the preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. …….

The preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions…. In the case of Minerva case (supra) while emphasizing the essence of the preamble, the Supreme Court of India explained that;

The preamble assures to the people of India a polity whose basic structure is described therein as a sovereign democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is … a meaningful concept whose essential attributes are recited in the preamble itself.

In the case of Anwar case (supra), the Supreme Court of Bangladesh cited with approval the Indian case of Minerva case (supra) and held that: "… this preamble is not only part of the Constitution but stands as an entrenched provision that cannot be amended by Parliament alone. … If any provision can be called the pole star of the Constitution, then it is the preamble.

Finally, in the Kesavananda case (supra) court observed that the preamble constitutes a landmark in a country and sets out as a matter of historical fact what the people resolved to do for moulding their future destiny.

Counsel invited this Court to take cognizance of the fact that the framers of the 1995 Constitution deemed it necessary to enshrine within the text of the Constitution such provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy. He argued that these provisions included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. He contended that these "lofty" provisions were designed and intended to guarantee orderly succession to power and political stability which to date remain a mirage for our motherland.

He argued that by amending Article 102 (b) to remove the presidential age limit, after scrapping term limits, Parliament not only emasculated the preamble to the Constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger.

It was the appellants' contention that the basic features of the Constitution herein mentioned to wit; supremacy of the Constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and Constitutional stability as well as Constitutionalism and Rule of law in general were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 Constitution. On that account

alone the Constitutional Court ought to have invoked the basic structure doctrine to strike down the entire Constitution (Amendment) Act, No.1 of 2018.

Counsel submitted that Article 102 (b) was also intended to place the destiny of this country in the hands of a mature but not very old president; one who falls within the bracket of 35 to 75 years. That the framers of the Constitution recognized the dangers of entrusting the state structure in the hands of a young person or a frail elder however popular they may be. Uganda having adopted a Presidential system as opposed to a Parliamentary system; and given its checkered history characterized by political upheavals, *coup d'etat* as well as counter *coup d'etat* and rigged or sham elections opted to provide a mechanism of age limit as a basic feature of its 1995 Constitution.

Counsel prayed that Issue 1 be answered in the affirmative.

Respondent's reply

The Attorney General (AG) submitted that the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act do not derogate from the Basic Structure of the 1995 Constitution.

Just as had been argued by the appellant, the AG submitted that the doctrine which was defined in the case of Kesavananda Bharati (supra) is to the effect that any amendment has to be done without destroying the spirit and the basic structure and the foundation upon which Uganda was built as a nation.

AG contended that the Constitutional Court clearly and correctly identified provisions of the Constitution which are fundamental and form part of the Basic Structure of the 1995 Constitution. He was in agreement with the court in arriving at the conclusion that what the framers considered as the foundation of the Constitution were safeguarded against the risk of abuse of the Constitution by irresponsible amendment of those provisions. According to the AG, the safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution.

That it follows therefore that Articles 69, 74(1), 75, 260 and 261 of the 1995 Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. Only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

The AG argued that the Constituent Assembly that took a considerable amount of time to debate and eventually include the peoples' views in what eventually became the 1995 Constitution, was alive to the fact that our society is not static but dynamic and over the years, there would arise a need to amend the Constitution to reflect the changing times.

He further contended that Article 79 of the 1995 Constitution primarily gives Parliament the power to make laws that promote peace, order, development and good governance in Uganda. That Article 259 of the Constitution offers the procedure to the amendment of the Constitution by giving Parliament powers to enact an Act of Parliament, the sole purpose of which is to amend the Constitution by way of addition, variation, or repeal of any provision in accordance with the procedure laid down in Chapter Eighteen.

That therefore, it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way contravene the basic structure of the Constitution neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

The AG supported his arguments with the unanimous decision of the learned Justices of the Constitutional Court's in answer to whether sections 3 and 7 of the impugned Act derogated from the Basic structure of the 1995 Constitution. Owiny-Dollo DCJ held thus:

"…Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the Constitution, I am unable to fault it for the process it took to effect these amendments"

Justice Remmy Kasule noted that:

"…The framers of the 1995 Constitution … in their wisdom … did not put Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum.''

The AG submitted that the people's power to elect the President or District Chairperson of their choice is not taken away by lifting their respective age limits. If anything, citizens would be

10 encouraged to aspire to elect leaders of their choice and to actively participate in politics and elections as they will now be presented with a wider choice of people to choose from.

In support of this submission, the AG referred to the judgment of Justice Elizabeth Musoke where she held as follows:

"…. I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 183 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution.

He also referred to the landmark decision in Kesavananda Bharati vs State of Kerala (supra) wherein it was held that principles of democracy and democratic government are part of the basic structure of the Indian Constitution and incapable of amendment.

The AG agreed with the finding of Cheborion JCC to the effect that that 1, 3 and 7 of the impugned Act were enacted within the reach of the amending power of Parliament and do not derogate from

the Basic structure of the 1995 Constitution.

The respondent's Counsel also pointed out that the Odoki Constitutional Commission Report did not propose that the age limits of the President or other local government leaders should be entrenched provisions of the Constitution. The commission had in fact saw it fit that that it would be the electorate to decide on the appropriate candidate.

The respondent in essence agreed with the lower court's elucidation of the doctrine as a principle which does not require amendment procedures beyond what is specified through more stringent prerequisites such as referenda. Whatever is not "*entrenched"* can be amended under Article 259 of the Constitution.

Consideration by Court

Before I proceed to resolve the issue, I need to get over what I consider a preliminary point. The appellants invited this Court to adopt what the Kakuru JCC outlined as the basic features of the 1995 Constitution. These include: sovereignty of the people and their inalienable right to determine the form of governance for the country; the supremacy of the Constitution; adherence to a popular and durable Constitution; Political and Constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation in decision making at all levels; Rule of Law, observance of the Bill of Rights; land belongs to the people and not the state; Natural Resources are held by government in trust for the people; the eminent domain concept, the duty of every citizen to defend the Constitution and Parliament not to make laws legalizing a one party state; separation of powers and accountability of the government to the people.

However, I am unable to oblige the appellants' prayer. As was in the Kesavananda case, each of the Justices of Uganda's Constitutional Court pointed out different features as constituting the basic structure of Uganda's Constitution. In Justice Owiny-Dollo's view, the basic features of the 1995 Constitution are: the sovereignty of the people, the supremacy of the Constitution, political and Constitutional stability, Rule of law, non-derogable rights, eminent domain, non-establishment of a one party state, duty of every citizen to defend the Constitution and separation of powers. According to Justice Musoke JCC, the basic features of the Constitution are: the preamble, sovereignty of the people, the Bill of Rights found in Chapter Four of the Constitution and the non-derogable rights in Article 44 of the Constitution.

I now move on to the central issue – Did the Constitutional Court misconstrue the essence of the Basic Structure Doctrine?

I posit that from a reading of the various persuasive authorities cited by both counsel, it can be concluded that BSD is to the effect that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not extend to authority to produce an output which alters the

country's Constitutional order. The Legislature should not engage in amendments which can be described as a Constitutional replacement. This is because the power to replace a Constitution with a different one belongs to the people. The respondents too agreed with this principle.

What therefore was in contention is not whether the Basic Structure Doctrine is applicable in Uganda but rather whether removing the age cap at which an individual can offer themselves for either the Presidency or District Chairperson would violate the basis structure of Uganda's Constitution.

However, in addition to the principle that the power to amend does not extend to authority to produce an output which alters the character or spirit of the Constitution, some of the authorities also posit that in amending provisions of the Constitution, the Legislature must be guided, not only by the procedure specifically laid down in the Constitution but must in addition identify and be guided by the implicit values and principles which form the bedrock of the Constitution.

It is to be noted that Uganda's Constitution provides for the amendment of various provisions by Parliament. These provisions are categorised into three; the first category is amendments requiring a referendum and the support of two-thirds majority votes of members of Parliament. Under this category are Articles: 259 (on the requirement for a referendum), l and 2 (Sovereignty of the people and Supremacy of the Constitution); 44(Prohibition of derogation from particular human rights and freedoms); 69, 74 and 75 (prohibition of a one party state and the right to choose a political system), 79 (2) (power of Parliament to make laws); 105 25 (1) (tenure of the Office of the President being five years); 128 (1) (independence of the Judiciary); and Chapter Sixteen(providing for the institution of traditional or cultural leaders).

The second category contains provisions whose amendment requires approval by District Councils and the support of two-thirds of all members of Parliament at the second and third readings. The said Articles are: 5 (2) (providing for the districts of Uganda); 152 (on tax laws); 176 (1), 178, 189 and 197 (providing for local government system and their functions).

The third category contains provisions whose amendment requires the support of two-thirds of all members of Parliament at the second and third readings. The Articles under this category are those which are not included in the above mentioned category. This means that Article 102 (b) of the Constitution falls under this category.

I note that the amendment of provisions in the first and second category require not only the support of two-thirds majority but also the support of the public through a referendum or the District Local Councils. The provisions in these categories have been said to constitute the

Constitution's basic structure and cannot be amended by normal Constitutional processes.[1063]

The provisions under the third category where Article 102 (b) falls only requires the support of two-thirds majority. No further stringent requirement for amending such provisions is (explicitly) imposed by the Constitution.

On the basis of the fact that Article 102 (b) of the Constitution fell under the third category, the category whose provisions could be amended by the support of two-thirds of all members of Parliament at the second and third readings, the majority Learned Justices of the Constitutional Court held that it therefore follows that it was not the intention of the framers of the Constitution to include the age qualifications of a President as part of the basic features of the Constitution. That had it been the intention of the framers that Article 102 (b) could only be amended by the people as opposed to being amended by the people's representatives, the Article would have been "entrenched" just like the provisions in the first and second categories.

Was the Constitutional Court correct in its interpretation of the Basic Structure Doctrine?

The Basic Structure Doctrine is Judge Made Law. My understanding of the doctrine is that it communicates an implied limitation on the power of Parliament to amend the Constitution.

The claim that a particular provision is a basic feature of the Constitution is determined by the court in each case that comes before it. I therefore do not find it necessary to set down an exhaustive list of what constitutes the basic structure of Uganda's Constitution.

I must emphasize however that I subscribe to the view that the Basic Structure Doctrine is a fundamental factor of Constitutionalism which holds together the substratum of the Rule of law. The doctrine requires that the spirit of the Constitution as distinct from the text be invoked in interpretation of the Constitution.

What constitutes the Basic Structure of a Constitution is not exclusively explicit, it is also implicit. The Basic Structure Doctrine deals with principles and values inherent in a Constitution. It transcends procedural imperatives and its essence cannot be reduced to procedural imperatives which must be followed in amending a particular provision.

The import of the doctrine is that it communicates an implied limitation on the power of Parliament to amend the Constitution – the power to amend is not the same as the power to re-write or replace a Constitution. There is therefore a direct link between the Basic Structure Doctrine and the philosophy of Constitutional replacement. The latter power is with the people and not with the people's representatives.

I posit that the Basic Structure Doctrine is concerned with the substance of a particular provision and its linkages to the spirit or character of the Constitution and with universally accepted

[1063] Kesavananda vs. State of Kerala (1973) 4 S.C.C. at 313-329.

principles such as democracy, human dignity, and peoples' sovereignty. I posit that any Article dealing with universally accepted human is part of the Constitution's fabric. I also posit that provisions of the Constitution which inherently rest on the universally acceptable principle of separation of powers between the Judiciary, Parliament and the Executive - such as the independence of the Judiciary - are part of the Constitution's basic structure. The list is long.

And the question which should be asked is: what is the bed rock, the purpose, the value inherent in a particular provision? Would the amendment of this particular provision contravene the spirit of the Constitution, would it alter the character of the Constitution? In which ways would the amendment of a particular provision for example go against the aspirations of the people as espoused in the preamble and in the National Objectives and Directive Principles – both of which were necessitated by our sad history?

I therefore agree with the appellant that to equate the doctrine to the need for referenda is a narrow interpretation of the doctrine.

In the matter before us, the specific question to be answered is: would the removal of the age restriction regarding eligibility to stand for presidency and for the office of District Chairperson change the character of the Constitution? I must answer the question: can one say that alteration of Article 102 (b) which set a minimum and maximum age for presidency and Article 183 (2) (b) which set age limits to who can stand for the office of District

Chairperson restricted run counter to the character of the Constitution?

But before I answer that question, I must also answer another question: what is the role of the Preamble in Constitutional Adjudication?

The preamble to a Constitution has grown from serving as a mere introduction or preface to the substantive part of the Constitution to emerging as the document that lays down the basic structure of the Constitution.[1064] The preamble contains the fundamental values and guiding principles on which the Constitution is based.[7] It serves as a guiding light for Constitutional Judges to interpret the Constitution in its light.[1065]

According to Liav Orgad (2010),[1066] a preamble is the part of the Constitution that best reflects the Constitutional understandings of the framers, what Carl Schmitt[1067] calls the "fundamental political decisions." A preamble presents the history behind the Constitution's enactment, as well as the nation's core principles and values. The preamble "is a key to open[ing] the mind of the makers, as

[1064] The Basic Structure Doctrine of the Indian Constitution: A comparative study of the preambles of the UDHR, ICCPR and ICESCR with the preamble to the Constitution of India, page 30. [7] Ibid, page 42

[1065] Ibid, page 42.

[1066] International Journal of Constitutional Law, Vol 8, Issue 4, 714-738.

[1067] Carl Schmitt, Constitutional Theory 77–79 (Jeffrey Seitzer trans. and ed., 2008).

to the mischiefs, which are to be remedied, and the objects, which are to be accomplished.[1068]

A look at the contents of the Preamble to Uganda's Constitution indeed reflects the country's history. One can confidently say that the preamble to Uganda's Constitution has an explanatory purpose: it serves to specify the reasons for the Constitution's enactment, its raison d'être and eternal ideals. Consequently, the preamble to our Constitution is a guiding framework for Constitutional interpretation and a guide in understanding the spirit of the Constitution. It is what Liav Orgad (supra) refers to as an interpretive preamble.

The importance of an interpretive preamble is that it is part of a Constitution's Basic Structure. In Kesavananda Bharati vs. State of Kerala (supra), the Indian Supreme Court Ruled that the preamble is the key to understanding the Constitution and interpreting its clauses. It was further held that the preamble, together with the Fundamental Rights and the Directive Principles of State Policy – the most important parts of the Indian Constitution – constitute the core of the Constitution. Jaganmohan Reddy J stated that elements of the basic features of the Indian Constitution were to be found in the preamble of the Constitution.

I am persuaded that the above is as true of Uganda's Constitution as it is for the Indian Constitution. Liav (ibid) posits that Preambles are not only a source of rights and powers but also of entrenchment. (My emphasis).

It must therefore be concluded that the Preamble is part of the Basic Structure of our Constitution and the authority of Parliament to amend a specific provision in the Constitution must be tested against the principles in the preamble. Consequently, I must answer the question: can one say that alteration of Articles 102 (b) … which set a minimum and maximum age for presidency and LCV … run counter to the character of the Constitution as represented in the preamble?

I must also posit that in addition to the Preamble, the power to amend a specific provision in the Constitution must be tested against the National Objectives and Directive Principles of State Policy. The central position of the National Objectives and Principles of State Policy in the country's governance was made clear by an amendment to the Constitution which introduced Article 8A which states that Uganda shall be governed based on principles of national interest and common good enshrined in the national Objectives and Directive Principles of State Policy. Does an amendment of an Article restricting the age at which an individual can stand for Presidency go against any of the National Objectives and Principles of State Policy?

I have carefully studied the Constitutional Court judgments and find that the learned Justices did not ignore the preamble in considering the basic structure doctrine. In fact, Justice Musoke JCC did mention the preamble as well as the National Objectives and Directive Principles as basic features

[1068] Joseph Story, Commentaries on the Constitution of the United States 218-219 (1883).

of Uganda's Constitution. She further held that the preamble to the Constitution captures the spirit behind the Constitution. That the preamble is meant to emphasize the popularity and durability of the Constitution. Cheborion JCC also held that the Preamble and National Objectives and Directive Principles of State are part of the Basic Structure of the Constitution. Justice Kakuru JCC (dissenting) also referred to the preamble in applying the basic structure doctrine.

I therefore hold that on the face of it, the 2nd appellants' submission that the court ignored the preamble being untenable. Nevertheless, it is possible that after referring to the Preamble, the Learned Justices did not go further to clearly identify the principles and values therein and then come to the conclusion that amending Article 102 (b) and Article 183 (2) (b) would in no way violate the identified principles.

I posit that the import of the Preamble is that it places the Constitution in a historical context. The Constitution was enacted as a tool to protect the people of Uganda from the ills of our sad history, a history characterised by tyranny, oppression and exploitation. It is a history of political and Constitutional instability. What is contained in the National Objectives and Directive Principles of State are linked to the said history. In the appeal before us, Democratic Principle (i) and (ii) are relevant. Principle (i) provides that: The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance. Democratic

Principle (ii) provides that: All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution.

Counsel invited this court to take cognizance of the fact that the framers of the 1995 Constitution deemed it absolutely necessary to enshrine within the text of the Constitution such provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy. He argued that these provisions included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these lofty provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland.

As already stated, it was the appellants' contention that the basic features of the Constitution are supremacy of the Constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and Constitutional stability as well as Constitutionalism and Rule of law. Counsel for the appellant argued that these were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 Constitution.

Even if I were to agree with what the appellant considers to be the Basic Structure of Uganda's Constitution, there is no evidence to the effect that the tyranny, oppression and exploitation suffered by Ugandans in the past was a result of the leadership being in the hands of particular age groups. I am unable to come to the conclusion that the impugned amendment had the effect of reintroducing the Kelsenian theory into our law or that the amendment violated the sovereignty of the People. It cannot be said that the impugned Section ignored the supremacy of the Constitution. There is no evidence that removing age restrictions in leadership positions would violate the aspirations of Ugandans to build a society based on democracy, a politically and constitutionally stable society.

I therefore hold that amending Article 102 (b) and 183 (2) (b) did not violate the basic structure of Uganda's Constitution.

I S S U E 2

Whether the learned majority Justices of the Constitutional Court erred in law and in fact in holding that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament.

The appellants contend that there were fatal irregularities committed from the time the motion was presented in Parliament until it was enacted into law.

In resolving the appellants' complaints under this issue, I will in tandem discuss the chronological legislative path that a Private Member's Bill takes.

Article 94 (4) of the Constitution and Rule 120(1) of the Rules of Procedure of Parliament (hereinafter abbreviated as Rules) provide for the right of a Member of Parliament to move a Private Member's Bill.

It is pertinent from the outset to note that in October 2017, the 2012 Rules of Procedure of Parliament were amended and the 2017 Rules came into force. Since the amendment occurred during the time when Parliament was already in the process of enacting the impugned Act, the Rules applicable to the proceedings in Parliament at each stage depended on whether the sitting was before or after the amendment.

Stage 1-Leave to bring a motion

According to Rule 121 (1) a Private Member's Bill is first introduced by way of Motion. Rule 55 provides that the motion shall only be moved after the Member responsible for its introduction has given the Speaker 3 days' written notice. After expiry of the 3 days' written notice, the motion shall then be placed on the Order Paper.

In the instant appeal, Hon. Raphael Magyezi introduced a Private Member's Bill seeking to amend various Constitutional provisions. On 21st September 2017, the office of the Deputy Speaker as well as the Clerk received the written notice of the said motion. On 26th Tuesday September 2017, the Speaker informed the House that Magyezi's motion to bring a Private Members' Bill had passed the test of 3 days written notice required by Rule 47 of the old 2012 Rules and was allowed to seek leave to introduce the Bill.

The Hansard of 26th September 2017 at the second session of the 7th sitting reports the Speaker addressing the House as follows:

"Honourable members, I have spent a bit of time trying to rationalize a number of requests for motions for the amendment of the Constitution. Therefore, I will be amending the Order Paper to permit those which are eligible to be presented. For a long time, we have been demanding that the Government presents in this House

Constitutional amendments. The last time we discussed this was a year ago when we asked them to bring a comprehensive amendment, but they have not done so. I am now constrained; I do not know how long I can continue stopping Members from bringing motions. Now that the Government has failed, Members should proceed and bring the motions so that we do our part."

The Speaker then went ahead and cited Rule 47 (supra) which allows a Private Members to bring a Bill after 3 days' notice. She then continued her address to the House:

"if we are to include any of the motions on today's Order Paper, the office of the Speaker should have received that notice by 21st September 2017. The following notices for motions for leave to introduce Private Member's Bill have met the test under Rule 47 for inclusion in today's Order Paper: the Magyezi motion whose notice was received by the office of the Deputy Speaker on 21st September 2017; Lyomoki motion providing for the transitional term for the first

President under the 1995 Constitution whose notice was received by the Office of the Speaker on 21st September 2017; and the Nsamba motion providing for set up of a Constitutional review Commission to comprehensively review the Constitution. The notice for this motion was received by the Office of the Speaker on 18th September 2017. It had a draft motion attached to it. This motion therefore also meets the test under Rule 47 of our Rules of Procedure for inclusion on today's Order Paper."

However, before Hon. Magyezi sought the leave to introduce Constitutional (Amendment) Bill No.1 of 2018, Hon. Ssegona raised a procedural issue arising out of Rule 26 (1) which states that, "*the Clerk shall send to each Member a copy of the Order Paper for each sitting- in the case of the first sitting of a meeting, at least two days before that sitting and in case of any other sitting, at least three hours before the sitting without fail*."

Hon. Ssegona raised issue that the Order Paper received by all Members did not include the Magyezi motion. That the Speaker had amended the Order Paper to include the said motion. The Hansard also shows that Hon. Winifred Kiiza also raised the same issue and noted that on the 19th and 20th September the Deputy Speaker had assured Parliament that the matter would not be brought on the floor by "surprise (without first going to the Business Committee). Hon Kiiza stated that since a ruling to that effect had been made by the Chair (Deputy Speaker), such a ruling had to be taken seriously. That whereas the Order Paper was brought out early, the Magyezi proposal had not been includedtherein The Speaker answered: "Honourable Leader of the Opposition, are you questioning the powers of the Speaker?"

The Constitutional Court held that the Rules do not require the Speaker to seek permission from the Members of Parliament or any other person to determine what should be included on the Order Paper. Therefore, the Speaker could not be accused of having smuggled the Magyezi motion onto the Order Paper.

Appellants' submissions

The appellants fault the Constitutional Court for the above finding and submitted that Rule 174 vests the Business Committee with the power to determine the contents of the Order Paper. That the Speaker's powers are limited to determining the order of Business in Parliament and not the Order Paper.

In support of this alleged contravention, the appellants relied on the affidavit evidence of Hon. Semujju Nganda which supported the petition in the Constitutional Court wherein he deponed that:

On 19th and 20th September 2017, the Deputy Speaker of Parliament assured the House that there was not going to be any ambush of the Members of Parliament concerning the Bill introduced by Magyezi since all business was to go through the Business Committee of the House for appropriate action and consideration. That however, on 26th September 2017, the Members of Parliament were taken by surprise when the Speaker amended the Order Paper which was already on the floor of Parliament to include the leave sought by Hon. Magyezi to bring a Private Member's Bill.

The appellants contended that according to Rules 27 and 29 (1), the Speaker had the duty to direct the Clerk to distribute in advance to all Members the Order Paper. This had been done 10 without the Magyezi motion.

AG's Reply

The AG submitted that the Speaker's action of amending the Order Paper was authorized by Article 94 (4). The AG also relied on Rule 25 which provides that the Speaker shall determine the order of business of the House and shall give priority to government business. The AG further contended that the Speaker had been given written notice of the Magyezi motion 3 days in advance before it

was placed on the Order Paper on 26th September 2017.

Therefore, the appellants' contention that the Magyezi Bill was smuggled onto the Order Paper was unfounded.

Consideration by Court

Article 94 (1) provides that:

"Subject to the provisions of this Constitution, Parliament may make Rules to regulate its own procedure, including the procedure of its Committees.

(4) The Rules of Procedure of Parliament shall include the following provisions –

(a)The Speaker shall determine the order of business in Parliament and shall give priority to Government Business."

In line with Article 94 (4), Parliament made Rule 25. Rule 25 provides as follows:

"(1) The Speaker shall determine the order of business of theHouse and shall give priority to Government business.

(2) Subject to sub Rule (1), the business for each sitting asarranged by the Business Committee in consultation with the

Speaker shall be set out in the Order Paper for each sitting and shall wherever possible be in the following order –

(a) – (y)."

The Rules made by Parliament complied with Article 94 (4) (a) and in fact Rule 25 (1) is in *pari materia* with the Constitutional imperative that the authority to determine the order of business is with the Speaker.

I however note that the Constitution is silent as to who has the authority to determine what gets to the Order Paper. On the other hand, the Rule 25(2) gives the said role to the Business Committee.

The power of the Business Committee is however subject to the Speaker's authority – the authority set out by Article 94 (4) (a) and Rule 25 (1) – authority to determine the Order of Business.

In resolving this issue, it is important to understand the two different phrases used in the provisions under discussion – Order Paper and Order of Business. In Parliamentary language, an Order Paper would mean the agenda of Parliament at a particular sitting.

On the other hand, Order of Business would be the arrangement of business, the sequence/order in which items will be discussed during a sitting, the time allocated for each item on the agenda and so on. This sequence may be a standard order of business or a sequence listed on an agenda or Order Paper that the Parliament has agreed to follow. This is drawn from Rule 25 (5) which provides that: "The Clerk shall, on instructions of the Speaker, draw up theorder of business for

each sitting." (My emphasis)

Rule 174 relied on by the appellants to argue that the power to determine the contents of the Order Paper lies in the Business Committee provides as follows:

"It shall be the function of the Business Committee subject to Rule 25, to arrange the business of each meeting and the order in which it shall be taken; except that the powers of the Committee shall be without prejudice to the powers of the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business as required by clause (4) (a) of Article 94 of the Constitution."

Although Rule 174 (supra) gives power to the Business Committee to arrange the business of each meeting, the Rule does not circumvent the powers of the Speaker given in Rule 25. In fact, Rule 174 and 25 (2) contain the proviso "subject to" which means that the power of the Business Committee to determine the order of business does not override that of the Speaker. The Speaker remains with the final word as to what order the business of Parliament will take. And under Rule 25 (5) the Clerk draws up theorder of business for each sitting on instruction by the Speaker. One notes that the provisions are consistent in linking the powers of the Speaker to determining the order of business but not anywhere does the law link her powers to determining the content of the Order Paper. The provisions limit the Speaker's powers to determining the order of Business in Parliament, the powers do not extend to determining what is to be on the Order Paper. It must have been for this reason that on both the 19th and 20th September 2017, the Deputy Speaker of Parliament assured the House that there was not going to be any ambush of the Members of Parliament concerning the Bill introduced by Magyezi, since allbusiness was to go through the Business Committee of the House for appropriate action and consideration.

It must also be noted that the power to determine the items to be discussed is vested in the Business Committee in consultation with the Speaker. The Speaker is the chair of the said Committee. This means that the power in question is bestowed on a Committee which the Speaker is chair of. The power bestowed upon the Committee cannot be unilaterally exercised by the Speaker, consultation is expected. However, because the Speaker is the Chair of the Business Committee and furthermore the Committee cannot act in isolation but rather in consultation with the Speaker, the role of the Speaker is not whittled down.

I must therefore find that the Speaker had no power to unilaterally determine the contents of the Order Paper/the agenda of the sitting.

I must also emphasize that a reading of all the provisions giving power to the Speaker – Article 94; Rule 25, Rule 174 oblige the Speaker to give priority to Government Business.

"The Speaker shall determine the order of business of the

House and shall give priority to Government business. (Article 10 94 and Rule 25)."

"… the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business. (Rule 174)"

It must therefore be concluded that the major reason for empowering the Speaker was to ensure that Government business would be given precedence over other matters. It is this that the power of the Business Committee is subject to. The power was not for purposes of enabling the Speaker to take unilateral decisions without engaging the Business Committee and thus rendering the Committee redundant.

From the above, I come to the conclusion that whereas the Speaker had the authority to determine the order of business, the amendment to the Order Paper which was done on the floor did not comply with the Rules.

Stage 2-Secondement

According to Rule 59 (1) after a Private Member is granted permission to introduce a Bill amending the Constitution, the Private Member's motion has to be seconded. It is on record that the Magyezi Motion was seconded.

At this point, the Speaker also ensures that the Private Member's Bill is accompanied with a Certificate of financial implication.

Under this stage, I will deal with the legal requirement of a Certificate of Financial Implications as well as the import of Article 93 of the Constitution.

Certificate of Financial Implications

Section 76 (1) of the Public Finance Management Act as well as Rule 117 require every Bill introduced in Parliament to be accompanied by a Certificate of Financial Implications issued by the Minister of Finance. The Certificate indicates the estimates of revenue and expenditure over the period of not less than two years after the Bill is passed. It also indicates the impact of the Bill on the economy.

The Attorney General submitted that the evidence on record shows that on 3rd October 2017, when Hon. Raphael Magyezi moved the House to have the Bill read for the first time, it was accompanied by a Certificate of Financial Implications as required by Section 76 of the Public Finance Management Act and the Rules of Procedure of Parliament. In the Attorney General's view, this Certificate also served as a guarantee that the Bill did not have financial implications prohibited by Article 93 of the Constitution.

The Attorney General emphatically submitted that Parliament only proceeded with the original Bill presented by the Hon. Raphael Magyezi after the Speaker and the House were satisfied that the Bill was accompanied by a Certificate of Financial Implications. That this position was confirmed by

the Constitutional Court in the judgments of Kasule, Kakuru and Cheborion, JJCC.

Consideration by Court

I note that the Certificate of Financial Implications from the Minister of Finance dated 28th September, 2017 was issued in respect to the original Magyezi Bill which dealt with the amendment of Article 102 (b). This Certificate was received by Parliament on 29th September, 2017 and presented before the House on 3rd October, 2017.

I also note that the original Magyezi Bill did not contain provisions on term limits or the extension of tenure of Parliament which required to be voted on through a referendum. However, the Hansard of Wednesday, 20th December 2017 indicates that while at the Committee stage, Hon. Tusiime proposed amendments to the effect that the tenure of Parliament be extended from five to seven years. These amendments were adopted into the Bill. In support of the said amendments, Hon. Rukutana (the Deputy Attorney General) stood in Parliament and stated that the Minister of Finance had provided a Certificate of Financial Implications in regard to the amendments and the Certificate indicated that if the expected amendments pass, the country will register a saving in revenues."

At the hearing of this matter in the lower court, the Clerk to Parliament tendered in evidence the second Certificate of Financial Implications accompanying the amendments introduced by Hon. Tusiime. Upon interrogation, the Court came to the conclusion that it was not a valid certificate for the following reasons:

(i) Hon. Mugoya Kyawa Gaster, Member of Parliament, Bukoli County North, Bugiri who had requisitioned for the second Certificate of Financial Implications from the Minister of Finance on 18th December, 2017 did not have the legal capacity to do so because it was Hon. Tusiime and not Mugoya who moved the amendments in Parliament.

(ii) Although Hon. Mugoya's letter of requisition was dated 18th December 2017, the endorsements and receipt stamps on the letter showed that it was received by the Deputy Secretary to Treasury on 17th December 2017. The Minister of Finance gave instructions to process the certificate on 16th December 2017. It was unexplainable how the certificate could be processed days earlier before the letter requisitioning for it was actually written.

(iii)Furthermore, no dates and particulars were given to Court as to who received the certificate for and on behalf of Parliament. The Clerk to Parliament only informed Court that, as the accounting officer of Parliament, it was her responsibility to originate a letter to the Minister of Finance requesting for a Certificate of Financial Implications as regards any Bill or amendment to be tabled before Parliament.

Arising from the above reasons, the Constitutional Court came to the conclusion that the second

Certificate of Financial Implications was wrongly applied for, issued and was not genuine. Accordingly, it served no legal purpose.

The question which then follows is: *whether a Certificate which spoke to only a part of the Bill fulfilled the requirements of the law?*

The facts on record reveal that the Certificate of Financial Implications issued on 28th September, 2017 was only in respect to the original Magyezi Bill. Accordingly, the amendments introduced by Hon. Tusiime on 20th December 2017 were not covered at all by that certificate. The Certificate which would have covered the amendments was requisitioned from the Minister of Finance but was rejected by the Constitutional Court as invalid.

I therefore come to the conclusion that by the time the Bill was passed, it was not accompanied by a Certificate speaking to the whole document in its entirety. As a result, I answer this sub-issue in the affirmative.

I now move onto Article 93 of the Constitution which prohibits Parliament from proceeding on a Private Member's Bill that creates a charge on the Consolidated Fund.

Bill violated Article 93

Article 93 of the Constitution provides that:

"Parliament shall not, unless the Bill or the motion is introduced on behalf of the Government—

(a) proceed upon a Bill, including an amendment Bill, that makes provision for any of the following the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;

……..

…….

(b) proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this Article." (My emphasis)

The provision bars Parliament from proceeding upon a private Member's Bill which imposes a charge by way of increment on the Consolidated Fund or Public Fund of Uganda.

The Constitutional Court held that, the introduction of the Private Member's Bill that led to the enactment of the Constitution (Amendment) Act, 2018 was not inconsistent with Article 93 of the Constitution, except for the introduction of Sections 2,5,6,8 and 10 because they required a referendum which has a charge on the Consolidated Fund. Musoke, JCC specifically held that the proposed Private Member's Bill in its original form together with its proposed four amendments was not likely to impose a charge on the Consolidated Fund and was budget neutral. However, the amendments which re-introduced term limits and increased the tenure of Parliament and Local Government Councils had the effect of imposing a charge on the Consolidated Fund.

Appellants' submissions

The gist of both the 2nd and 3rd appellants' argument is that the court having found that some of the provisions in the Bill contravened Article 93 should have come to no other conclusion than to nullify the whole Act.

Counsel for the 3rd appellant specifically argued that the words "Parliament shall not proceed" in Article 93 should be given their ordinary meaning. He supported his argument with the authority of Theodore Sekikubo and ors vs. Attorney General[1069] where this Court applied the cardinal rule of statutory interpretation that where words are clear and unambiguous, they should be given their primary, plain, ordinary and natural meaning.

In counsel's view, the words "Parliament shall not proceed" in their ordinary interpretation mean "to stop, not to go forward". He argued that Parliament proceeded with the Bill contrary to Article 93 and subsequently enacted the Act. The fact that the offending provisions were later found to be unconstitutional does not change the fact that Parliament proceeded with the Bill in contravention of the Constitution.

Counsel further contended that according to Rule 113 of the 2012 Rules, the Speaker was required to inform the House that the Bill contravened Article 93. However, the Speaker Ruled that Article 93 was not applicable because the House was dealing with a Committee report and not a Bill. Counsel contended that the Speaker's Ruling was wrong because she had earlier put the question that the Bill be read for the second and called for a vote on the same. Therefore, Article 93 (b) (supra) was applicable.

Counsel contended further that even if the Speaker's Ruling (that the House was dealing with a Committee report and not a Bill) was to be true, the report of the Committee of the Whole House 10 contained provisions which created a charge on the Consolidated Fund.

That in the above circumstances, the Constitutional Court could not validate the unconstitutional acts by severing the offending parts of the Bill.

Counsel also faulted the Constitutional Court for using the Certificate of Financial Implications as the test for determining whether the Bill created a charge on the Consolidated Fund.

In counsel's view, by the Minister stating in paragraph 'e' of the Certificate that there were no additional financial obligations beyond what was provided in the medium term expenditure framework meant that the Bill had financial implications. That "medium term" is defined in the Public Finance Management Act as a period of three to five years. A medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that a Government is committed to implement during a specific period of

[1069] Supreme Court Constitutional Appeal No. 01 of 2015.

between three and five years. It draws on a larger objective such as vision 2025. It may identify priority areas scheduled for implementation during the period, specify economic growth percentage expected policy goals, project sources of financing etc. According to counsel, it is just a plan which is incapable of being used as a yardstick to determine whether a Bill creates a charge on the Consolidated Fund under Article 93 of the Constitution. Thus, the Minister's assertion that the Bill will not have additional financial obligations beyond what is provided in the Medium Term Plan has no relevance to determine whether or not the Bill will create a charge on the Consolidated Fund. Counsel argued that when the law requires a determination of whether a Bill places a charge on the Consolidated Fund, it is erroneous to use a forecast/plan as the yardstick.

That the determination of whether a Bill creates a charge on the Consolidated Fund is the Speaker's role and not the Minister of Finance since Article 93 (supra) opens with the phrase: "Parliament shall not proceed ..."

In respect to the 29 million facilitation, counsel argued that Article 156 of the Constitution requires Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill "which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure."

Article 154 of the Constitution also provides that no monies shall be withdrawn from the Consolidated Fund except…. where the issue of those monies has been authorized by an Appropriation Act." The Appropriation Act is in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million did not come from the Consolidated Fund but the account of Parliament. The decision to pay that money was a result of the Motions for the 1st and 2nd second reading of the Bill. Those Motions therefore had the effect of removing 29 million shillings from the Consolidated Fund albeit unconstitutionally. To hold otherwise would mean that expenditure on Magyezi Bill was provided for in the 2016/17 Budget since it was introduced in September 2017. It would mean that at the time of preparing budget estimates in 2016, Parliament was aware of this Bill and made provision for it. That does not seem logical. The logical conclusion is that the Ministry of Finance provided the money. If it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act. The burden to do so laid with the Respondent but it failed to do so.

On the other hand, the 1st appellant (Mr. Mabirizi) submitted that since the impugned Act affected expenses of various offices like the Electoral Commission, payments and emoluments to the President and Local Government leaders which are charged on the Consolidated Fund, the Bill could not be introduced by a Private Member. To support this argument, Mabirizi cited Article

66(3) of the Constitution and Section 9(2) of the Electoral Commission Act, which are to the effect that the Commission's expenses are charged on the Consolidated Fund.

Mabirizi further contended that the impugned Act added more 15 days for the Supreme Court to determine a Presidential Election petition lodged before it which translated into more allowances. That Article 128(5) of the Constitution provides that, "the administrative expenses of the judiciary, including all salaries, allowances … shall be charged on the Consolidated Fund."

In his view Mabirizi argued that Article 93 (supra) prohibits 'proceeding' against a Bill or motion as opposed to Article 92 which prohibits the 'passing' of a Bill. Mabirizi relied on the Black's Law Dictionary[13], to define the words 'proceeding' and 'passing'. Proceeding is defined as an act or step that is part of a larger action." This means that any step, be it notification of the Speaker of an impending motion or the seeking of leave is prohibited under Article 93. Passing on the other hand is defined as enact (a legislative Bill or resolution); or to adopt.

Mabirizi prayed that the impugned Act be considered illegal and struck out since its enactment was prohibited by Article 93.

AG's reply

The Attorney General submitted that the Justices of the Constitutional Court were right to apply the principle of severance by striking out the provisions of the impugned Act that did not comply with Article 93 and maintained those that complied with the Constitutional provision.

The Attorney General invited this Court to uphold the decision of the Constitutional Court that the original Bill presented by Hon.

Magyezi did not contravene Article 93 of the Constitution.

In regard to the twenty-nine million given to the Members of Parliament, the Attorney General relying on the affidavit evidence of the Clerk to Parliament submitted that the said sum of money was appropriated for use by the Parliamentary Commission. It was not drawn from the Consolidated Fund.

Consideration by Court

The purpose of Article 93 is that, a Bill introduced by a Private Member should not contain any provision which causes the withdraw of funds from the Consolidated Fund.

The amendments introduced by Hon. Tusiime had the effect of placing a charge on the Consolidated Fund contrary to Article 93.

Once it is noted on the floor of the House that a Bill or an amendment to a Bill which is being introduced by a motion brought by a Private Member would have the effect of imposing a charge on the Consolidated Fund, the motion should for that reason fail. In the matter before Court therefore, Parliament should not have adopted the amendment to the Bill.

Nevertheless, the Constitutional Court severed those provisions which had the effect of creating a charge on the Consolidated Fund and upheld the provisions contained in the original Magyezi Bill. We will later in this judgment discuss whether severance was applicable in such circumstances.

Be that as it may, I do not agree with the appellants' arguments that paragraph (e) of the Certificate of Financial Implications accompanying the original Magyezi Bill can be interpreted to mean that the Bill had the effect of causing financial implications contrary to Article 93. Every Bill whether introduced by Government or a Private Member at a certain point has financial implications in terms of administrative and operation costs. It can never be said that any Bill should have a 'zero' financial cost. In fact, Section 76 (2) of the Public Finance Act provides that the certificate shall indicate the estimates of revenue and expenditure over the period of not less than two years after the Bill is enacted into law. Therefore, the appellants' argument that paragraph (e) meant that there was financial implication cannot be sustained.

Arising from my analysis above, I also do not find that the UGX 29,000,000/= facilitation amounted to the impugned law placing a charge on the Consolidated Fund contrary to Article 93. If the money used had already been appropriated for use by Parliament, the funds cannot be said to have been directly withdrawn from the Consolidated Fund for purposes of implementing an amendment to the Constitution brought by a Private Member. Similarly, I also do not find Mabirizi's argument that the allowances to be paid to the Judges due to the extended time of hearing a Presidential petition or expenses incurred by the Electoral Commission in carrying out its mandate amounted to placing a charge on the Consolidated Fund.

Stage 3- First reading

Rule 124 provides that every Bill shall be read three times prior to its being passed. At the stage of the first reading, the clerk to Parliament shall cause the Bill to be printed and published in the gazette. The Clerk shall then read aloud the Short Title of the Bill and it shall be taken to have been read for the first time. In the instant appeal, the Bill that led to the impugned Act was read for the first time on 3rd October 2017.

Stage 4- Committee stage

In regard to this Stage, two complaints were raised by the appellants. One that the Committee report was signed by non-members and the other that the Committee did not comply with the 45 days Rule.

After the first reading is done, the Bill is referred to the appropriate Committee for consideration. (See: Rule 128). In the instant case the appropriate Committee to which the Bill was referred was the Legal and Parliamentary Affairs Committee.

The Committee examines the Bill in detail and makes all such necessary Public inquiries in relation

to it and shall report back to the House within 45 days from the date the Bill is referred to the Committee as required by Rule 128 (2).

The Bill that led to the impugned Act was referred to the Legal and Parliamentary Affairs Committee on Tuesday 3rd October 2017. On Monday 18th December 2017, the Speaker informed the House that the majority and minority reports from the Committee on Legal and Parliamentary Affairs were ready to be presented to the House. This was way beyond the 45 day's threshold required by the Rule.

The Committee report according to Rule 201 (1), must be signed and initialed by at least one third of all the Members of the said Committee. The majority Committee Report on record was signed by 29 members. During the presentation of the Report, Hon. Ssekikubo raised issue with 8 signatories who were not part of the appointed Legal and Parliamentary Affairs Committee and the fact that they appended their signatures on to the Report yet they had not attended the Committee sessions.

The Constitutional Court held that although the fact that people who were not members of the Legal and Parliamentary Affairs Committee signed the report was irregular, it was not fatal to the enactment process and cannot invalidate the Committee report. The court reasoned that according to Article 94 (3) of the Constitution, *the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself invalidate those proceedings.* Furthermore, the court stated that even if the eight (8) nonmembers who signed the report after the deliberations were removed, there would still be sufficient quorum of Members who signed the report for it to pass.

Appellants' submissions

The appellants alleged that Rule 201 (1) was flouted when 8 nonmembers of the Legal and Parliamentary Affairs Committee signed the report. Rule 201 (1) provides that: "A report of a Committee shall be signed and initialed by at least one third of all the Members of the Committee, and shall be laid on the Table."

Furthermore, the appellants argued that the Committee did not report back to the House within 45 days from the time the Bill was referred to them as required by Rules 128 (2) and 140 (1). The said Rules provide as follows:

"128 (2). The Committee shall examine the Bill in detail and make all such inquiries in relation to it as the Committee considers expedient or necessary and report back to the House within forty-five (45) days from the date the Bill is referred to the Committee.

Rule 140 (1). Subject to the Constitution, no Bill introduced in the House shall be with the Committee for consideration for more than forty-five days."

AG's reply

In response to the appellants' allegation, the AG submitted that the Committee had the requisite quorum to sign the report with or without the non-members. The AG supported the findings of the Constitutional Court and prayed that this Court upholds them.

In regard to the 45-day Rule, the AG submitted that the Committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the House was sent on recess on 4th October 2017. During recess, there was no transaction of parliamentary business without leave of the Speaker. That therefore, the 45 days could not start running until the leave was obtained.

It was the AG's submission that by a letter dated 29th October 2017, the Committee Chairperson duly applied for leave to the Speaker, which was granted on the 3rd November 2017. Therefore, the 45 days started to run from 3rd November 2017 and would expire on 16th December 2017. The Committee reported back on 14th December 2017, two days before the expiry of the 45 days' period. Thus, the Committee report was duly presented to the whole House within the period stipulated under Rule 128.

The AG further argued that the above notwithstanding, non-compliance with the 45 days Rule did not vitiate subsequent proceedings on the Bill since Rule 140 provides that where extra time is granted and it expires, the House shall proceed with the Bill without any further delay.

Consideration by Court

Signing of the Committee report by non-members

It is on record and undisputed that the report of the Parliamentary and Legal Affairs Committee was signed by non-members to the Committee. The Hansard indicates that Hon. Ssekikubo raised a procedural issue on the floor of Parliament concerning the matter.

The discourse on record clearly shows that the two Honorable members were part of two Committees at the same time contrary to Rules 154 (1) and 155 (2) which prohibit Members from being part of more than one Committee at the same time.

Be that as it may, Rule 203 allows non-members of a Committee to participate in any of the public proceedings of a particular Committee. Furthermore, Rule 206 (1) and (2) also allows for coopting of Members to participate in the proceedings of a Committee. This Rule provides that:

"(1) A Committee may, with the approval of its Members coopt any other Member who is not a Member of the Committee but shall have no vote on any matter to be decided by the Committee."

From the above cited Rules, it can safely be concluded that non-members of a Committee can participate in proceedings of any Committee but not cast a vote so as to make a binding decision.

The question which follows is: *whether the signatures of the eight non-members invalidated the*

Committee report?

The voting on the resolutions and subsequent signing of the Committee report by members are binding. The votes determine what forms the majority view and the minority view. The binding effect of the signatures flows from people who have the authority to sign the report. The validity or invalidity of the report resulting from non-members' signatures depend on whether the provisions of law makes it material or not. Rules 203 and 206 (supra) emphasize the prohibition that non-members of a designated Committee are not allowed to cast a vote or form part of thequorum. Therefore, a non-member's signature on the report is invalid and has no authority to form binding decisions by their signatures.

A properly constituted Committee Member is one who is entitled to not only participate in Committee proceedings but also cast a vote. I therefore hold that the signing of the Committee report by non-members was a material irregularity which rendered the report suspect. The Constitutional Court erred in holding that although the signing of the report by non-members was fatal, it did not invalidate it. It follows that the AG's argument that the signatures of the 8 non-members when severed do not invalidate the report cannot be sustained.

Non-compliance of the Committee to the 45 days Rule

In light of the explanation given by the AG in regard to this matter, I find that Rule 128 (2) was not violated.

Stage 5- 2nd reading and Constituting of the Committee of the Whole House.

The next procedural step in the legislative path is for the Bill to be read the second time and the Committee report to be debated.

Rule 201 (2) provides that:

"Debate on a report of a Committee on a Bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or the Speaker."

The appellants argued in the lower court that the rule requires physical laying of a document on the Table in Parliament. Furthermore Mr. Mabirizi argued that the Constitutional Court was dishonest in finding that the motion to suspend Rule 201 (2) was when the House constituted itself into the Committee of the Whole House whereas it was at plenary. That according to Section 8 (2) and (4) of the Electronic Transactions Act, there was no evidence to support the finding of the court that the report had been electronically delivered four days prior to the debate.

On the other hand, the Attorney General contended that since each Member of Parliament had been availed with an ipad, laying on table of the Committee report had been done electronically through the ipads. That it was on this basis that he moved a motion to have Rule 201(2) suspended.

The Respondent submitted that Members of Parliament received the report of the Committee three days before the debate and prayed that the finding of the Justices of the Constitutional Court is upheld.

Regarding the secondment of the motion moved by Hon. Rukutana, the AG submitted that the majority Justices of the Constitutional Court came to the right conclusion that the Rules were not flouted since no secondment was required.

Furthermore, the AG argued that it would be inconceivable for the Speaker to have allowed debate on the motion moved by Hon. Rukutana without it being seconded as required by Rule 59.

In conclusion, the AG invited this Court to uphold the findings of the majority Justices of the Constitutional Court as far as the secondment of the motion for suspension of Rule 201 was concerned.

The Constitutional Court held that the motion by Hon. Rukutana to suspend the operation of Rule 201 (2) (supra) which required a lapse of 3 days before the report was debated was permitted by Rule 16 of the Rules of Parliament. Court concluded that the suspension of Rule 201 (2) was not fatal to the subsequent legislation.

The court reasoned that the proceedings indicated in the Hansard show that the Speaker pointed out to the Members that they had received copies of the report on their ipads four days prior to its being laid on Table. That the purpose of the said Rule is to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament.

Furthermore, the court found that the requirement for secondment of the motion to suspend Rule 201(2) was merely directory and not mandatory. This is because the motion to suspend the Rule was moved when Parliament was sitting as a Committee of the Whole House and Rule 59 (2) provides that, *"in a Committee of the Whole House or before a Committee, a seconder of a motion shall not be required."*

The AG invited this Court to consider the rationale for inclusion of Rule 201 as stated by Cheborion, JCC that since the rationale for the inclusion of Rule 201 was to give adequate notice of the 25 Committee report, the purpose of the Rule was achieved and no breach was occasioned to the Rules.

I however note that on the other hand, Kakuru, JCC (dissenting) held that according to the Hansard, the debate went on without the motion having been seconded or voted upon. That from the record, by the time the motion to suspend *Rule 201(2)* was moved,

Rt. Hon. Speaker of Parliament had ruled that she had already given the notice required under *Rule 201(2)* to members electronically through their IPads.

That Rule 201(2) is couched in mandatory terms. It requires that Members of Parliament be given sufficient time to read and internalize a report of a Committee before debating on it. According to Kakuru, JCC, Rule 201 is not one of those that cannot be suspended. However, its suspension was not seconded by anyone as required by *Rule 59,* of the Rules of Procedure of Parliament which stipulates thus;-

"(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded."

In conclusion on the issue, Kakuru JCC held that the Speaker of Parliament failed to apply Rule 201(2) which is mandatory. He accepted the submissions of the Petitioners' counsel that "laying 20 on the table" means physically presenting the Bill on the table of Parliament and does not include sending an electronic copy to Members. The Judge noted that, Parliament amended and adopted the 2017 Rules in October 2017. That had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore, the submissions of the Hon. Deputy Attorney General that when the Members of Parliament were availed with IPads, Rule 201 no longer serves any useful purpose has no legal basis.

Thus, Parliament while passing the impugned Act, failed to comply with *Rule 201(2)* of its Rules of Procedure, which is mandatory. That failure contravened Article 94 (1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018.

Consideration by Court

The first important question to be addressed under this sub-issue is: the proper meaning of the phrase "laying on the table/tabling."

The interpretation section of the Rules defines "table" and "tabling" as follows:

"Table" means the Clerk's Table;

"Tabling" means the laying of an official document on the

Table and laying before Parliament shall be construed accordingly.

The Parliamentary Rules were amended in October 2017 but the definition of the above phrases were left intact. On the other hand, another rule (Rule 29 (1)) which I find pertinent in resolving the issue at hand was amended by integration of electronic interaction as a mode of communication to Members of Parliament.

Rule 29 (1) provides that: *"a weekly Order Paper including relevant documents, shall be made and distributed to every member through his or her pigeon hole and where possible, electronically."* In

my view, this is evidence that where Parliament intended to integrate electronic modes of communication into its rules and practice, the changes were specifically dealt with. Indeed, I am in agreement with Justice Kakuru (dissenting) when he stated that since at the time of debating the impugned Act, Parliament had adopted the 2017 Rules, but did not change the Rules to take into account "electronic laying on the table", Rule 201(2) remains in force.

It therefore is clear to me that tabling and laying an official document before Parliament must be physically done and the document must be placed on the Clerk's table.

Furthermore, a look at the Hansard shows the phrase being equated to physical laying on the table by other Members of Parliament who in the same session presented reports from other committees. For example: in the Hansard of Tuesday 26th September 2017, Hon. Muwanga Kivumbi stated: "*Madam Speaker, I beg to lay on the Table a report entitled, Report of the Delegation of Parliament of Uganda …". Muwanga* Kivumbi then proceeded to present the physical report to the House. And furthermore, the Hansard of 3rd October 2017 records Hon. Peter Ogwang stating that: "*Madam Speaker I beg to lay on the Table reports of the Auditor- General on the financial statements of the following entities…"* He then went ahead to physically present the said reports before the House and the Speaker directed that they be sent to the Committee on Public Accounts.

Would it be reasonable in a parliamentary session to attach different meanings to a rule, depending on which report was in issue? My answer is "No".

I therefore find that tabling and laying an official document before Parliament must be physically done and the document must be placed on the Clerk's table. As the Rules stand today, electronic distribution of the Committee Report on Members' ipads or pigeon hole does not amount to tabling.

Arising from the above analysis, it would follow that there was no lapse of three days after the laying on the table of the report. The report was laid on the table on 18th December 2017 and the debate ensued on the same day.

Without prejudice to the foregoing analysis, I must address the appellants' argument that the motion to suspend 201 (2) by Hon. Rukutana needed to be seconded.

The Hansard states that on Monday 18th December 2017, when the House reconvened to receive the Committee report, the Speaker stated as follows:

"... Today, we shall receive two reports; one on the Constitutional (Amendment) (No.2) Bill, 2017. It is anticipated that we shall receive the report; debate it today and tomorrow so that as many Members as possible, are given an opportunity to express their views ... Debate what will be presented to us."

Hon. Karuhanga raised a procedural issue that debating the report on the same day it was laid on the table would violate 201 (2) because the minimum period of 3 days between the tabling of the

report and the debate would not be respected. The Deputy Attorney General responded by moving a motion to have the rule suspended so that the debate could continue. A debate on the report indeed ensued.

Did the motion to suspend 201 (2) require secondment?

I note that when Hon. Rukutana moved the motion, the House was constituted as a Committee of the whole House. Rule 59 (2) provides that, "*in a Committee of the whole House or before a Committee, a seconder of a motion shall not be required." (My emphasis).*

When Hon. Rukutana moved the motion to suspend Rule 201(2), the motion for the second reading of the Bill by Hon. Magyezi had been moved. At this point, the Bill stood committed to the Committee of the whole House. This is according to Rule 130 (1) which is to the effect that if a motion for the Second Reading of a Bill is carried, the Bill shall stand committed, immediately, to the Committee of the Whole House.

Rule 2 defines a Committee of the Whole House as a Committee composed of the whole body of Members of Parliament. As shown above in Rule 59(2) (supra) the motion in issue did not require secondment since the House had been constituted as a Committee of the whole House.

Consequently, the debate which ensued would be regular.

I nevertheless still need to expound on the import of Rule 29 and draw a distinction between the purpose of this rule and Rule 201 (2). It was argued by the AG that the purpose of Rule 201(2) is to adequately notify each Member of the content in a document such as the committee report in this matter. Based on this argument, it was submitted that there was no need to physically lay the Committee Report on table because it was sent to Members' iPads electronically which fulfilled. Let me start with a discussion of Rule 29 and more specifically with how it is formulated. The rule uses the word "and". The use of the word "and" connotes togetherness. The use of "and" would mean that the documents must be availed both in the "pigeon hole" and "electronically." However, whereas availing a hard copy in the pigeon hole is mandatory, the distribution of the electronic copies has been subjected to its being possible.

Why then was it necessary for Parliament to craft Rule 201 (2) in addition to Rule 29? I posit that the purpose of Rule 29 is to notify members that a particular document is ready. On the other hand, Rule 201 (2) is aimed at ensuring that members start reading the document in preparation for meaningful debate. The tabling of a document under Rule 201 (2) is like a referee's whistle, blown so that those in the race commence the run. Without Rule 201, it is possible for members who have been availed with numerous documents under Rule 29 to each concentrate on documents of their choice and consequently members would attend sittings when not on the same page.

I now move on to Mabirizi's contention that the requirements of Section 8(2) of the Electronic

Transactions Act were not complied with. It must be noted that the fact that the report was electronically re-laid to all Members of Parliament was not in dispute. What was in issue was whether or not Parliament complied with Rule 201 (2)-an issue I have already discussed above.

Consequently, I do not find it relevant to discuss the Electronic 10 Transactions Act.

Debating the Bill

The next step after the Committee report is tabled and 3 days have elapsed is for the House to constitute itself into a Committee of the

Whole House. The Committee of the Whole House starts to debate the Bill clause by clause and any amendments proposed to the clauses or Bill are raised. The appellants here allege that the Speaker denied the Members adequate time to debate the Bill, allowed the debate to proceed in absence of the Leader of Opposition and allowed Members of the Ruling party to cross the floor of Parliament to the Opposition side.

In respect to the above irregularities, the Constitutional Court held that as long as there was the requisite quorum of one-third of the Members in Parliament, the business of Parliament can go on in the absence of the Leader of Opposition, the Chief Whip and opposition Members of Parliament. That Article 94 of the Constitution allows Parliament to act notwithstanding a vacancy in its membership.

Furthermore, Court held that there was no evidence presented as to why the Leader of the Opposition and opposition Members were not in Parliament when the Bill was tabled for debate.

In regard to crossing the floor of Parliament, Court held that the Speaker according to circumstances obtaining at a particular moment can exercise her powers and permit MPs to sit at particular places in the chamber of Parliament. On the denial of adequate time to debate the Bill, the Court held that there is no provision making it a mandatory requirement for deliberations to be got from every Member of Parliament. The only condition precedent under Article 262 is the requirement for the Bill to be supported by a two-thirds majority of all the Members of Parliament. That from the Hansard, 124 Members of Parliament had contributed before the Speaker closed the debate. The Leader of Opposition equally frustrated the Speaker's effort to have more Members contribute to the debate. This however did not adversely affect the passing of the Act.

Appellants' submissions

Denial of adequate time to debate the Bill

Regarding the denial of adequate time to debate the Bill and the debate ensuing in the absence of opposition Members, Mabirizi contended that it is not the quorum which makes Parliament properly constituted to transact business. That the quorum is only a requirement at the time of voting. Therefore, the absence of the Opposition Members at any stage renders the House

improperly constituted.

Crossing the floor of Parliament

On crossing the floor of Parliament, Mabirizi submitted that the Court was wrong in finding that the Speaker exercised her general powers under Rule 7 (2) yet Rule 82 (1) (b) provides that, during a sitting, a Member shall not cross the floor of the House or move around unnecessarily. Mabirizi supported this argument with the principle of law that a general provision cannot apply where there is a specific provision. He relied on the authority of Adonia vs. Mutekanga[1070]wherein it was held that the Courts will not normally exercise their inherent powers where a specific remedy is available.

For the 2nd appellant (MPs), it was submitted that there was evidence on record to show that Members of Parliament were denied adequate time to debate the Bill which violated the Rules.

AG's reply

The AG submitted that the Constitutional Court rightly found that the Members of Parliament were given adequate time to debate the Bill. Furthermore, that Rule 9 (1) and (4) obliges the Speaker to ensure that each Member has a comfortable sit in Parliament. The Speaker was therefore justified in the circumstances to permit Members to sit in the available seats on the Opposition side. Thus, there was no crossing of the floor of Parliament as alleged by the appellants.

Consideration by Court

Denial of adequate time to debate

In regard to denial of adequate time to debate the Bill, the appellants did not provide Court with any parameters to guide it in determining what constitutes adequacy of time for debate.

Crossing the floor

The circumstances surrounding the alleged crossing of the floor of the House are that, when the Leader of Opposition voluntarily withdrew from the House, the Speaker invited Members who had been standing on the Government wing of the House to take up seats vacated by the Leader of Opposition and her colleagues. The appellants allege that this was prohibited by Rule 82 (supra). The appellants also fault the Court for interpreting the crossing of the floor of the House in a Political sense.

'Crossing the floor' is an expression used to describe a Member's decision to break all ties binding him or her to a particular party.[1071]

I note that the Members from the Ruling party took up opposition seats at the Speaker's directive. The Members were not changing from their Political party to join the opposition. Consequently, I

[1070] (1970) 1 E A 429.
[1071] A Glossary of Parliamentary words, Parliament of Australia accessed on 4/2/2019 at www.aph.gov.au.

do not find the appellants argument that there was crossing of the floor sustainable.

Debating in absence of Opposition Members

The Hansard details the events that led to the absence of the Leader of Opposition-Hon. Winfred Kiiza. Prior to her exit of the chamber, she raised an issue to the Speaker alleging intolerance of Members on the government side. Hon. Winfred appealed to Members who felt that the House was not proceeding within the Rules to first move out and consult each other. Thereafter, she exited the House.

The function of the opposition side in Parliament is to criticize and or offer alternative views in debating national issues. [See: Rule (4)]. It is this arrangement and functionality of Parliamentary opposition that reflects the fundamental Constitutional principle of democracy and Rule of law. The Speaker as Chairperson of the House had to bear this in mind. However, in the circumstances of the present appeal, the Leader of Opposition voluntarily exited the Chamber and never returned.

I therefore cannot fault the Constitutional Court for answering this sub-issue in the negative.

Suspension of Members

Rules 87(2) and 88 provide for the suspension of any Member of Parliament as follows:

"87 (2) The Speaker or Chairperson, shall order any Member whose conduct is grossly disorderly to withdraw immediately from the House or Committee for the remainder of that day's sitting; and the Clerk or the Sergeant-at-Arms shall act on such orders as he or she may receive from the Speaker or Chairperson to ensure compliance with this Rule."

"88 (1) If the Speaker or the Chairperson of any Committee considers that the conduct of a Member cannot be adequately dealt with under sub Rule (2) of Rule 87, he or she may name the Member.

(2) Where a Member has been named, then-

In the case of the House, the Speaker shall suspend the Member named from the service of the House; or in the case of a Committee of the whole House, the Chairperson shall forthwith leave the Chair and report the circumstances to the House and the Speaker shall suspend the Member named from the service of the House."

In addressing the issue of suspension of some Members from the House, the Constitutional Court held as follows:

"Under Rule 87(2), the Speaker has powers to order a Member of

Parliament whose conduct is grossly disorderly to withdraw immediately from the House for the remainder of that day's sitting and the member so suspended has to immediately withdraw from the precincts of the House until the end of the suspension period under Rule 89. Under Rule 86(2) the decision of the Speaker on any point shall not be open to appeal and shall not be reviewed by the 20 *House, except upon a substantive motion made after notice.*

It is asserted by the petitioners that the Speaker ought to have afforded a hearing and also have provided reasons for suspending the six Honourable Members of Parliament under Articles 28(1) and 44(c). It is however unexplained by the petitioners what fair hearing the Speaker should have given to the suspended members. Like in contempt of Court proceedings the members affected misconducted themselves in the very eyes and hearing of the Speaker, including disobeying her very orders to them to be orderly and the very members were exchanging defiant words and physical gestures to the chair.

This Court did not receive any evidence whether any of the suspended members moved a substantive motion to question the decision of the Speaker. At any rate, later on, the Members of Parliament with the necessary quorum freely participated in debating the Constitutional (Amendment) Bill, 2017 in the Second and Third Readings.

It cannot therefore be concluded that the suspension of the six Members of Parliament made the enactment of the Constitution (Amendment) Act No. 1 of 2018 to be unconstitutional. Issue 7(f) is answered in the negative."

Appellants' submissions

The appellants submitted that on the 18th December 2017 when Parliament convened to consider the report of the Legal and Parliamentary Affairs Committee, three honourable Members of

Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members from Parliament in contravention of Articles 1, 28 (1), 42, 44 (c) and 94 of the Constitution.

That the Hansard clearly showed that Hon. Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs was fatally defective since non-Members to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the Committee of Defence and Internal Affairs had signed it.

Furthermore, Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the impugned Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the subjudice Rule. However, the Speaker declined to pronounce herself on the matter and instead adjourned the proceedings.

Before Members could leave the chambers, the Speaker made an arbitrary order suspending the 1st to 5th appellants together with another MP without assigning any reason whatsoever as required under the Rules nor did she state the offences committed.

Therefore, that the Speaker grossly violated the Rules of Procedure of Parliament by: not according the said MPs a fair hearing before suspending them, not giving any reason for their said suspension and acting ultra vires after being *functus officio* at the time of making the suspension decision.

Counsel submitted further that by virtue of the illegal suspension of the MPs, the speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

The appellants argued that these illegalities were elaborately presented before the Constitutional Court but the court held that the participation of the new members that were added to the Committee though irregular, did not invalidate the Committee report because even if the number of non-Members was deducted, the majority report still had enough signatures to pass it. Also, that the action taken by the Speaker to suspend certain Members of the House from participating in the proceedings of the House was due to the fact that the suspended members had defied the Speaker and disrupted the proceedings in the House thereby provoking the wrath of the Speaker.

AG's reply

In reply to the appellants' contention above, the AG submitted that

Rule 88(2) (a) of the Rulesempowers the Speaker to name and suspend from the service of the House a Member who conducts him/herself in a disorderly manner in Parliament. A Member so suspended from the service of the House is commanded in Rule 89 to immediately withdraw from the precincts of the House until the end of the suspension period. Rule 88 (4) guides the period of suspension of a member and it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. In accordance with Rule 88(4), the 3 sittings for which the member is suspended are computed from the next sitting of Parliament.

Arising from the above, the AG contends that the appellants misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances in this case. That it would be absurd that a Member, who is found by the Speaker to have conducted himself in a disorderly manner in the House and is therefore suspended from the service of the House, is then allowed to remain in the House for the rest of the day's sitting.

In regard to the right of fair hearing, Rule 86 (2) provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice in the instant case none was made.

In respect to the contention that the Speaker while suspending the Members was out of her chair, the AG referred to the Hansard of 18th December 2017 where the Speaker stated: "*I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended:*

Hon. Ibrahim Ssemujju

Hon. Allan Ssewanyana

Hon. Gerald Karuhanga

Hon. Jonathan Odur

Hon. Mubaraka Munyangwa

Hon. Anthony Akol."

Article 257 (aa) of the Constitution as well as Rule 2(1) of the Rules define *"sitting"* to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Rule 20 of the Rulesprovide that the Speaker may at any time suspend a sitting or adjourn the House.

The AG therefore submitted that the Speaker only suspended the sitting to 2.00 O' clock and did not adjourn the house, hence She was not *functus officio* because there was a continuous sitting of the House when Members were suspended. That the Speaker acted within her mandate to suspend Members of Parliament for their un-Parliamentary conduct, there is no evidence to show that the suspended Members of Parliament moved a substantive motion challenging their suspension. The AG therefore prayed that the findings of the Justices of the Constitutional Court be confirmed.

Consideration by Court

It is imperative to note from the outset of resolving this sub-issue that there were two instances of suspension. The instance of suspension contended under issue 2 is one where six MPs were expelled from the House. The Members' suspension occurred during the presentation of the Committee report. Different Members kept interjecting the presentation by raising various procedural issues. I note that from the Hansard none of the six suspended MPs raised any interjections. The Hansard does not show why they were suspended. However, Rule 87 (2) gives discretion to the Speaker to suspend any Member whose conduct is grossly disorderly to withdraw immediately from the precincts of the House. The Speaker did not exercise her powers ultravires the law.

As to when the suspension takes effect, Rule 88 (4) provides that:- If a Member is suspended, his or her suspension on the first occasion in a Session shall be for the next three sittings, excluding the sitting in which he or she was suspended; on the second occasion in a session, for the next seven sittings excluding the sitting in which he or she was suspended, and on the third and any subsequent occasion during the same Session, for the next twenty eight sittings of the House, excluding the sitting in which the Member was suspended.

The correct interpretation of the above provision is that where a Member has been suspended in a Session, the suspension takes effect from the next three sittings. The words 'excluding the sitting in which he/she has been suspended' does not mean that the suspended Member stays in the House until the next three sittings commence. The suspension takes immediate effect and the duration of the suspension lapses after three sittings have been held.

Failure to close doors to the chambers at the time of voting on the 2nd reading of the Bill.

Article 89 of the Constitution provides for the voting procedures in Parliament as follows:

"(1) Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting in a manner prescribed by Rules of procedure made by Parliament under Article 94 of this Constitution."

The above Constitutional provision is reiterated in Rule 92 (1). More specifically, Rule 98 (1) (a) provides that, "*Roll call and tally voting shall be held at the second and third reading of the Bill for an Act of Parliament to amend a provision of the Constitution."*

The appellants alleged that the Speaker did not comply with Rule 98 (4) which required the Speaker to direct that the doors to the chamber to be locked and the bar drawn before the voting commenced.

The Constitutional Court held that since the House was full and there were no seats for all Members of Parliament, the Rules could not be adhered to the letter. That in the absence of any evidence that strangers took advantage of the failure to close the doors and voted, the allegation of any breach of Rule 98 of the Rules of Procedure is legally and factually untenable and did not render the Amendment Act unconstitutional.

Appellants' submissions

Counsel submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution as well as Rule 98(4) of the Rules of Parliament. That this fact was admitted by the Clerk to Parliament in her affidavit. According to the 2nd and 3rd appellants' counsel the rationale of Rule 98 (4) is to bar Members who had not participated in the debate to enter

Parliament vote. That the Speaker however not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how the failure to close all the doors during voting made the enactment of the Act unconstitutional. That the Rules of procedure were not made in vain. Therefore, they must at all material times be obeyed and respected save where they have been duly suspended. Thus, the non-compliance with Article 98 (4) rendered the entire enactment process and the outcome thereof illegal.

AG's reply

No reply was made by the AG on this sub-issue.

Consideration by Court

I have carefully studied the Hansard when the motion to have the Bill read for the second time was moved. Hon. Kantuntu raised the issue of the need to have the doors locked during voting. The voting continued. After voting, the Speaker gave her reasons for not following the procedure in Rule 98. She stated as follows:

"Honourable members, ideally I was supposed to have closed the doors under Rule 98(4). However, that exists in a situation where all the Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore, it was not possible to lock them out and that is why I did not lock the doors … Is there anybody who has not voted? We now close the ballot."

I find the Speaker's reasoning plausible. Most important is that a roll call of the Members was taken to identify who was present or absent as well as those who were not eligible to cast a vote. The voting process with unclosed doors went on smoothly. Voting was by roll call and the majority votes recorded was 317. Therefore, the appellants' contention that the failure to close the doors of Parliament during voting made the impugned Act unconstitutional lacks merit.

Stage 6- 3rd reading of the Bill

Rule 136 provides that the third reading is upon a motion that *"the Bill be now read a third time and do pass."*

If any member desires to delete or amend any provision contained in a Bill as reported from a Committee of the whole House he or she may, at any time before a member moves the third reading of the Bill, move that the Bill be recommitted either wholly or in respect only of some particular amendment or amendments. [Rule 137 (1)] The appellants allege that the 2nd and 3rd reading of the Bill was done on the same day, 20th December, 2017. This violated the Constitution.

Non observance of the 14 days Rule between the 2nd and 3rd reading of the Bill.

Article 263 of the Constitution provides that, "the votes on the second and third readings referred to in Articles 260 and 261 of this Constitution shall be separated by at least fourteen sittingdays of Parliament." The Hansard on record shows that the 2nd and 3rd readings of the Bill that led to the enactment of the impugned Act was done on the 20 same day that is 20th December 2017.

In resolving the issues surrounding the enactment of the impugned Act, the Constitutional Court held that it is only the amendment of provisions under Articles 260, 261 and 263 which required the separation of 14 days between the 2nd and 3rd25 readings. That since Sections 1,3,4,7 and 9 of the Constitution (Amendment) Act did not amend any of the provisions covered by Articles 260 (amendments requiring a referendum), 261 (amendments requiring the approval of district councils) and 263 there was no requirement that the second and 3rd readings of the Bill be separated by fourteen sitting days of Parliament.

The court held that it was only the amendments which were introduced after the original Bill that required the separation of the 14 days sitting between the 2nd and 3rd readings. Such amendments were unconstitutional and contravened Articles 262 and 263 of the Constitution.

Appellants' submissions

The 1st and 3rd appellants faulted the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd readings did not contravene the Constitution.

The 1st appellant (Mabirizi) argued that it was mandatory for the speaker to separate the 2nd and 3rd readings with 14 sitting days of Parliament. That both the provisions which required the separation of 14 days and those that did not formed part of a single Act. According to Mabirizi, this meant that the Act as a whole had to comply with the 14 days Rule. In support of this argument, Mabirizi cited Article 257 (1) (a) of the Constitution which defines an "Act of Parliament" as a law made by Parliament. That the Article does not define an Act of Parliament as a section, subsection or part of the law made by Parliament. Following this argument, Mabirizi submitted that had the justices keenly looked at the language of the Constitution which uses the word 'Act' as opposed to 'Section', they would have not have made a distinction between those Sections which had to comply with the Rule and those that did not have to.

Similar to the 1st appellant's submission, the 3rd appellant (ULS) argued that when the clauses in the Bill requiring 14 days' separation were passed at the third reading, they became part of the Act. The court could not therefore make a distinction of the provisions which had to comply and those that did not.

That the proper approach Court had to take was to hold that since the Act contained provisions which had the effect of amending Article 1 by infection, there was need to separate the 2nd and 3rd readings by 14 days sitting. Article 260 (1) states that a Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days.

Counsel for the third appellant argued that it was mandatory for the legislature to comply with the Constitutional 14 days Rule and not relegate its duty to the Constitutional Court to strike out the provisions which contravened the Rule and maintain those which did not.

AG's Reply

The Attorney General submitted that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. It is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution which required the 14 days' separation between the 2nd and 3rd readings. That the learned Justices were

right to sever those Articles that offended the Rule from those whose enactment did not require the separation of the second and third reading by 14 days. The Attorney General invited this Court to reject the Appellants' submissions and uphold the findings of the majority Justices of the Constitutional Court.

Consideration by Court

Article 260 provides for the criteria to be met by an Act of Parliament amending the Constitution through a referendum. The Article requires that apart from referring the intended amendment to the people through a referendum, it must also have the support of two-thirds majority of Parliament. The two-thirds majority is determined through a voting system and the votes at the 2nd and 3rd readings have to be separated by 14 days.

Similarly, Article 261 also requires that a Constitutional amendment requiring the approval of district councils be backed by the votes of two-thirds majority of Parliament. The votes are to be separated by 14 days between the 2nd and 3rd readings.

The Constitutional Court held that the impugned Amendment Act did not require compliance with the 14 days sitting Rule in Article 263 (supra) because the Act did not contain provisions that needed a referendum or the approval of district councils. I note that in making this finding, the Constitutional Court severed those provisions which required a referendum and hence the need to comply with the 14 days Rule. The severed provisions were Sections 2, 6, 8 and 10 because they had the effect of amending Article 1 on the sovereignty of the people by infection. The said provisions amended the Constitution by extending the tenure of 30 Parliament from five to seven years which provisions had to be submitted to a referendum but were not.

It is evident from the Hansard of 20th December 2017 that the second and third readings of the impugned Act were on the same day. The focus of the 14 days Rule in Article 263 (supra) applies to Constitutional amendments of provisions which either require a referendum or the approval of district councils. These are Articles 10 1, 2, 5(2), 44, 69, 74, 75, 79(2), 105(1), 128(1), chapter 16, 152, 176(1), 178,189 and 197. Article 102 (b) which is in issue before this Court is not one of those provisions whose amendment requires that the 2nd and 3rd reading be separated by 14 days.

I however note that when the Bill was passed at the reading it contained provisions extending the tenure of Parliament from five to seven years which required a referendum. As such, the Bill would have then required to comply with the 14 days Rule. As earlier noted the Constitutional Court severed these provisions from the impugned Act and came to the conclusion that the remainder of the Act did not need to comply with the 14 days Rule. I will discuss later in this judgment whether the doctrine of severance applied.

Stage 7- Assent by the President

The final stage of the Legislative process is the President's Assent to the Bill.

Article 263 (2) of the Constitution provides that: A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the

President only if—

(a)it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; …

Section 16 of the Acts of Parliament Act provides for the form the certificate of compliance takes. In essence the certificate shows which Articles have been amended, the number of majority votes obtained to pass the amendment and a statement to the effect that Chapter Eighteen of the Constitution has been complied with.

Appellants' submissions

The appellants fault the learned Justices of the Constitutional court for holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's certificate of compliance and the Bill that was sent to the President for assent. The discrepancies are that the speaker's certificate of compliance clearly indicated that the impugned Bill only amended Articles 61, 102, 104 and 183 of the Constitution whereas the Bill itself indicated that Parliament had in addition amended Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel for the appellants averred that the discrepancies and which appeared between the certificate and the Bill were gross both in content as well as form and thus contravened Article 263 (2) of the Constitution and Section 16 of the Acts of Parliament Act. That this had the effect of not only rendering the presidential assent to the Bill a nullity but even the resultant Act.

The Constitutional Court found that the omission of some clauses in the certificate of compliance per se invalidated Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that Articles 77, 105, 181, 289 and 291 had been amended in strict compliance with the provisions of the Constitution. Thus, the purported amendments in respect of these Articles were fundamentally flawed and invalid. However, the Court held that the Certificate was not invalid. That the only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended.

AG's reply

The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy between the certificate and the Bill at the time of Presidential Assent. That upholding the validity of the certificate was acknowledgement by the court that the certificate complied with the form prescribed

in Section 16 (2) and Part VI of the Second Schedule of the Acts of Parliament Act since the Articles that were being amended were enumerated in the certificate.

That the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution to reach its finding that the other Articles that had been amended but not included in the Speaker's Certificate were unconstitutional.

Consideration by Court

Article 263 (2) of the Constitution hinges the President's assent to a Bill on the availability of the Speaker's Certificate of Compliance.

In Semwogerere vs AG 2002[1072] this Court held that the presidential assent is an integral part of the law making process and not a mere formality and that a bill does not become law until the President assents to it. It was further emphasized that the Constitution commands the President, to assent to a Bill only if specified conditions are satisfied. The command is mandatory and does not allow for discretion in the President to assent without the Speaker's certificate of compliance.

Where the President assents to a bill which is not accompanied by a Certificate, the resultant Act would be invalid for non-compliance with the requirement under Article 262(2) (a) [now 263 (2)]. The resulting Act would not become law and its proposed amendments to the Constitution would not become part of the Constitution.

What is the legal status of a Certificate which speaks to only some of the provisions in a Bill presented to the President for assent and is silent on some provisions? The answer lies in Section 16 of the Acts of Parliament Act. The Section refers to Part V of the 2nd schedule to the Act which provides for the contents of the

Certificate of Compliance.

Part V specifically obliges the Speaker to indicate *inter alia* the Articles sought to be amended;

the number of members in support at each reading; and to mention specifically that Article 261 of the Constitution has been complied with. In the matter before this Court, the Certificate presented by the Speaker did not mention some of the Sections in the Bill that and was therefore defective.

I also find it necessary to answer the question: what is the purpose of the Certificate of Compliance envisaged under Article 263 of the Constitution. The purpose of the certificate is to assure/guarantee the President that Parliament complied with the requirements of the constitution. A certificate which tells half the story does not fulfill the legal objective. Furthermore, it is not expected of the President to engage in an inquiry as to what happened in relation to the sections which the certificate does not speak to. After all, Section 16 (7) of the Acts of Parliament Act states

[1072]Constitutional Appeal No. 1 of 2002

that: "A certificate under Section 16 signed by the Speaker shall be *prima facie* evidence of the facts stated in the certificate." It cannot be expected that the President will inquire into what happened in Parliament. Under no circumstances should a Speaker forward a Bill to the President with full knowledge that it contains provisions passed in contravention of the Constitution.

To assent to a Bill presented for signature, the President handles the Bill and the Certificate together. The certificate is not read in isolation of the Bill and the Bill is not dealt with in isolation of the certificate. A Certificate which does not comprehensively speak to the Bill cannot be considered a valid certificate. It was not necessary in the Semwogerere case (Supra) for this Court to specifically state that a valid Certificate of Compliance is mandatory - for indeed a document will only qualify for recognition by courts if it is valid. If assent to a Bill which is not accompanied by a certificate renders the assent null and void, assent to a Bill accompanied by a defective certificate leads to the same result – null and of no legal effect.

What the Speaker did at the stage of preparing the certificate should have been done in Parliament – stopping amendments which had not complied with constitutional imperatives from tainting the Bill which would be presented to the President for assent. Instead, with the full knowledge that the Bill contained provisions passed in contravention of constitutional imperatives, the Speaker sent the Bill to the President for assent.

What the President assented to was a Bill which had provisions passed in violation of mandatory constitutional imperatives as well as provisions which perhaps[1073] had been passed in compliance with the Constitution. But the President assents to a Bill and not to sections of a Bill. The assent was therefore to a Bill which was null and void.

Applying the principle of severance to a document which fails to satisfy the objective of a supreme law clause would be reducing the Certificate of Compliance to a mere procedural requirement – the very thing which this Court said it was not, in Semwogerere vs AG (Supra).

I therefore find that the discrepancies in the Speaker's Certificate of Compliance went to the root of the enactment process of the Act and contravened the Constitution. No Consultation in the course of enacting the Bill.

The majority learned Justices of the Constitutional Court held that despite the interference by Asuman Mugyenyi's directive prohibiting MPs from consulting beyond their constituencies, there was proper consultation carried out.

Appellants' Submissions

The Appellants fault the learned majority Justices of the Constitutional Court for finding that there

[1073] I say perhaps because I have already made a finding that the Speaker did not comply with Parliamentary Rules when she placed the Magyezi Bill on the Order Paper.

was proper consultation of the people of Uganda on the impugned Act. The appellants submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted yet it is one of the basic structures of our Constitution. In support of their arguments, the appellants relied on the Kenyan authorities of: Law Society of Kenya vs. Attorney General[1074]and Robert N. Gakuru & Others vs. Governor Kiambu County & Others[20].

The appellants invited Court to uphold the findings of the learned dissenting Justice of the Constitutional Court that Parliament failed to encourage, empower and facilitate public participation of citizens in the process of enacting the impugned Act.

AG's Reply

The Attorney General submitted that the majority Learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of the conceptualization and enactment of the impugned Act.

The Attorney General argued that whereas South Africa and Kenya provide for parameters and guidelines for Public Consultations, Uganda did not have such parameters. Therefore, there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the

Constitution. It was further argued that the body to determine the requisite standard of public consultation was the Parliament.

The Attorney General also argued that the appellants' contention on the quality and quantity of the consultation was not factual. The AG submitted that there is evidence on record of media prints inviting the Public to submit their views on the Bill, the Parliamentary and Legal Affairs Committee conducted open hearings for individuals and groups that wanted to give their views on the Bill and the Hansard which indicates the views that various Members of Parliament had got from their constituencies.

The AG submitted in the court below that consultations were done through live debate on Television, Radios, social and print media calling for the Public' s views on the Bill. Furthermore, that the report of the Parliamentary and Legal Affairs Committee included a list of 53 stakeholders from Civil Society organizations, prominent Constitutional law scholars and other interest groups who submitted their views on the Bill to the Committee. In addition, the Clerk to Parliament, Jane Kibirige, averred that each Member of Parliament was facilitated with UGX. 29,000,000/= to go and consult the masses.

Basing on the above evidence, the Attorney General invited this Court to uphold the majority Judgment of the court that proper consultation was carried out.

[1074] Constitutional Petition No. 3 of 2016. [20] Petition No. 532 of 2013

Consideration by Court

The essence of the arguments from both parties call for resolution of a fundamental question: *what parameters should be used to evaluate the adequacy of the public consultations in Uganda?* In answering the above question, it is imperative to first understand what public consultation/participation is.

In a constitutional making process, public consultation involves direct engagement with the public or representative groups or other factions of society. Public participation in Constitution making is considered to be essential for the legitimacy and effectiveness of the process.[1075] A representative, open process with direct public input is, on balance, good for setting the course for a democratic state.[1076]

The reason for engaging the public is that people are the custodians of democracy and should be involved at all stages of Constitution making. The process must empower the people ratherthan inhibit them by creating opportunities and avenues for individual effective participation.[1077](My emphasis)

Under the International Human rights regime, Public Consultation is derived from the right to 'democratic participation' under Article 21 of the United Nations Declaration of Human Rights (UDHR). Similarly, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides for every citizen's rights to take part in the conduct of public affairs.

At the regional level, Article 13 (1) of the African Charter on Human and People's Rights (Banjul Charter) provides for public participation as follows:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law." In Uganda's Constitution, public participation is provided for in Objective II (i) of the National Objectives and Directive Principles of State Policy as follows:

"The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance." (My emphasis)

The content of public participation has been expanded and developed to include other rights like political equality, freedom of speech and association.[24]

Can one say that the public was empowered and encouraged to express their views in regard to the

[1075] The Citizen as Founder: Public Participation in Constitutional Approval, Zachary Elkins, Tom Ginsburg and Justin Blount, Temple Law Review, Vol 81 No.2, 2008.

[1076] Post-conflict Peace- Building and Constitution Making (noting benefits of more participatory and inclusive Constitution-building processes), Kirsti Samuels, 6 CHI.J.INTL ,663, 668 (2006).

[1077] S Mwale, Constitution review: The Zambian search for an ideal Constitution making, paper presented at the 10th African Forum for Catholic social teaching (AFCAST) working group meeting, 02 may 2006, Nairobi Kenya. [24] G Hyden & D Ventor, Constitution Making and Democratization in Africa, (2001) .

amendments which resulted into the impugned Act?

Mc Whinney states that in Constitution making, public participation can come in different forms namely a constituent assembly, public meetings and a referendum.[1078] Public participation can also be conducted in various ways, such as using the media and organizing public meetings, depending on the available resources and the geographical area of coverage.[1079]

As submitted by the Attorney General unlike Uganda does not have laws or guidelines on how the public is to be engaged during Constitutional amendment processes. Based on this legal fact and the evidence submitted by the AG and not disputed by the appelllants, one can come to the conclusion that this Court would not be in position to question the modes of consultation adopted by Parliament. Based on this, I would have accepted the proposition by the AG that the body to determine the requisite standard of public consultation should be Parliament. I would have answered this sub-issue in the negative.

However, it is an undisputed fact that in some instances the consultations were interfered with and the process was marred with violence and resulting from the Mugyenyi Directive. This was contrary to Objective II (i) of the National Objectives and Directive Principles of State Policy (supra). I will more elaborately discuss the effect of the Mugenyi directive under Issue 3.

Conclusion on Issue 2: *Severance and constitutional violations of procedure.*

It was the unanimous decision of the Constitutional Court that Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extension of the tenure of Parliament as well as Local Government Councils by two years; and for the reinstatement of the Presidential term–limits, were unconstitutional for contravening various procedural imperatives of the Constitution.

However, the court went ahead and held that the above Sections of the impugned Act could be severed and struck out of the Act so that Sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018 would remain part of the Act. It was the contention of the appellants that since violations of Constitutional imperatives had been proved, the only legal remedy which should have been given by the Constitutional Court was nullification of the impugned Act.

Mabirizi specifically faulted the Court for raising and considering the issue of severance *suo moto* yet it was not pleaded by any of the appellants. That the Court had no power to frame the subissue of whether severance can be applied because Order 15 Rule 3 of the Civil Procedure Rules restricts the court to determine allegations made by the parties on oath, in their pleadings and accompanying documents.

[1078] E McWhinney, Constitution- making: principles, process and practice, (1981) 12.
[1079] H Ebrahim The Soul of Nation: Constitution making in South Africa (1998) 242.

The AG on the other hand submitted that the learned Justices of the Constitutional Court were right to apply the severance principle because through severance, the Court is able to control and limit the consequence of its order of invalidity.

What is Severance?

Severance refers to the ability of courts to strike out a portion of a statute if that portion is held to be unconstitutional.

There are two types of unconstitutional legislation:

1. Legislation that violates substantive constitutional requirements.
2. Legislation enacted in violation of procedural constitutional requirements

Substantive constitutional violations occur when a Statute contains provisions that are found constitutionally invalid based on content. A Statute will have been enacted following the procedural requirements of the constitution but later - based on the Constitution – the content of some of the provisions are found by court to be invalid. I opine that Article 2 (2) of the Constitution deals with such enactments. The Article empowers courts to sever portions which are invalid in substance from those whose content does not violate the constitution. It provides that:

Supremacy of the Constitution

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

My view that the Article is only relevant to statutes enacted in a procedurally constitutional manner, but does not deal with statutes enacted through *procedurally* unconstitutional processes is emboldened by the simultaneous enactment of a related Article 274. In light of the fact that the 1995 constitution came into existence when a legal regime was already in existence, the enactors of the new constitution provided as follows:

274. Existing law.

(1) Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessaryto bring it into conformity with this Constitution. (My emphasis)

(2) For the purposes of this Article, the expression “existing law” means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this

Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

The effect of the two Articles read together is that severance is one way in which a statute which contains unconstitutional content can be modified so as to be bring it in conformity with the constitution.

It is in line with the above provisions of the constitution that one can understand the authority of Attorney General vs. Salvatori Abuki[1080] cited by the respondents. In that case, a section which provided for the banishment of a convict of witchcraft from his home area for a period of 10 years after serving a custodial sentence was declared unconstitutional for contravening several fundamental rights of an individual. However, the 1957 Witchcraft Act itself was not declared unconstitutional – the offence of practicing witchcraft, the sentence of imprisonment and other provisions of the Act were left to stand. What can be deduced from a reading of the constitutional provisions and from a reading of Abuki case is that if any provision of a statute is found by the Court to be unconstitutional, the remaining provisions of the statute are valid unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with the void provision that none can be implemented without the other.

Uganda's Legal Framework controls the procedure of the legislative process – this is through provisions of the Constitution and through the Rules of Procedure of the Parliament of Uganda. These types of restrictions "regulate only the process by which legislation is enacted." Such restrictions are "designed to eradicate perceived abuses in the legislative process, such as hasty, corrupt, or private interest legislation." Abuses of these restrictions are called procedural constitutional violations. So it is possible to challenge a Statute on the ground that it is unconstitutional, not because of its content but rather because the process of its being enacted was marred by violations of constitutional procedural rules.

In the appeal before us I must answer the question: faced with the proven fact that the impugned Act contains both provisions which were passed without adherence to constitutional imperatives as well as provisions which did not require adherence to the above mentioned procedural rules, does the Court have the option of severing the unconstitutionally passed portions of the Act and letting the constitutionally handled portions of the bill remain law? If as I have already pointed out, Article 2 and 274 deal only with *Substantive* constitutional violations what would be the basis of severance?

Writing about the law in the State of Missouri, USA Jonathon

[1080] Constitutional Appeal No. 1 of 1998

Whitfield[1081] talks of "statutory severance" on the one hand and "severance by judicial doctrine" on the other. He points out that whereas statutory severance is codified (similar to the presence of Article 2 and 274 of Uganda's Constitution), courts have created a separate doctrine of severability. This doctrine applies to procedurally unconstitutional laws and supplements the statutory delegation of authority. The doctrine was made necessary because the ability to sever portions of laws based on the substance of its provisions does "not adequately address the problems inherent in *procedurally* unconstitutional statutes.

According to Whitfield for procedural constitutional violations, "the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." To determine whether or not the provisions that are part of the added subject pass this test, the court considers "whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill."

The principle laid down by Whitfield above is based on several decisions of the Supreme Court of Missouri beginning with Hammerschmidt vs. Boone County[29]in which an Act of Parliament was challenged for violating procedural regulations to wit Article III, section 23 of the Missouri Constitution which *inter alia* provides that: "No bill shall contain more than one subject which shall be clearly expressed in its title." The Law restricted an Act to one subject and matters properly connected therewith.

And the Supreme Court stated that: When the procedure by which the legislature enacted a bill violates the constitution, severance is appropriate if this Court is convinced beyond a reasonable doubt that the specific provisions in question are not essential to the efficacy of the bill. Severance is inappropriate if the valid provisions of the statute are so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one. Severance is also inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

In several cases since Hammer schmidt, the Supreme Court of Missouri has applied doctrinal severance in Section 23 cases and has severed the unconstitutional portions in every case.[1082]

[1081]*Two Tests of Severance: Procedural and Substantive Constitutional Violations and the Legislative Process in Missouri*, 79 Mo. L. Rev. (2014) Available at: http://scholarship.law.missouri.edu/mlr/vol79/iss3/10

[1082] See for example: Legends Bank vs. State 361 S.W. 3d 383 (2012) and MissouriRoundtable for Life, Inc. vs State of Missouri, 396 S.W. 3d 348 (Mo. 2013) (en banc).

Should we adopt the "severance by judicial doctrine" or can we say that the Missouri cases are so distinguishable that they cannot serve as persuasive authorities?

In the Missouri cases the procedural irregularity in each case was the legislature's introduction into the Bill which was already before it, a matter that was unrelated to its original subject. The result was that the Bill contained a multiplicity of subjects – subjects with no link to each other. The Bill either violated the single-subject requirement of constitutional amendments and/or the original purpose requirement of constitutional amendments. The original purpose requirement does not prohibit subsequent additions or changes to legislation but is against the introduction of a matter that is not germane to the object of the legislation or that is unrelated to its original subject.

What type of procedural irregularity is this Court dealing with?

In the matter before us, we are dealing with a Bill which contained various sections calling for different steps as prerequisites for the provision to be validly amended. What the Legislature however did was to subject the Bill to a uniform process. Sections which required stringent/rigorous processes were subjected to the less rigorous processes. On this point the anomalies in the Missouri cases are distinguishable from what we are dealing with in the matter before us. Secondly, whereas the Missouri cases dealt with severance of irregularities in the enactment of ordinary statutes, the instant appeal deals with irregularities in the amendment of the Constitution.

I must also point out the fact that although in both Legends Bank vs. State (Supra) and Missouri Roundtable for Life, Inc. vs. State of Missouri (Supra) Judge Fischer filed concurrence opinions, in each case he stated that although he concurred in the result of the case, he was writing separately to express his view that the judicial doctrine of severance as applied to procedurally unconstitutional Bills should be abolished. The Learned Justice argued that judicial severance encourages the Legislature to disregard its oath to protect the Constitution of theState and procedural mandates expressed within it. That judicialseverance provides no incentive for legislators to follow the clearand express mandates of the constitution.

I am persuaded by Fischer J's reasoning.

But even more important is that severance in the context of an Act of Parliament passed in violation of constitutional imperatives and parliamentary rules goes against several principles already well established in our jurisprudence. One such principle is the principle of legal purity which is to the effect that in enacting and/or amending a country's constitution the actors must ensure that resultant Act is delivered in a medium of legal purity - sound constitution-making should never be sacrificed at the altar of expediency. Another principle is that Parliament as a law making body should set standards for compliance with Constitutional provisions and with its own rules. The result of the

said principles is that failure to obey procedural rules of parliament while enacting a law renders the whole enacting process a nullity. That an Act of Parliament so enacted is by such reason unconstitutional.

The said principles are well articulated in the cases of Prof Oloka-Onyango and 9 Others vs. Attorney General,[1083]Ssempebwa vs. AG[32]and Ssemwogerere vs. AG 2002[1084].

In Prof Oloka-Onyango and 9 Others vs. Attorney General,[1085] the 10 Petitioners alleged that the enactment of the AntiHomosexuality Act 2014 by the 9th Parliament was without quorum in the house and that this was in contravention of Articles 2(1) & (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure. Article 94 (1) provides that Parliament may make rules to regulate its own procedure. Article 88 of the Constitution provides that the quorum of Parliament shall be prescribed by the rules of Procedure of Parliament made under Article 94 of the Constitution. Rule 23 states that at any time when a vote is to be taken the Speaker shall ascertain whether the Members present in the House form a quorum for the vote to be taken. If the Speaker finds that the number is less, the Speaker shall suspend the proceedings of the House.

On 20th December 2013 when the Anti Homosexuality Act was being put to vote before Parliament, a procedural question as to the quorum in the House was raised by the Prime Minister. The Prime Minister stated that if the law was to be passed it must be with quorum. However, the Speaker of Parliament did not respond to the issue raised and instead called for a vote to be taken.

The case for the petitioners was that the Anti- Homosexuality Act was not passed in accordance with the Law because Rule 23(1), a rule made pursuant to Article 94 imposes on the Speaker a Constitutional Command to ascertain that there is Quorum. So when a procedural question is raised about quorum, the question has to be determined. That According to the evidence adduced, the Speaker disobeyed that command. Counsel for the petitioners argued that legislative sovereignty must be exercised in accordance with the provisions of the Constitution.

On the other hand, the respondent stated that there is no evidence to prove that there was no quorum and that the burden to prove that fact rested with the Petitioners. According to the AG the key aspect to the petition was an allegation that Parliament passed the Act without a quorum and thus violated the Constitution, and so the key issue arising from the pleadings is; "the absence of Coram". She argued further that the fact of absence of Coram is what is alleged to have made the Act inconsistent with the Constitution and therefore the petitioners had the duty to adduce evidence

[1083] CONSTITUTIONAL PETITION N0. 08 OF 2014 [32]Constitutional Case No. 1 of 1987
[1084]Constitutional Appeal No. 1 of 2002

[1085] CONSTITUTIONAL PETITION N0. 08 OF 2014

that the required number was not present at the time of the vote. That the evidence adduced to prove that the Speaker did not comply with Rule 23 by failing to ascertain Quorum is not itself evidence of the absence of quorum.

The court held that Rule 23 obliges the Speaker, even without prompting by any Member of Parliament to ensure that Coram exists before a law is passed. That the Speaker did not ensure compliance with Rule 23 and thus acted illegally in neglecting to address the issue of lack of Coram.

That the speaker is duty bound to ensure compliance with the Rule 23. That Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. That the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and vitiates the law that is enacted as a result of it. Failure to obey the Law (Rules) rendered the whole enacting process a nullity.

Court declared that the act of the Rt. Hon. Speaker of not entertaining the objection that there was no Corm was an illegality under Rule 23 of the Rules of Procedure which tainted the enacting process and rendered it a nullity. The Act itself so enacted was by this reason unconstitutional.

I must emphasize that indeed it was never proved that the Act was passed in the absence of the required quorum. What was proved was that the Speaker did not comply with a procedural imperative. The critical principle therefore - the *Ratio Decidendi* – is that *An Act of Parliament passed without strict compliance with Parliamentary Rules of Procedure is a nullity.*

I also find it useful to draw lessons from the pronouncements by (court which court?) in Ssempebwa vs AG[1086]. The National Resistance Council purported to pass an Act of parliament but did not strictly comply with the 1967 Constitution. It was held that since the Constitution sets out not only who exercises legislative power but also how such powers are to be exercised valid legislation can only be made in accordance with the established legislative framework. The court emphasized many points which I consider very pertinent in a country which values the Rule of Law to wit:

1. Human affairs, much more so affairs of state, should always be conducted on the basis of certainty. That is why there are written laws and constitution according to which individuals and governments are expected to behave.

2. The National Resistance Council (read Parliament) … cannot be an exception. The people of Uganda are entitled to expect it as the legislature to follow the constitution. So it cannot choose to legislate inside or outside that constitution according to its own wish … (even more so for purposes of amending the Constitution).

[1086]Constitutional Case No. 1 of 1987

3.… for reason of sanctity of the Constitution as the supremelaw of Uganda … and certainty which is necessary inconducting affairs of the state it would be a dangerousprecedent for this court to say that laws invalidly made should be left to stand because errors regarding them can be easily corrected. (My emphasis)

In view of our history, Governments in Uganda should follow the rule of law in exercising legislative and other powers. To do so is a necessary process in developing a return to the rule of law which has been conspicuous in this country in breach than in observance by Governments and citizens alike. In this process the Courts as the guardian of the Constitution…. have an important role to play. What was said of the national Resistance Council applies just as much to today's Legislative Body – Parliament.

If an individual is to ask the question: if indeed Parliament has the authority to go back and pass into law the provisions which were severed from the impugned Act and declared valid by the Constitutional Court, why the fuss? I would answer in the words of the persuasive Kenyan authority of Njoya & Ors vs. the Attorney General of Kenya[1087]where Ringera J,stated that:

I have in the end formed the conviction that constitution-making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound constitution-making should never be sacrificed at the altar of expediency.

The pronouncements made in regard to the making of a new constitution are equally pertinent in the process of amending a constitution in peace time and in the context of an existing valid constitutional order as exist in today's Uganda. Applying the principle of severance goes against this profound statement. And in the Ssemwogerere vs. AG 2002 case (Supra), Kanyeihamba JSC aptly said in his Lead Judgment:

… if Parliament is to successfully claim and protect its powers and internal procedures it must act in accordance with the constitutional provisions which determine its legislative capacity and the manner in which it must perform its functions.

I now must now specifically make mention of the application of severance to the Certificate of Compliance which was presented to the President by the Speaker. Having found that the President assented to a Bill which was a nullity, I must hold that a court cannot sever a document which has no legal standing.

[1087](2004) AHRLR 157

ISSUE 3: VIOLENCE

Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?

This issue is based on two "events" to wit: What occurred in Parliament on 27th September 2018 and Prevention of Members of Parliament from consulting outside their constituencies

Events in Parliament on 27th September 2017.

The Hansard shows that on 27th Wednesday September 2017, the Speaker welcomed Members to the day's session. The Speaker then informed the House that Parliamentary business had not been properly carried out since 21st September 2017 because Members were not willing to listen to each other. The Speaker also informed the House that she had received credible information that Hon. Kibuule endangered the safety of Members by bringing a firearm into the chamber of Parliament on 21st September 2017. The Speaker also stated that at the previous sitting of 26th Tuesday September 2017, Members were unruly and that therefore she had made a decision to exercise her powers under Rule 87 (2) as well as Rule 88 and suspended Members of Parliament.

Rule 87(2) provides that:

The Speaker shall order any Member whose conduct is grossly disorderly to withdraw immediately from the House or Committee for the remainder of that day's sitting; and the Clerk or the Sergeant-at-Arms shall act on such orders as he or she may receive from the Speaker to ensure compliance with this Rule.

Rule 88 provides as follows:

(1) If the Speaker considers that the conduct of a Member cannot be adequately dealt with under sub Rule (2) of Rule 87, he or she may name the Member.

(2) Where a Member has been named, then-

(a) in the case of the House, the Speaker shall suspend the Member named from the service of the House.

(6) Where a Member who has been suspended under this Rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his or her direction, and the Sergeant –at-Arms shall be called upon to eject the Member from the House.

After the Speaker naming the suspended Members, she directed their immediate exit and adjourned the House for 30 minutes for the Members to oblige. There is no evidence in the Hansard to show

whether the suspended Members were still in the House after the expiry of 30 minutes. What the Hansard shows is that when the Speaker exited the House unknown people entered the House and started evicting the named Members by force.

On record is a letter written by the Speaker on 23rd October, 2017 to H.E the President of Uganda raising concern as to where the unknown people emerged from. The letter states as follows:

"I took action to suspend members of Parliament from the service of the House for 3 sittings. However, after I had requested the Sergeant Arms to remove the members from precincts unknown people entered the Chamber beat up the members, including those not suspended and fight ensued for over an hour. I have had the opportunity to view camera footages of what transpired and noticed people in black suits and white shirts who were not part of the Parliamentary police or staff of the Sergeant at Arms beating Members. Additionally, footage shows people walking in single file from the office of the President to the Parliament precincts.

I am therefore seeking explanation as to the identity, mission and purpose of the unsolicited forces.

I am also seeking an explanation about why they assaulted Members of Parliament.

I am also seeking an explanation why the Members were arrested and transported and confined at police stations."

No response was made to the Speaker's letter. However, the evidence of the Chief of Defence Forces, (CDF) General David Muhoozi confirmed that the 'unknown people' constituted staff from the Uganda People's Defence Forces (UPDF).

In the Constitutional Court the present appellants alleged that Article 24 which deals with respect for human dignity and protection from inhuman treatment was violated when members of the UPDF came into Parliament and manhandled some members of Parliament. That furthermore Article 97 which provides for Parliamentary immunities and privileges was also violated.

In support of this allegation, Honourables: Munyagwa, Karuhanga, Ssewanya and Nambooze swore affidavits. Hon. Betty Nambooze deponed that she was intercepted by security personnel and assaulted. That she was violently thrown on the ground, beaten and kicked. Nambooze averred that this amounted to subjecting her to inhuman and degrading punishment. The Clerk to Parliament confirmed that Parliament footed Nambooze's medical bills when she went to India for treatment. The Clerk however denied knowledge of Hon. Nambooze being assaulted during the scuffle.

Honourable Munyagwa, Karuhanga and Ssewanyana deponed that although they were not among the suspended Members of Parliament, they too were assaulted and thus subjected to inhuman and degrading treatment.

Involvement of UPDF: findings of the Constitutional court

In reference to the intervention of the UPDF in the scuffle at Parliament, Owiny-Dollo, DCJ held

that there was absolutely no reason for the intervention of the UPDF. In his view, proof of this is in the fact that the members of the UPDF who intervened went barehanded in civilian attire; something they would not have done had the situation been such as to warrant their intervention. The Learned Justice referred to Uganda's sad and painful history of military intervention in matters that are purely civilian. He then concluded that it was therefore a gross error of judgment on the part of the Army Chief to deploy the UPDF in a situation that did not, by any stretch of classification, warrant military intervention.

The judge however held that despite "the unwarranted and wrongful" intervention by the UPDF, there are extenuating circumstances that point to the fact that the ramifications of the interventions did not in any way vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act.

Similarly, Justice Elizabeth Musokeopinedthat the police force could have contained the situation at Parliament and the deployment of the army, albeit from the permanent establishment at Parliament/President's office, was not justified. The Judge noted that the Sergeant at Arms did not request for the back-up from the UPDF even when he knew they had a permanent establishment at the Parliament.

Justice Musoke then made a finding that the acts of the security agents at the Parliament premises constituted acts of security interference that contravened Articles 1, 2 and 8A, of the Constitution. She nevertheless concluded that based on the fact that business went back to normal after the eviction of the offending Members of Parliament and also because on the day the Bill was passed into law, the House was full to capacity, the process leading to the enactment of the impugned Act was not negatively impacted. According to Justice Remmy Kasule, this issue required the court to determine whether there was any violence both inside and outside Parliament, and if there was, whether that violence disabled members from freely enacting the impugned Act.

The Judge held that on the basis of the evidence availed to the court, there was no justification at all for the army and other security forces to join in this scuffle, which should have been handled by the normal police personnel and within the normal security systems of Parliament. Kasule JCC also referred to the 1966 crisis when the Executive deployed the army under Idi Amin and other State security organs to suppress Parliament and to arrest and detain, without trial five Ministers of the Cabinet and other Ugandans. He then stated that it is because of such incidents that the Preamble to the 1995 Constitution implores us to recall

"… our history which has been characterized by political and Constitutional instability". The Judge went further to point out thatUgandans, through the Constituent Assembly, made provision for the army to be represented in Parliament and that the force should restrict its role in political disputes

through its representatives in Parliament. That to conduct itself otherwise, is to overlook and disregard the very painful lessons of the history of Constitutionalism in Uganda.

The Learned Justice nevertheless went on to make a finding that since Parliament thereafter carried on its business without any disruption or interference from any internal forces, the Constitution (Amendment) Act No. 1 of 2018 was not enacted as a result of violence.

Similarly, Kakuru JCC held that there was no evidence pointing to the need for intervention of the UPDF as the Police Force in Uganda is equipped and professional enough to evict unarmed people from a building that is not even on fire. The Learned Justice pointed out that our history requires that the Army be kept out of partisan politics. The Judge held that the action of the Police and the Army in forcefully evicting Members of Parliament from the Chambers and arresting them after man handling them violated the Constitution. He nevertheless came to the conclusion that although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result.

It was only Justice Cheborion who opined that the involvement of the Army in the scuffle in Parliament was justified. In his view the intervention of Uganda Police and UPDF "to secure the precincts of Parliament by causing the eviction of the said Members of Parliament was a necessary avenue to enable Parliament to proceed with its Constitutional mandate. The Learned Justice based his opinion on Section 42 of the Uganda Peoples Defence Forces Act which allows the UPDF to be called in aid of civilians in situations of riots or disturbance of peace and Article 209(b) of the Constitution which enjoins the Uganda Peoples Defence Forces to co-operate with civilian authority in emergency situations and in cases of natural disaster. According to the Judge, the question which needed to be answered was: was the situation in Parliament an emergency?

Cheborion JCC pointed to the unrebutted evidence of the Sergeant at Arms that the Speaker had to exit using the rear door and that MPs had started throwing chairs around and some of his staff were injured. That there was also evidence that a Member of Parliament had entered the chamber of Parliament with a gun. In the opinion of the Learned Justice, these events were life threatening and constituted an emergency within the meaning of Article 209(b) of the Constitution and therefore the involvement of the army, an institution which is mandated to act in cases of emergencies, was justified.

The Learned Justice went on to point out that a Member of Parliament is entitled to enjoy the rights enshrined in Articles 1, 2, 3 (2), 8A and 97 to debate and be accorded the privileges under the 1995 Constitution and the Parliamentary (Powers and Privileges) Act. That nevertheless where the conduct of a Member of Parliament in the exercise of their aforementioned rights is inimical to the

mandate of Parliament to conduct business, such right may be curtailed as long as the limitation does not go beyond what is acceptable and demonstrably justifiable in a free and democratic society. The Learned Justice then stated that the next question to be answered therefore would be: Did the measures taken by the Sergeant at Arms and the security forces in implementing the order of the Speaker fall within those stated to be "acceptable and demonstrably justifiable" in a free and democratic society within the meaning of Article 43(2) of the Constitution?

The Judge held that the affected Members of Parliament's right to participate in the debate leading to the enactment of the Constitution (Amendment) Act was curtailed on account of their misconduct. And that therefore the curtailing of such rights did not amount to violation of Articles 1, 2, 3(2), 8A and 97 of the Constitution as it was necessitated by their rather unprecedented misconduct, which was contemptuous of the Rules of Parliament and the orders of the Speaker of Parliament.

The Learned Justice however hastened to say that this finding is not intended to grant a *carte blanche* to the army and the Sergeant at Arms in Parliament to intervene in matters of Parliament without reasonable cause - each incident should has to be evaluated on its own merits and findings made accordingly.

The Judge also stated that although the intervention of security forces was warranted, the intervening forces used excessive force in stopping the scuffle in Parliament. The treatment of the Members of Parliament was inhuman and contravened Article 24 of the Constitution. That nevertheless, after the said scuffle, the sitting of Parliament resumed when the Bill came for the 3rd reading, 439 Members of Parliament were present and the house was full. Many gave feedback on their consultations and voted on the Bill, there was no evidence of violence in Parliament and consequently, it cannot be said that the entire amendment process was tainted with violence. The Judge concluded that consequently, it is could not be said that 25 Parliament was legislating under duress.

The Mugenyi Directive

On 16th October 2017 Asuman Mugenyi, an AssistantInspector General of Police issued a Directive to District Police Commanders throughout the country. The directive was to the effect that in the process of consulting the public on the proposed amendment of Article 102 (b), Members of Parliament must be restricted to their constituencies. The police was to stop MPs from moving to other constituencies "in order to support their counterparts or to consult outside their constituencies."

Jonathan Odur deponed that in a letter dated 18th October and addressed to the Inspector General of Police, a group of members of Parliament from the Lango Sub-Region notified the police that they

would address public rallies to consult the public about the proposed amendment of Article 102 (b). The letter gave the Police a detailed programme indicating where the group would be on particular dates and time. On 24th October 2017, Odur and 5 other Members of Parliament from the Lango Sub-region gathered to hold a joint consultation meeting in Lira District. However, the police dispersed people who had gathered at Adyel Division by firing tear gas and live bullets. Hon Odur further deponed that he and other members of Parliament were arrested, beaten and subjected to torture by security forces (the Army, Police Force and other militia) while in their constituencies for purposes of consulting the people they represent in Parliament.

Hon. Winfred Kiiza similary deponed that public rallies by members of the opposition in Mbale, Lubaga South, Makindye East, Makindye West were dispersed with tear gas and live bullets by members of the Uganda Police Force.

Counsel for the petitioners contended that the directive violated the Constitution and vitiated the process of enacting the impugned Act. In a strongly worded messageto the Uganda Police Force, Owiny Dollo DCJ in his judgment reminded the Police Force that it must exercise its national responsibility in a professional and non– partisan manner; and indiscriminately serve the people without any favour, malice, or ill will. That the Circular, which the leaders of the Police Force sent to the Police throughout the country to ensure that members of Parliament were restricted in their Constituencies … and intimating that this was to ensure members of the opposition did not interfere with the process of consultation, was most unfortunate.

That the Police Force does not belong to, and must never serve the interest of any political party, not even the political party in government. This is owing to the fact that our Constitution and democratic dispensation recognises that Parliament is one of the three arms of government alongside the Executive and the Judiciary; hence, since the opposition parties are also in Parliament, they are together in government with the political party that forms the executive arm of government. The Honourable Justice quoted Lord Hatherly in Campbell's Trustees vs Police Commissioner of Leith (1870) LR 2HL (Sc) 1, at p.3, thus: *"The courts will hold a strict hand over those to whom the legislature has entrusted large powers, and take care that no injury is done by extravagant assertion of them."*

Nevertheless, the Learned DCJ declined to hold that the unlawful order had vitiated the whole legislative process. The Hon DCJ held that despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, there are extenuating circumstances that point to the fact that the interventions did not vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act in any way. That the consultations took place fairly well. The Learned Justice Kakuru stated that the

Police had no powers to issue directives stopping Members of Parliament and specifically Members of the Opposition in Parliament from consulting the people of Uganda. That the act of the Police in issuing the letter in question violated Articles 1, 2, and 29 of the Constitution.

Kakuru JCC also stated that the police directive goes against every letter and spirit of the Constitution. The Learned Justice noted that the directive was aimed only at intimidating persons perceived to be against the removal of the Presidential age limit and therefore the police acted in a partisan manner. And that in the process it also criminalized an otherwise legitimate political issue, it criminalized a section of society - the people who did not support the amendment of the age restriction on eligibility for presidency. In this the police contravened Articles 1, 2, 21, and 29 of the Constitution. The Learned Justice however held that nevertheless no sufficient evidence was adduced to prove that the directive, unconstitutional as it was, on its own vitiated the whole process of enacting the impugned Act.

Similarly, Justice Cheborion, JCC held that the Mugenyi Directive contravened the Constitution. It restricted freedom of association and movement of Members of Parliament without any justification. That in the current multiparty dispensation, most Members of Parliament belong to one party or another and they should therefore be expected to offer support for similar minded colleagues in their constituencies. Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

That there was absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies. That furthermore, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. The Learned Judge was of the view that the directive was recklessly and wantonly issued without any regard for the law more specifically Article 29(2) which guarantees the freedom of every Ugandan to move freely in Uganda. That the directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi.

However, the Learned Justice declined to make a finding that the unlawful directive had a chilling effect. In his view, he could only arrive at such finding if it had been proved that the disruption of meetings was widespread. On the contrary evidence indicated that although in some cases meetings

and rallies were dispersed, in some cases the directive was roundly ignored and in most parts of the country meetings went on without disruption. According to the Learned Justice, it could thus not be said that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory and the entire Bill a nullity.

Kasule JCC made a finding that the Mugenyi Directive was aimed at preventing MPs from exercising their freedom of association and movement within their respective constituencies, and elsewhere in Uganda. By the directive some MPS were prevented from seeking participation of Ugandans whom they represent in Parliament, on the proposed Bill. The directive was contrary to Article 29 (1) (d); 29 (1) (e) and (2) (a) of the Constitution as well as the Provisions of the Parliamentary (Powers and Privileges) Act.

The Judge pointed out that the court received no evidence that the Uganda Police acted as they did in consultation with the Speaker of Parliament, the head of the legislature, the second arm of State. The Learned Justice concluded that this was a subjugation of Parliament as the country's legislature to the unlawful orders of this police officer. The Learned Justice however held that because the overwhelming number of Members of Parliament carried out consultations and only a few were inhibited he could not hold that the Constitution (Amendment) Act No. 1 of 2018 was enacted as a result of violence having been exerted upon the Honourable Members of Parliament.

I note that at the Constitutional Court, it was the finding of 4:1 that the intervention of the Army was uncalled for. Nevertheless, the Justices who made the above finding and who further held that the intervention contravened the Constitution went on to conclude that nonetheless the unlawful acts of the army did not invalidate the impugned Act.

I also note that it was the unanimous finding of the Constitutional Court that the directive issued by the Asuman Mugenyi was unconstitutional. The court however held that the unlawful directive and acts which ensued did not vitiate the legislative process which culminated into the impugned Act.

In arriving at the finding that the conduct of the security forces contravened the Constitution, the Learned Justices pointed out specific provisions which had been violated. For Justice Musoke Articles 1, 2 and 8 A had been contravened. Similarly, Kakuru JCC made a finding that Articles 1 and 2 had been violated. As already discussed in this judgment, these Articles are part of what constitutes the Constitution's bed rock or Basic Structure.

The findings of Owiny-Dollo DCJ, of Kasule JCC and of Kakuru JCC point us to our "sad and painful" history characterized by military intervention in civilian matters, political and Constitutional instability. As already discussed in this judgment, the Constitution's Preamble which captures our "sad" history forms part of the Constitution's basic structure. The Justices also make findings that fundamental human rights such as the freedom to assemble, to associate and to move

freely throughout the country had been violated. The court even made mention of the non-derogable right to be protected from inhuman and degrading treatment - (Article 24) - it was contravened.

In my view what this Court is called upon to determine is whether the proven violations of the Constitution and the proven violation of the rights of individuals had an impact on the validity of the Constitution (Amendment Act) No. 1 of 2018.

In my view, enactment of an Act of Parliament is not an event. It is a process. In the matter before this Court, the conduct complained of violated the rights of individuals who were engaged in activities directly connected to and/or necessary for the enactment of the impugned Act of Parliament. It was the Speaker who specifically sent out legislators to their constituents for the specific purpose of collecting the views of citizens on proposals which were before parliament. Members of Parliament accessed Public Funds for the purpose. The consultations were no doubt directly linked to the enactment process. The Mugenyi Directive specifically gave orders aimed at interfering with this very process. I find it inconceivable that the court could de-delink the proven violations from the legislative process which resulted into the impugned Act.

I find it incomprehensible that a court which found that the sovereignty of the people and the supremacy of the Constitution had been violated in that process, would go on to say that "nevertheless" such violations did not vitiate the enactment process.

In my discussion of Issue 1, I stated that the Preamble to Uganda's Constitution reflects the country's history and that therefore it serves to specify the reasons for the Constitution's enactment, its *raison d'être* and eternal ideals. I find it inconceivable that a court which made a finding that the conduct of the security forces (conduct connected to activities linked to the legislative process) was a repeat of our sad history, can go ahead and conclude that acts which take us back to our sad history would not be held to have vitiated the enactment process.

Furthermore, it is on record that the Speaker of Parliament disassociated herself from the forces who entered Parliamentary Chambers on 27th September – *the forces werenotpart of the Parliamentary Police or staff of the Sergeant at Arms.* On the other hand, the Chief of Defence Forces confirmed that the 'unknown people' constituted staff from the Uganda People's Defence Forces (UPDF). This is evidence that there was interference with the sovereignty of Parliament and a violation of the democratic principle of separation 25 of powers - an essential feature of democracy.

Regarding the Mugenyi Directive it was the unanimous finding of the Constitutional Court that it resulted into disruption of consultations of some Members of Parliament. That the work of some MPS was interfered with thus preventing them from seeking the participation of Ugandans whom

they represent in Parliament, on the proposed Bill.

It is clear that the Constitutional Court concentrated on the rights of the members of Parliament and said little about the fact that scores of citizens were denied the right to actively participate in issues of governance since they were denied the opportunity to express their views on the proposed amendments. The courtemphasized that it had not been proved that that the disruption ofmeetings was widespread throughout the country. It was for this reason that court declined to make a finding that the unlawful directive rendered the public participation in the Bill nugatory and the entire Bill a nullity.

I respectfully differ from the reasoning of the Constitutional court. I must emphasize that the rights in issue are granted to each and every individual citizen – it was violation of the fundamental right of each and every citizen who wanted their opinions listened to but was denied this right. The right of an individual cannot be rendered inconsequential just because other citizens were enabled to enjoy their rights. What occurred is contrary to Objective II (i)of the National Objective and Directive Principles of State Policy which statesas follows: The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.

I must also add that as argued by the 3rd Appellants the Police Directive and what ensued therefrom also violated Article 38 of the Constitution which deals with the Civic Rights of Citizens. I am in agreement with Counsel for the 3rd appellant that when Parliament chose to invoke consultations on Section 3 of the impugned Act, it brought itself under Articles 38 of the Constitution which and provides as follows:

(1) Every Ugandan has a right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

The right to participate in the affairs of government no doubt accrues to each and every citizen and its violation cannot on the basis of numbers, be deemed “inconsequential”.

Issue 4

Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition.

1st appellant’s submissions (Mabirizi)

Mr. Mabirizi submitted that under Article 137 of the Constitution, the Constitutional court has no jurisdiction to apply the ‘substantiality’ test. That the Constitutional Court derives its power from Article 137 of the Constitution which does not give it jurisdiction and power to determine whether the contravention affected the resultant action in a substantial manner. That the court’s jurisdiction is to determine whether the actions complained against were in contravention of the Constitution

and when it finds a contravention to declare so or give redress or refer the matter for investigation.
That since the court's role is limited to determining whether there was contravention of the Constitution or not, there is no way the Constitutional Court could go ahead to investigate the degree of contravention and whether the (process of enacting the impugned Act) contravened the Constitution in a substantial manner. In the 1st appellant's view, it is only the Presidential and Parliamentary Elections Acts which provide for the 'substantiality test'. There is no law enabling the Court to apply the test in Constitutional petitions.
Similarly, the 2nd appellants submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of procedure of Parliament. That whereas the substantiality test is expressly provided for in electoral laws, in Constitutional matters the test is totally different. That the Constitution being the supreme law of the land does not provide room for any scintilla of violation.
In support of their submission, the 2nd appellants relied on the decision of this Court of Paul K. Ssemogerere & 2 Ors vs. 30 Attorney-General SCCA. NO. 1 OF 2002, where it was held that the Constitutional procedural requirements are mandatory. They also relied on the Kenyan case of Njoya & Ors vs. the Attorney General of Kenya[1088] where Ringera J,stated that:
I have in the end formed the conviction that Constitution-making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid Constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound Constitution-making should never be sacrificed at the altar of expediency.
Similarly, the 3rd appellant submitted that the substantiality test is only applicable in electoral laws and faulted the Constitutional Court for applying the test to the unlawful directive of the police and to the invasion of Parliament by security forces. Counsel for the 3rd appellant argued that the wrongful application of the test prevented the court from applying the proper test which is whether the limitations imposed by the police were justified – it prevented the court from asking itself whether the directive passed the test set under Article 43 of the Constitution. Further argued that the substantiality test cannot be applied to violation of rights under Article 29 - it is impossible to measure the degree of curtailed speech or restricted movement of a Member of Parliament. A right cannot be quantified the same way votes can. It would be impossible to evaluate how the failure of a member to go to a particular constituency because of limitations affected the outcome/result of

[1088](2004) AHRLR 157

the consultations. And thus the substantiality test is not applicable.

The appellants pointed out that the case of Col. Dr. Kizza Besigye versus Y.K Museveni & The Electoral Commission[1089] relied on by the Learned Justice Musoke dealt with the meaning of Section 59 (6) of the Presidential Election Act whereas what is applicable in a Constitutional Petition is Article 137(3) and (4) of the Constitution. That furthermore, the Supreme Court authority of Charles Onyango Obbo and Andrew Mujuni Mwenda vs. Attorney General[1090] specifically provides for the evidential burden in respect of limitations of fundamental rights.

That what was in issue before court was infringement of Constitutional rights such as limitations to free speech and expression, movement and participation. The Court is not required and there is no legal basis for it to determine the effect proved facts (violations).

That furthermore, unlike it is in election petitions, it is impossible to prove the exigent of the Constitutional limits imposed by police, the degree of such limitations and the substantial effect they had on the outcome of the consultations. That where a directive by any organ of the state is sent to all districts of Uganda requiring police officers all over the country to breach the Constitution and indeed there is evidence that the directive was complied with in any part of the country, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or that it was in public interest to do so. Where the respondent fails to do so, as was in this case, the petitioner has proved breach of the Constitution. All that remains is the remedy. That it cannot be argued that violations of the Constitution have to be widespread throughout the country for the Court to invalidate the Constitutional Amendment Act. That the appropriate test which ought to be applied is whether the violations contributed to or had the effect of contributing to the enactment of the Act. That once the Court found Constitutional violations as it did, it was required to make a declaration to that effect and grant relief.

The essence of the 3rd appellant's argument was that once a petitioner has adduced evidence that the police directive was complied with in any part of the country and court makes a finding that the directive resulted into violation of rights, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or that it was in public interest to do so. This would be in line with Article 43 of the Constitution. That in the matter before Court, the petitioner proved breach of the Constitution but the respondent failed to prove that the curtailment of rights under Article 29 was justified. Consequently, what remained for the Constitutional Court was to grant the petitioner a remedy.

Like the 2nd appellants, the 3rd appellant relied on the case of Paul K Ssemogerere & 2 Ors versus

[1089] Election Petition No.1 of 2001

[1090] Constitutional Appeal No. 2 of 2002.

Attorney-General SCCA. No. 1 of 2002 for the proposition that Constitutional procedural requirements are mandatory and that the Constitution provides for no room of any scintilla of violation.

The appellants prayed that this Court substitutes the order of the Constitutional Court with one striking down section 3 of the Act.

Submissions of the Respondent AG

The AG conceded that indeed various Rules of Parliamentary procedure were violated and in some instances Constitutional imperatives were contravened. That nevertheless, since the court found that there was general compliance with the Constitutional requirements and procedure for the enactment of the impugned Act, the Justices of the Constitutional Court were justified in applying the substantiality test to arrive at the finding that the few instances of irregularities did not adversely affect the process of passing the impugned Act and subsequently applying the doctrine of severance to reach the decision that some of the sections of the impugned Act were validly passed by Parliament. That having arrived at this finding, the court was right to strike down sections of the impugned law which were tainted with illegal processes but saved that which was amended within the law.

That the question that begs an answer is therefore whether the Court was wrong to use that substantiality test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

It was the argument of the AG that the Appellants posited evidence which the Trial Court properly evaluated, the court considered whether the Constitution was amended within the precincts of the law and it interrogated whether the alleged violations of the Constitution impacted the Constitutional making process.

To support their case, the respondent AG relied on the decision of Odoki, C.J in Kizza Besigye vs. Yoweri Museveni Kaguta and & The Electoral Commission (supra) where the court applied the substantiality test in a presidential election petition to determine whether the proven non-compliance with electoral laws would result in nullification of the election. Odoki CJ held that for an election to be nullified, the court has to evaluate the whole process for the election and it must be proved not only that the irregularities affected the result but also that the degree of the effect was substantial. It was also held that numbers are useful in making adjustment for irregularities.

After citing the learned CJ's pronouncements extensively, the AG concluded that the substantiality test therefore is a tool of evaluation of evidence and that to fault the Court for applying the substantiality test in a Constitutional petition is to say that a court interpreting the Constitution should not apply a tool of evaluation in the determination of the matter before it.

It was further argued that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether a court is handling a constitutional dispute or an ordinary suit, it is trite that the matter be determined after a proper evaluation of evidence. The respondent AG contended that the position of the law with regard to the application of substantiality test was canvassed in Nanjibhai Prabhudas & Co. Ltd vs. Standard Bank Ltd[1091].

The respondent further argued that it is pertinent to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. That the court's evaluation of evidence and resulting decision was not exclusively based on the quantitative test. That the court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation was not sufficient to satisfy nullifying the entire process.

The Attorney General also argued that it was evident on the facts of the case that the process in Parliament was not negatively affected as observed by the majority Learned Justices of the Constitutional Court. The respondent noted that in applying the substantiality test, the Learned Hon Lady Justice Elisabeth Musoke, JCC applied both the Quantitative and Qualitative Test. It was submitted that the qualitative requirements appraise the entire legislative process.

The respondent also sought to rely on the High Court case of Winnie Babihunga vs. Masiko Winnie Komuhangi & Others[1092] as a case in which the qualitative and quantitative aspects of the substantiality test were expounded when the court stated that:

"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

The AG argued that a perusal of the 1st appellant's pleadings shows that what was being sought was that the Constitutional Court determines the effect of certain events/actions that occurred during the process of enacting the impugned Act. That the Appellant pleaded and argued in the Constitutional Court that the entire process of amending the Constitution from the tabling of the Bill, to the passing thereof, were compromised and the whole process was marred/tainted with illegalities, irregularities and violence. That however, there was no credible evidence to show that such violence and intimidation affected the validity of the impugned Act.

The AG submitted that it was important to determine what the standard of proof in dealing with Constitutional matters is, most especially where the matters involve amendment and breaches of the Constitution. Is the standard of proof different from the usual on the balance of probabilities?

[1091][1968] E.A 670 at page 683.
[1092]HTC-OO-CV-EP-004-2001

The AG further made submissions on burden of proof in civil disputes. That that it is not in dispute that whoever desires any court to give judgment, as to any legal right or liability dependent on the existence of facts which they assert, must prove that those facts exist. That in the matter before court the Appellants bore the burden of proving to the required standard that the irregularities/violence that occurred affected the result of the entire passing of the Bill into law and that the impugned Act should therefore be nullified. That the evidence adduced by the Petitioners at the lower court did not support their assertion that the proven irregularities and violence were so widespread/massive that the court ought to have nullified the entire resultant Act.

The AG supported the conclusion of the Constitutional Court that the evidence did not disclose any profound irregularity in the management of the legislative process for the enactment of the impugned Act, nor did it prove that the participation of some members of Parliament was gravely affected. That the parts that were so affected were rightly severed by the Court.

That the Constitutional court was right to inquire into the extent of the alleged massive irregularities and to apply the qualitative and quantitative test to consider whether the errors, and irregularities identified sufficiently challenged the entire legislative process so as to lead to a legal conclusion that the Bill was not passed in compliance with the requirements of the Constitution. Prayed that this Court upholds the finding of the Constitutional court that certain irregularities/errors were mere technicalities and were not so fatal as to invalidate the entire process of enactment of the impugned Act.

Consideration of Court.

Analysis of the judgments of Owiny-Dollo DCJ, Kasule JCC, Elizabeth Musoke, JCC and Cheborion JCC clearly indicates that each of the learned Justices applied the substantial effect test in arriving at the decision that the proven violations of the Constitution arising out of the violence in and outside parliament did not invalidate the process in Parliament which resulted into the impugned Act.

Elizabeth Musoke, JCC stated thus:

What this Court has to determine is whether the alleged police orchestrated violence affected the process of consultation and people participation thereby also negatively impacting the enactment of the Constitution(Amendment) Act, 2018, in a substantial manner such as to render the resultant Act null and void. It is important to decide whether the test to apply would be qualitative or quantitative, or both.

I further note that the learned Justice Musoke was guided by the jurisprudence of this Court in Kizza Besigye vs Yoweri MuseveniKaguta (Supra). The case dealt with the applicability of Section 59 (6) (a) of the Presidential Elections Act in resolving a petition challenging the legality of an

Election, on the basis that the election was marred by irregularities and malpractices which violated the Presidential Election Act. After analyzing the interpretation given to the section and its application to the facts of the petition, Musoke JCC, stated that the principles developed in the various Presidential Elections would apply to the incidents of violence alluded to by the petitioners in the Constitutional Court - the appellants before this Court.

In regard to the Police Directive issued by AIGP Asuman Mugenyi Cheborion, JCC made a finding that:

The directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi. ... In some places MPs were violently and unlawfully stopped from consulting their people, live bullets and teargas were fired and fear was instilled. Though isolated, this was most unfortunate. ... However, in some cases the directive was rightly and roundly ignored. ... There was no evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. ... The evidence presented by the Petitioners fell woefully short of demonstrating that this directive had that chilling effect in actual fact.

The import of the learned Justice's decision was that arising from the fact that the majority of members of Parliament had been able to consult their constituents, he could not invalidate the impugned Act.

And Kasule JCC held as follows:

"*… By the directive of this very senior police officer, a number, however few, Honourable Members of Parliament were prohibited from … seeking support outside each one's Constituency, thus preventing them from seeking participation of Ugandans whom they represent in Parliament, on the proposed Bill. The directive was contrary to Article 29(1)(d)(e) and (2)(a) as well as the Provisions of the Parliamentary (Powers and Privileges) Act.*

The Court, however received no sufficient evidence that the …directive was carried out throughout the country. ... The overwhelming number of Members of Parliament held and carried out their meetings of consultations of the people uninterrupted.

The interference by police with the meetings of the Honourable Members of Parliament seems to have been rather isolated and affected only a few … During the debate on the Bill, Members one after the other reported having consulted their electorates throughout the country."

In conclusion, the answer to this issue is that the Constitution (Amendment) Act No. 1 of 2018 was not enacted as a result of violence having been exerted upon the Honourable Members of Parliament."

And according to Owiny Dollo DCJ,

"... despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, in the manner that came out in evidence, there are extenuating circumstances that point to the fact that the ramifications of the interventions did not vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act in any way. The consultations took place fairly well."

Did the Constitutional Court err in law when they applied the substantiality test in determining the petition?

In Uganda's jurisprudence, the substantial effect test is a creation of statute and is found in Section 59 (6) of the Presidential Elections Act and Section 62 (1) (a) of the Parliamentary Elections Act. Section 59 (6) (a) of the Presidential Elections Act provides that: The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court (that there was) —*non-compliance with the provisions of this Act,* if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and *that the non-compliance affected the result of the election in a substantial manner;* (my emphasis)

But in analyzing the issue at hand, I must start off with bringing clarity to what may be considered a preliminary issue – the need to understand the legal character of the substantiality effect test. The Respondent Attorney General submitted that the substantiality test is a tool of evaluation of evidence. The respondent's submissions also suggest that the issue at hand calls for a discussion of the burden as well as standard of proof required in Constitutional disputes. The respondent seems to have understood the arguments of the appellants as contentions which in effect faulted the Constitutional Court for applying *the burden and standard of proof applicable in elections laws to Constitutional matters*.

My understanding of the test is that it does not define which party bears the burden. It does not depart from the trite legal principle that places the duty of proving a fact on the party who alleges its existence. The import of the test is that it establishes what must be proved by a party who wants to prove a disputed fact. What the test places on the party is not only the duty to prove what he alleges to have occurred but also to prove that the act had significant effect/consequences on something else – the outcome of a process. I do not therefore see how the test can be referred to as a tool for evaluation of evidence. Furthermore, the phrase "standard of proof" refers to the level/degree of certainty of evidence necessary to establish a disputed fact or to establish the occurrence of an event. Consequently, whether or not the substantiality test is applicable in Constitutional adjudication is not in any way linked to the standard of proof required for determining that a Constitutional imperative was contravened. Since the matter before court was a

civil dispute – albeit of a Constitutional nature - the standard of proof applicable was the same as required in other civil suits including elections petitions. The applicable standard is proof on a balance of probabilities. The petitioners did not aver anywhere that the court had erred in applying to a Constitutional dispute, the standard of proof applicable to election disputes. I therefore respectfully find that the AG's submissions that in resolving the issue at hand, it was important to determine what the standard of proof in dealing with Constitutional matters is were misplaced. Linking the applicability of the substantiality test to the burden and the standard of proof is evidence of a misunderstanding of the legal nature of the test.

Be that as it may, in answering the question whether the substantial effect Rule is applicable in Constitutional disputes, one must among other things interrogate what the purpose of that test is analysis of the value attached to the test by courts from across the globe[1093] while dealing with presidential election petitions can be summarized into this: "given the national character of the exercise where all voters in the country formed a single constituency, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the free choice and true will of the majority of voters?" Did the proven irregularities decisively show that the conduct of election was so devoid of merit as not to reflect the expression of the people's electoral intent? If a court answers the question in the negative, it refrains from annulling the election. As I sated in my judgment in Kizza Besigye vs. The Attorney General (supra):

The import of the test for Uganda therefore is that it enables the court to reflect thus: did the proved irregularities distort the election to the extent that the ensuing results did not reflect the choice of the majority of voters envisaged in Article 1 (4) of Uganda's Constitution? Did the non-compliance negate the voters' intent? It is the individual preferred by the majority who has the 10 legitimacy to be in leadership. This is the very philosophy on which Article 1 (4) of the Constitution is founded – giving power to voters to choose who is to govern them.[1094]

The test has a quantitative and a qualitative aspect. From the quantitative aspect, the substantial effect test deals with numbers and is based on the proportionality test. It is rooted in the philosophy that in a democratic system constituted strictly on the basis of majoritarian expression through the popular vote, the essence of an election is that the election of a leader is the preserve of the voting

[1093] Kizza Besigye vs. Yoweri Museveni Kaguta, Election Petition No.1 of 2001;Anderson Kambela Mazoka and 3 others vs. Levy Patrick Mwanawasa and 3 Others, Presidential Petition No.SCZ//01/02/03/2002, the Zambian Supreme Court); Nana Addo Dankwa Akufo-Addo & 2 others vs. John Dramani, Presidential Election Petition Writ No.J1/6/2013, (Ghana)

[1094]Constitutional Petition no. 0013 of 2009.

public and that the court should not tamper with results which reflect the expression of the population's electoral intent. The question which is in effect asked is: if the irregularities had not occurred, would the declared winner have garnered enough votes to lead and lead with the percentage legally required to be declared president?

However, the substantial effect test is not exclusively quantitative, it has a qualitative aspect. The qualitative aspect is best articulated in the U.K persuasive authority of Morgan and Others v Simpson and another [1974] 3 All ER 722 in which the Court of Appeal held that:

… if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected.

In Kizza Besigye vs The Attorney General (Supra) where Section 59 (6) was unsuccessfully challenged for contravening the constitutional, I analyzed both the quantitative and qualitative aspects of the substantial effect testand their import in understanding the meaning Section 59 (6) (a) of the Presidential Elections Act. Specifically, in regard to the qualitative test, I held as follows:

… if there is evidence of substantial departure from Constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election ….

The above opinion was adopted with approval by the Supreme Court of Kenya in Raila Amolo Odinga and Another vs. Independent Electoral and Boundaries Commission.[1095] The import of the qualitative test is that the process is as important as the outcome – the process is as important as the numbers. As stated by Stephenson L.J in Morgan and Others v Simpson (supra):

For an election to be conducted substantially in accordance with the law there must be a real election … and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election. But perhaps even more important is the differentiation between contravening the Constitution on the one hand and violating provisions of an Act of Parliament on the other hand. In Kizza Besigye vs The Attorney General (ibid) I noted as follows:

But perhaps even more important is the need to point out that the wording of Section 59 (6) (a) is *silent in regard to non-compliance with provisions of the Constitution* and only refers to noncompliance with the provisions of the Presidential Elections Act. The Section provides that: "The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court (that there was) — *non-compliance with the provisions of this*

[1095] Presidential Petition No. 1 of 2017 [2017] eKLR.

Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and *that the non-compliance affected the result of the election in a substantial manner;"* (my emphasis)

Consequently, there may/would be no need to prove that the substantial departure from the Constitutional imperatives had substantial effect on the results in circumstances where fundamental Constitutional imperatives have been violated.

It is therefore clear in my mind that even in presidential elections where the substantial effect test is applicable, the test is not extended to violations of Constitutional imperatives. It is limited to violations of an Act of Parliament.

The appellants filed petitions in the Constitutional Court under Article 137 of the Constitution which provides as follows:

137. Questions as to the interpretation of the Constitution.

Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional court.

When sitting as a Constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

A person who alleges that—

an Act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional court for a declaration to that effect, and for redress where appropriate.

The Constitutional Court made findings that the Police Directive which interfered with the consultations by some members of Parliament violated various Articles in the Constitution. This would be in line with Article 137 (3) (b) since the police had engaged in acts (conduct) which contravened provisions of the Constitution.

Kasule JCC made a finding that the Police Directive violated Articles 29 (1) (d) (e) and 2 (a) were violated. I note that these are human rights guaranteed to individuals. The learned Justice however held that since the overwhelming number of MPs carried out consultations with their people without interruption, the impugned Act was not enacted as a result of violence exerted upon MPs.

Owiny-Dollo, DCJ held that the interference by the Police with the consultations of some MPs, targeted at opposition MPs was unwarranted and most unfortunate. In regard to the intervention of the UPDF in Parliament, the Honourable DCJ also found that it was a gross error of judgment on the part of the Army Chief to deploy the UPDF in a situation that did not, by any stretch of classification, warrant military intervention. The DCJ linked this to what he referred to as our sad

and painful history of military intervention in matters that are purely civilian. He however concluded that the ramifications of the interventions did not in any way vitiate the process in Parliament that resulted in the enactment of the impugned Act.

Musoke JCC also made a finding that the deployment of the army during the scuffle in Parliament was not justified, especially because the Sergeant at Arms did not request for their assistance. She concluded that on the 26th September, 2017, the interference of Security UPDF contravened Articles 1, 2 and 8A of the Constitution. She nevertheless held that the process leading to the enactment of the impugned Act because business went back to normal after the eviction of the "offending" members of Parliament and on the day the Bill was passed into law, the House was full to capacity.

Cheborion JCC held that the Asuman Mugenyi directive was very arbitrary and unconstitutional. It restricted freedom of association and movement of Members of Parliament without any justification and contravened Article 29 (2) of the Constitution which guarantees the freedom of every Ugandan to move freely in the country. The learned Justice however held that however, since the majority of Members of Parliament had been able to consult their constituents, he could not invalidate the impugned Act because the illegal acts had not occurred throughout the country.

So does the test apply to matters which come to court under Article 137 of the Constitution?

Is a party who has successfully proved that their Constitutionally guaranteed rights were violated expected to further prove that the effect of the violation(s) were substantial or in this particular matter that had the violations not occurred, the Act of Parliament would have been different or would never have been passed?

The case for the appellants is that the process which brought the impugned Act into existence was tainted with Constitutional contraventions and violations of Parliamentary procedure. The essence of their argument is that a right granted to an individual by the Constitution can only be limited in line with Article 43. Once a complainant has adduced evidence and successfully proved that a right guaranteed by the Constitution has been interfered with, the complainant will have done their part. The evidential burden the shifts to the respondent, in this case the Attorney General, to bring the actor's conduct within the purview of Article 43 which provides as follows:

43. General limitation on fundamental and other human rights and freedoms.

In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

Public interest under this Article shall not permit— political persecution; detention without trial; any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in

this Constitution.

In the matter before us, the AG did not adduce any evidence to prove that the curtailment of rights in question was justified so as to protect the rights and freedoms of others and/or for purposes of preserving public interest. The AG did not prove that the nature of curtailment of the rights involved was such as is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution. It is for this reason that the court made findings (declarations) that rights had been violated.

The question which should have been asked by the court is: what is the effect of the proven irregularities and or contraventions of the Constitution on the validity of the impugned Act? The question should not have been: did the contravention of the law have substantial effect on the process of enacting the Law?

The substantial effect test cannot be applied to a violation of a Constitutional right - the right of an individual or even of a community. We should even take cue from the fact that even under Section 59 (6) (a) of the Presidential Election Act from where the substantiality test is derived, the test is not extended to violations of Constitutional imperatives. It is limited to violations of an Act of Parliament. And yet the Constitutional Court applied the test to violations of Article 29 and even to violations of Articles which are part of the Basic Structure of the Constitution – 1, 2 and 8A!

Arising from the above, I respectfully hold that the Justices of the Constitutional Court erred when they applied the substantiality test in determining the petition.

Issue 5

Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the

Constitution (Amendment) Act, 2018 on the removal of age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution.

Appellants' submissions

1st appellant (Mabirizi)

Mr. Mbabrizi submitted that removal of the age limit by Section 3 of the Constitutional (Amendment) Act amounted to 'Constitutional replacement' which has no place in a Constitutional democracy. In support of this argument, Mabirizi relied on Carlos Bernal's Article[1096] in which he laid down the seven-tiered test as the standard for determining Constitutional Replacement.

Mabirizi submitted that, in the instant case, the essential element of the Constitution which is at

[1096] Unconstitutional Constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the Constitutional replacement doctrine, Published in International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, Pages 339–357.

stake is the age qualification attached to the office of the President.

That the element of qualifications of the President is essential because of the immense powers and duties vested in that office. Those powers were balanced in such a way that the President is neither too young nor too old. Removal of such a balance may have grave consequences on exercise of such powers. That the age qualification can only be amended in a compliant way so as not to destroy the entire Constitutional system.

Mabirizi also argued that the powers to remove the age limit only rests in a constituent assembly not Parliament. In order to curb the Parliament's actions, Mabirizi contends that the courts have a role to play. He relied on Carlos Barnel's Article

(supra) in which he stated that, "*the Constitutional Court began to exercise innovative forms of control over the government with the purpose of compensating for the predominance of the president and the deficit of political control by the Congress*. *Judicial review of the content of Constitutional amendments by means of the Constitutional replacement doctrine is one of these new forms of control."*

That it is therefore diversionary for court to base its decision on the fact that the Constitutional Commission and the Constituent Assembly did not entrench age limitations. That the majority of the learned Justices of the Constitutional Court justified their decision not to nullify Section 3 on the reasoning that the framers of the Constitution never treated the provisions of Article 102 on age limit for the office of President as a fundamental feature of the Constitution. In this, they underestimate the decision of the framers to include it in the Constitution.

Mabirizi contented that, upholding of Section 3 of the impugned Act will disharmonize the Constitution so as to render among others Articles 51(3), 144(1)(a), (b), 146(2)(a) and 163(11) unconstitutional. Furthermore, that it will open a flood-gate of private members' Bills to amend those Articles which have age restrictions.

2nd appellants' (MPs) submissions

Counsel for the 2nd appellants contended that the Constitutional Court ought to have found that by amending Article 102 (b) of the Constitution, Parliament was usurping the sovereignty of the people and thereby amended Article 1 of the Constitution by infection. Counsel further contended that Parliament also amended Article 21 (3) of the Constitution by creating 'age' as another form of discrimination. That the Constitutional Court however erroneously held that accepting this proposition amounts to over stretching the application of the amendment by infection principle which would in the end render the principle superfluous.

That the purpose of the impugned Act was to pave way for the indefinite eligibility of the sitting. That this Court should execute its noble duty of striking down such nefarious legal instrument

which has got far reaching implications in the political trajectory of the nation.

Furthermore, that the provisions which removed the age limits from the Constitution amended Articles 1, 8A and 21 of the Constitution by infection and hence the requirements under Article 263 (1) of the Constitution were mandatory.

3rd appellant's (ULS) submissions.

Counsel for the 3rd appellant first and foremost faulted the Constitutional Court for making a finding that the 3rd Appellant did not challenge the removal of age restrictions. That under paragraph 1(d) of their petition, Section 3 of the impugned Act was challenged.

Counsel argued that as a result, the Constitutional Court limited its answer to Articles 1 and 21 of the Constitution. Articles 8A and 38 which were raised by the 3rd appellant in addition to Article 1 were not considered. That had the court properly considered the appellant's pleadings, it would have come to a different conclusion.

Counsel stated that when Parliament chose to consult citizens on removal of age restrictions for presidency it brought itself under Articles 1, 8A and 38 of the Constitution. Parliament decided the people must be the arbiter. According to counsel, the process must therefore produce a result of what the people want.

Counsel referred to the affidavit of Professor Ssempebwa in which he extensively alluded to the mandate of the Constitutional Review Commission. That the Commission is specifically mandated to examine sovereignty of the people, democracy and good governance and how to ensure that the country is governed in accordance with the will of the people. In their affidavits supporting the appeal, Professor Ssempebwa, Professor Latigo and Francis Gimara averred that there was abuse of human rights, violence, harassment, humiliation, assault, detention and these human rights violations negated a conducive atmosphere to genuinely seek the views of the people.

AG's reply

The Attorney General submitted that the Justices of the Constitutional Court rightly held that amendment of Articles 102(b) and 183(2) (b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Parliament is enjoined to make laws under Articles 79 and 259 of the Constitution. This power is exercised through Bills passed by Parliament and assented to by the President.

The Attorney General submitted that the Justices of the Constitutional Court unanimously held that the power to make laws extends to the amendment of Articles 102 and 183 through established

Constitutional procedures.

In contrast to the appellants' arguments, the effect of Section 3 is to open up space and widen the scope of persons who are eligible to stand for election for the office of the President. That in fact the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

In response to Mabirizi's arguments that Section 3 of the impugned Act amounted to Constitutional replacement, the Attorney General agreed with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). The Attorney General cited Article 259 of the Constitution which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. He added that the appellant's argument that upholding Section 3 of the impugned Act will disharmonize Articles 1(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. According to the Attorney General, the Section is not against the spirit of the Constitution. However, that upholding the appellant's argument would instead curtail the right of Members of Parliament to bring Bills in accordance with Article 94 (4)(b) of the Constitution.

Furthermore, the Attorney General argued that the amendment of Article 102 (b) was not a Constitution making process that required a Constituent Assembly. It was an amendment process which the peoples' representatives (MPs) are empowered to do in accordance with Chapter Eighteen of the Constitution.

Consideration by Court

The contentions of the appellants regarding the link between Article 102 (b) on the one hand and Articles 1 and 8A on the other have been discussed under Issue 1 and need not be repeated here.

Article 38 raised by the 3rd Appellants which deals with the civic rights of citizens and entitles every Ugandan citizen to participate peacefully in the affairs of government has been handled under issue 3 which dealt with of the unlawful Police Directive issued by ASP Asumani Mugenyi.

The value of the philosophy of Constitutional replacement was also discussed under Issue 1.

What remains to be resolved under issue 5 therefore is the contention by the appellants that the amendment of Article 102 (b) on the removal of the age restriction which resulted into allowing persons aged above 75 years and below thirty five years to stand for election as president amended Article 21 (3) of the Constitution by infection.

Article 21(3) lists factors on the basis of which an individual cannot be discriminated. These factors are: sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing,

political opinion and disability.

The argument of the appellants as I understand it is that by removing the age restriction for purposes of eligibility to stand for Presidency or District Chairperson, Parliament added age to the list of factors mentioned in Article 21 (3).

I find the argument incomprehensible. It is not only in the area of elective office that the law in Uganda treats people differently based on age. Ugandan law prohibits an individual who has not attained the age of 18 years to participate as a voter in Presidential Elections (Article 103 of the Constitution); the law prohibits an individual from entering marriage before attaining the age of 18 years (Article 31 (1); a person serving as a Chief Justice must vacate office on attaining the age of 70 years (Article 144 (1) (a)) and Section 12 of the Pensions Act provides for the compulsory retirement of a Public Officer on attaining the age of 60 years. The list is endless.

It cannot be said that the removal of age restrictions for purposes of standing for Presidency has the ripple effect of removing age as a parameter or factor for determining rights legal capacity in all areas of the law. I am in agreement with the Constitutional Court that the appellants have misconstrued and over stretched the application of the amendment by infection principle.

Issue 6: Vacation of the office of President.

Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years. I take note of the fact that although the issues before Court were jointly framed by all parties, it is only the first appellant (Mr. Mabirizi) who addressed this issue.

Article 102 of the Constitution before its amendment provided as follows:

Qualifications of the President.

A person is not qualified for election as President unless that person is—

(a)… not less than thirty-five years and not more thanseventy-five years of age; and a person qualified to be a member of Parliament. (My Emphasis)

The Constitutional Court held that the petitioners' arguments on this point were misconceived. Owiny Dollo, DCJ in particular held that the relevant Constitutional provision to answer the issue is Article 105(3) which provides for the circumstances when the office of the President falls vacant as follows: Tenure of office of a President.

…The office of President shall become vacant—

(a)on the expiration of the period specified in this Article; or

(b) if the incumbent dies or resigns or ceases to hold office under Article 107 of this Constitution.

Article 107 provides for the circumstances under which the President may be removed including: abuse of office, misconduct and mental incapacity.

Owiny Dollo, DCJ interpreted the above Constitutional provisions to mean that, "*a President who attains the age of 75 years, while serving a 5 year term would still continue in office until the expiration of the term. We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!"*

Similarly, Justice Kakuru, JCC (dissenting) held that, *the words used in Articles 83(1) (b) and 102(b) are plain and ought to be given their natural and ordinary meaning. The age limit of the President applies only at the time of election and not otherwise. That had the framers of the Constitution intended that the President and Members of Parliament have same qualifications, they would have stated so but they did not. The factors that disqualify Members of Parliament are not applicable to the President. This is simple and clear. Therefore, I find that, this ground is misconceived and devoid of any merit whatsoever. The issue is resolved in the negative.*

In summary, the learned Justices of the Constitutional Court unanimously held that the age limit qualification of 75 years for the office of the President in Article 102 is a threshold only at the point of election.

Consideration by Court

I am in agreement with the unanimous decision of the Constitutional Court that the age limit of the President applies only at the time of election. Where words of the Constitution are clear and unambiguous, they ought to be given their primary, plain, ordinary and natural meaning. It is the term of office provided for in Article 105 (supra) that marks the time when a person holding the office of President should vacate that office. The 1st appellant's arguments are therefore not sustainable.

Issue 6 is answered in the negative.

Issue 7:

Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.

If so, what is the effect of the procedural irregularities on the decision of Court?

Appellants' submissions

1st appellant

Mabirizi (1st appellant) argued that the Constitutional Court committed the following procedural irregularities:

(i) Violation of the right to a fair hearing by:

(a) Failing to determine the petition expeditiously and violating the renowned principle that: *"justice delayed is justice denied.* The appellant argued that evidence of this was the fact that the petition which was filed in the Constitutional Court on December 2017 was heard in April 2018. He submitted that the hearing was in a relaxed manner because the court would break for weekends starting from Friday up to Tuesday.

In addition, Mabirizi argued that the Court's failure to give its judgment within 60 days from the hearing date of 19th April 2018 was against Rule 33(2) of The Court of Appeal Rules which provides that, "*Judgment or an order may be given at the close of the hearing of an appeal or application or reserved for delivery on some future day which may be appointed at the hearing or subsequently notified to the parties and which shall, in any case, be without delay."*

(b) Evicting the appellant from court seats and relegating him to the dock infringed on his right to a fair hearing. He cited the Canadian Supreme court decision of Andrews vs. Law Society of British Columbia[1097], where Mcintyre J stated that discrimination arises where a Rule or standard is adopted which has a discriminatory effect upon a prohibited ground because of some special characteristic.

2nd appellants (MPs)

Counsel for the 2nd appellants submitted that the right to a fair hearing was compromised by the Constitutional Court in a number of ways.

First, that the learned Justices of the Constitutional Court declined to invoke their powers under the law to summon key government officials and individuals who played a pivotal role in the process leading to the enactment of the impugned Act to appear and testify in the matter. In particular, the Constitutional Court declined to summon the Speaker of Parliament, the Rt. Hon. Kadaga Rebecca, without assigning any reason.

In the appellant's view, there were other witnesses who were competent to testify before the Constitutional Court on the enactment process of the Act but the court failed to summon them. These were:

a) The Deputy speaker who would testify on his role during the enactment of the impugned Act, the discrepancies in the certificate of compliance, procedural irregularities, arbitrary suspension of the honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

The Minister of Finance to testify on the contradictory Certificates of Financial Implication which were issued from his Ministry in regard to the impugned Act.

The Hon. Magezi Raphael who was the sponsor of the impugned Act to testify on the

[1097] [1989] 1SCR 143

conceptualisation and mischief he intended to cure by moving Parliament to enact the said Act.

The President who assented to the Bill which was not accompanied with a valid certificate of compliance. The Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee who processed the Bill at Committee stage.

Counsel contended that the court should have exercised its powers *under*Rule 12 (3) of the Constitutional Court (Petitions and References) Rules and summoned the above witnesses. The Rule provides as follows: The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.

The second procedural irregularity was that the Constitutional Court restricted the appellants and their counsel on what to ask the witnesses during cross-examination. That the Court limited the cross-examination to the averments that were made in the affidavits of the respective witnesses. The 2nd appellants' counsel contended that this contravened Section 137 (2) of the Evidence Act which is to the effect that cross-examination of a witness need not be confined to the facts to which the witness testified about during examination –in- chief.

The third alleged procedural irregularity is that the Constitutional Court adopted a materially defective mode for presenting submissions during the hearing of the petition; for instance:

a) The learned Justices of the Constitutional Court erroneously directed the appellants' counsel to make submissions before cross examining the relevant witnesses.

b) The learned Justices of the Constitutional Court erroneously denied the appellants' counsel a right to a rejoinder after the representative of the Attorney General had made their submissions in reply.

The 2nd Appellants' counsel further contended that the learned Justices of the Constitutional Court erred in law and fact when they injudiciously exercised their discretion in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which is manifestly meagre considering the nature and significance of the matter.

That all the above irregularities contravened the natural principle of fair hearing which is a non-derogable right under Article 44 of the Constitution. That this right has received judicial consideration in a number of authorities for example: Bakaluba Peter Mukasa vs. Nambooze Bakireke[1098]where Katureebe JSC (as he then was) observed that:

"Fair trial, … is one of the fundamental rights guaranteed by the Constitution."

Issue 7 (b)

[1098] Supreme Court Election Petition Appeal No. 04 of 2009.

Both the 1st and 2nd appellants contended that the above procedural irregularities led to a miscarriage of Justice. Furthermore, the 2nd appellant contended that the irregularities limited the Constitutional Court's scope of investigation and thereby failed in its duty vested under Article 137 (1) of theConstitution. That this duty was emphasized by Kanyeihamba JSC in Ssemwogerere (supra) wherein he observed that:

"In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."

Consideration by Court

The essence of the arguments of the 1st appellant and the 2nd appellants is that the Constitutional Court abused the right to a fair hearing in various aspects and thereby came to a wrong conclusion.

In order to answer the appellants' arguments comprehensively, I will answer the issue on the right to a fair hearing under three subheadings as follows:

(i) Cross-examination and interjections by the court

The appellants' arguments seek to address the question *whether the limitations on the cross-examination of witnesses resulted into an unfair trial.*

Section 136 of the Evidence Act defines cross-examination as the examination of a witness by the adverse party.

On Monday 9th April 2018, which was the first day of the hearing, Mabirizi and the MPs' counsel - Erias Lukwago - made an oral application to the Constitutional Court seeking the leave of court so that several named witnesses could be summoned and crossexamined.

In its preliminary ruling, the court granted leave to have several witnesses appear for cross examination. The court however stated that they found no reason to have the Speaker of Parliament appear in court. Court then stated that the detailed reasons for their decision would be in their final judgment.

I have carefully studied the judgments and found that none of the learned Justices gave the detailed reasons as promised. This was an error. Court must always give reason for exercising its discretion in a particular manner. The only way that a litigant can gauge whether or not the court exercised its discretion judicially is if reasons are given.

Nevertheless, it cannot be said that the said error - failure to give reasons for the court's decision not have the Speaker testify in court- - prejudiced the appellants' right to a fair hearing. I must emphasize that it cannot be said that there was any particular evidence which could only be accessed by the appellants through the testimony of the Speaker. The procedural irregularities and

violations which occurred during the process of enacting the impugned Act could be and were in fact identified from the Hansard. I am therefore of the view that the non-appearance by the Speaker in court did not prejudice the case of the appellants.

Furthermore, the appellants argued before this Court that the Constitutional Court interjected in the cross-examination of the witnesses which limited them from asking questions to the witnesses. On the other hand, the Attorney General contended that the cross-examination should be restricted to the averments made in the affidavits.

The relevant part of the court record indicates as follows:

"Justice Owiny Dollo: So the individual summon will be served on this counsel; the one for the Attorney General will be served on the Attorney General here, the one for the other counsel will be served accordingly. So on Tuesday we expect these witnesses, we finish with them and continue.

Mr. Rukutana (Attorney General):

Much obliged my lords. We have received your ruling with respect and we shall comply, however we are seeking guidance, isn't it prudent for the petitioners who have applied to summon these witnesses to indicate to us the areas on which they intend to examine each and every witness so that we can prepare them?

Mr. Lukwago:

My lords we take it that these are competent witnesses, by the time they took oath they knew what they were testifying on. The only assurance we can give we shall not thereof what they have presented before court [sic]. *So our cross examination will be restricted to their averments but of course one question leads to another. We shall restrict ourselves to what is relevant to this case.*

Justice Owiny Dollo:

No that is wrong. You will restrict yourself to what has been deponed to in the respective affidavit.

Mr. Mabirizi:

My lords my concern is there are concealments, he may have made an affidavit but concealed some pertinent facts. So when we are so restrictive on what they deponed you may find that we may be closing out concealments because most of them conceal what would be on the table."

In discussing this issue I will be guided by Sections 137 and 147 of the Evidence Act. Section 137 provides that, "*the examination and cross-examination must relate to relevant facts, but the crossexamination need not be confined to the facts to which the witnesstestified on his or her examination-in-chief."* (My emphasis)

It is therefore clear that the Court erred in its *"ruling" that the petitioners "will restrict yourself to what has been deponed to in the respective affidavit."*

But although the right to cross-examine a witness is part and parcel of a fair hearing, the right of a

party to cross-examine a witness is not absolute. The exercise remains in control of the trial court. Section 147 of the Evidence Act provides that the court can exercise its discretion and decide whether or not to compel a witness to answer a question. In exercising this discretion, the court shall have regard to whether the questions asked convey an imputation of truth which would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he or she testifies or whether the questions are improper such that the imputation which they convey relates to matters so remote in time that the truth or imputation would not affect the opinion of court.

I however note that the Court's restrictions were pronounced before any of the petitioners had posed any questions to any witness. So it cannot be said that the restrictions were in line with Section 147 of the Evidence Act. The Constitutional court therefore acted in error.

(ii) Denial of the right to a rejoinder

Rejoinder is the opportunity for the side that opened the case to offer limited response to evidence presented during the rebuttal by the opposing side.[1099]

The sequence of presentation of a Constitutional petition is governed by the Constitutional Court (Petitions and References) Rules. Rules 4-12 detail the order in which each party to the petition presents their arguments. This order can be summarized as follows:

First, the petitioner presents his or her case; the respondent then makes a reply. The petitioner then makes a rejoinder to the reply/submissions made by the respondent.

The 1st appellant alleges that the above sequence was not followed by the court which made him loose out on the opportunity to make a rejoinder.

The record indicates that after the Attorney General made his submissions in reply, Justice Owiny Dollo, DCJ stated as follows:

"Thank you. In view of what the AG has said as concluding remarks not submissions, would you like to say something? You will be giventhe opportunity to say by way of concluding remarks, apart from that do you have anything to say?

Mr. Ogalo: My Lords, we request your indulgence that you allow a rejoinder. My Lords, in the course of submissions by the learned Attorney General we are of the view in this side that in those arguments new matters were raised.

Justice Owiny Dollo: What is the new matter?"

The petitioners' counsel then went ahead to make rejoinders as follows:

Counsel Byamukama: *"My lords I have just a short point on issues No.1 to 4 on the seven year term that they gave themselves and on that issue the learned AG at the end of all their arguments*

[1099] https://definitions.uslegal.com/r/rejoinder, USLegal.com accessed on 4/1/2019 at 12:14p.m.

said that anyway they are entitled to make retrospective laws under Article and all I want to do in connection with that argument is provide to court an authority that might be useful on the issue of retrospective legislation. It is a House of Lords decision; Wilson & Others vs. Secretary of State for Trade. It was filed and the respondent was given a copy yesterday. My lords I am seeking validation of it.

Justice Owiny Dollo replied: *Okay"*

Counsel Lukwago then stated: "*My Lords, mine is just two matters. One arose out of the first as we were addressing the first set of issues, it was on the doctrine of basic structure. When the AG argued that it is an academic theory, it is not a legal doctrine and so on."*

Mabirizi then stated as follows*:* "*My lords I have a few, first of all I want this court to note that in the pleadings and submissions the respondent has not refuted the fact that there was colourable legislation."*

Justice Owiny Dollo:

No, that is not new.

Mr. Mabirizi: My lords, I am moving to issue 6A and B and have one point to make. I am defining the word charge. The word charge is defined by Black's Law dictionary 8th edition at page 701 under definition 7 as the price, cost or expense.

Again on issue No.13 there was a submission that that issue is moot because the act has been already assented to. My lords, I rely on the authority of Ssemwogerere vs. AG a decison of Kanyeihamba, he said that an Act of Parliament which is challenged under Article 137 remains uncertain until the appropriate court has pronounced itself upon it. Therefore, at the time my lords of you considering this, the issue is not moot because this act is still uncertain and therefore my lords you can determine it."

I find that the Constitutional Court used a wrong phrase "concluding remarks" instead of "rejoinder". However, the gist of what was thereafter submitted by the petitioners in response to the submissions of the respondent constituted a rejoinder.

I therefore find that no miscarriage of justice occurred as a result of the court's error.

(iii) Meagre award of costs to the appellants

I will resolve this sub-issue under the heading of costs.

Having answered Issue 7 (a) and (b) in the negative, I find that this issue should fail.

I S S U E 8

Remedies

All the appellants prayed that the appeal be allowed in the terms and prayers specified in their Memoranda of Appeal.

In particular, the appellants prayed that Constitution (Amendment) Act No. 1 of 2018 be annulled and that the respondent pays costs of this Appeal and in the Court below.

In the alternative but without prejudice to the foregoing, if court answers issue 7 in the affirmative, a retrial should be ordered.

Consideration by Court

I will start with the alternative prayer for a retrial which is hinged on the finding in issue 7 above. Since issue 7 has been answered in the negative, it follows that the prayer for a retrial should fail.

Costs

I will first address the issue raised by the appellants that the award of twenty million (Ushs.20, 000,000/=) given by the Constitutional Court as costs was little.

Section 27 of the Civil Procedure Act is to the effect that costs follow the event. The appellants' counsel partially succeeded in the Constitutional Court. It follows that they were entitled to an award in the form of costs. However, the amount awarded remains in the discretion of court. An appellate court can only interfere with the lower court's discretion in the award of costs if that discretion was exercised arbitrarily, based on wrong principles of law or if the award is so excessive or so low.[1100]

In this Court's recent decision of Muwanga Kivumbu vs. AG[50], it was held that, "*where costs are awarded in Public interest litigation cases, the award should be nominal."*(My emphasis)

Following from the above, I find no reason to vary the award given.

It was neither excessive nor so low.

Conclusion

1. For the reasons given above, I would allow the appeal.

2. Since this is a Public Interest Litigation matter, I would order that each party bears its own costs.

Dated at Kampala this …… day of ……..….. 2019.

……

PROF.LILLIAN TIBATEMWA-EKIRIKUBINZA JUSTICE OF THE SUPREME COURT.

[1100] Kwizera vs. Attorney General Supreme Court Constitutional Appeal N0. 1 of 2008. [50] Supreme Court Constitutional Appeal No.6 of 2011.

EXEGESIS OF THE GOSPEL ACCORDING TO PROF. EKIRIKUBINZA LIILIAN TIBATEMWA JSC

BACKGROUND

In 2017, Hon. Raphael Magyezi, a Member of the 10th Parliament of the Republic of Uganda, brought a Private Member's Bill (Constitutional Amendment Bill No. 2 of 2017). On the 27th December, 2017, Parliament passed the Bill eliminating Presidential Age Limit and extending Parliamentary Term. The Ugandan Parliament passed an amendment to the Constitution which, among other measures, aims to eliminate the requirement that candidates vying for the presidency be under 75 years of age.

The court again by a 4-1 majority upheld the larger Bill applying severally the doctrine of severance to save the repeal of the age limit even though all the justices unanimously found unconstitutional means that were used to stifle the MPs' access to their constituents through the police.

Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this Court. The Appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in the Supreme Court containing 84 grounds of appeal categorized under different parts. Issues for court's determination were framed out of the consolidated appeals.

JUSTICE PROF. LILLIAN TIBATEMWA

Central to her dissenting decision to dissent was on the procedures that were flouted in the due course of enacting the impugned Act. Justice Tibatemwa agreed with majority judges that Article 102(b) was not part of the basic structure doctrine and thus could be amended but faulted Parliament for failing to follow its own rules of procedure in passing the impugned age limit bill. Most important to her judgement, Justice Tibatemwa disagreed with the majority holding that the doctrine of severance cannot be applied to save a bill that ought not to have been assented to in the first place due to procedural impropriety.

FATAL IRREGULARITIES IN ENACTMENT OF THE LAW.

The Constitutional Court in **Oloka–Onyango and 9 Others versus Attorney General**[1101], discussed the question as to whether or not Parliament while passing legislation may ignore or waive legal requirements. It was held as follows: -

"Parliament as a law making body should set standards for compliance with the Constitutional

[1101]Constitutional Petition No. 8 of 2014(unreported)

Provisions and with its own Rules. The speaker ignored the law and proceeded with the passing of the Act. We agree with Counsel Opiyo, that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it."

Failure to scrupulously comply with provisions of the Constitution or Rules of Procedure during the enactment of legislation is fatal.

Smuggling the bill into the order paper

It was the finding of Justice Tibatemwa that the Magyezi bill was smuggled into the order paper by the Speaker of Parliament. Justice Tibatemwa noted that the provisions are consistent in linking the powers of the Speaker to determining the order of business but not anywhere does the law link her powers to determining the content of the Order Paper. The provisions limit the Speaker's powers to determining the order of Business in Parliament, the powers do not extend to determining what is to be on the Order Paper. It must have been for this reason that on both the 19th and 20th September 2017, the Deputy Speaker of Parliament assured the House that there was not going to be any ambush of the Members of Parliament concerning the Bill introduced by Magyezi, since all business was to go through the Business Committee of the House for appropriate action and consideration.

The power to determine the items to be discussed is vested in the Business Committee in consultation with the Speaker. The Speaker is the chair of the said Committee. This means that the power in question is bestowed on a Committee which the Speaker is chair of. The power bestowed upon the Committee cannot be unilaterally exercised by the Speaker, consultation is expected.

The amendment of the order paper on the floor of Parliament was in contravention to the rules of procedure of Parliament. The treatment of this irregularity as a mere irregularity by the Constitutional Court and not being fatal sets a very bad precedent for the conduct of legislation procedure in Parliament. Parliamentary Procedure should not be treated lightly when considering bills that have such a big bearing on the politics and leadership of our country. The speaker of Parliament therefore acted ultra vires by smuggling in the Magyezi bill on the order paper.

Certificate of financial implications

Article 93 of the Constitution provides that:

"Parliament shall not, unless the Bill or the motion is introduced on behalf of the Government—

(a) proceed upon a Bill, including an amendment Bill, that makes provision for any of the following the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;

(b) proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this Article." (My emphasis)

The provision bars Parliament from proceeding upon a private Member's Bill which imposes a charge by way of increment on the Consolidated Fund or Public Fund of Uganda. The Constitutional Court held that, the introduction of the Private Member's Bill that led to the enactment of the Constitution (Amendment) Act, 2018 was not inconsistent with Article 93 of the Constitution, except for the introduction of Sections 2,5,6,8 and 10 because they required a referendum which has a charge on the Consolidated Fund.

The amendments introduced by Hon. Tusiime to reinstate term limits among others had the effect of placing a charge on the Consolidated Fund contrary to Article 93. Once it is noted on the floor of the House that a Bill or an amendment to a Bill which is being introduced by a motion brought by a Private Member would have the effect of imposing a charge on the Consolidated Fund, the motion should for that reason fail. In the matter before Court therefore, Parliament should not have adopted the amendment to the Bill.

Signing of the committee report by non-members.

The report of the Parliamentary and Legal Affairs Committee was signed by non-members to the Committee. Rules 203 and 206 of the Parliamentary Rules of Procedure emphasize the prohibition that non-members of a designated Committee are not allowed to cast a vote or form part of the quorum. Therefore, a non-member's signature on the report is invalid and has no authority to form binding decisions by their 25 signatures. A properly constituted Committee Member is one who is entitled to not only participate in Committee proceedings but also cast a vote.

Justice Tibatemwa held that the signing of the Committee report by non-30 members was a material irregularity which rendered the report suspect. The Constitutional Court erred in holding that although the signing of the report by non-members was fatal, it did not invalidate it.

Tabling of documents.

The Parliamentary Rules were amended in October 2017 but the definition of tabling was left intact and could not be said to include electronic tabling. For instance, Rule 29 (1) was amended by integration of electronic interaction as a mode of communication to Members of Parliament. This was evidence that where Parliament intended to integrate electronic modes of communication into its rules and practice, the changes were specifically dealt with.

Justice Tibatemwa was in agreement with Justice Kakuru (dissenting in the Constitutional Court) that since at the time of debating the impugned Act, Parliament had adopted the 2017 Rules, but did not change the Rules to take into account "electronic laying on the table", Rule 201(2) remains in force. The tabling and laying an official document before Parliament must be physically done and the document must be placed on the Clerk's table.

S E V E R A N C E

The doctrine of Severance refers to the ability of courts to strike out a portion of 10a statute if that portion is held to be unconstitutional. A reading of Salvatori Abuki v Attorney General[1102] case states that if any provision of a statute is found by the Court to be unconstitutional, the remaining provisions of the statute are valid unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with the void provision that none can be implemented without the other.

The test used to effect severance is whether 'the good is not dependent on the bad' and whether the inconsistency can be separated from the rest of the statute. The manner in which the court would apply severance, therefore, is to determine whether, after the parts have been cut-off due to invalidity, the part remaining will still be able to give effect to the object of the statute. The test therefore has two parts – to determine:

1. first, whether it is possible to sever or cut-off the invalid provisions, and
2. second, if so, does what remains give effect to the purpose of the legislation?

What has been observed, however, is that it may not always be possible to separate the good from the bad and still give effect to the purpose of the impugned provision. Where this occurs, the court has no option but to declare the provision as a whole invalid. Severance, however, must be distinguished from notional severance. While similar to severance, it allows for the unconstitutional parts to be removed, leaving certain parts unaffected. The difference, however, is that the section is given a particular meaning, which would only apply to certain cases or in certain circumstances.

Whereas statutory severance is codified (similar to the presence of Article 2 and 274 of Uganda's Constitution), courts have created a separate doctrine of severability. This doctrine applies to procedurally unconstitutional laws and supplements the statutory delegation of authority. The doctrine was made necessary because the ability to sever portions of laws based on the substance of its provisions does "not adequately address the problems inherent in procedurally unconstitutional statutes.

Justice Tibatemwa held that the critical principle of Prof. Oloka Onyango and 9 others v Attorney General[1103] is therefore that an Act of Parliament passed without strict compliance with Parliamentary Rules of Procedure is a nullity. She also cited the pronouncements in Ssempebwa vs AG[1104]. The National Resistance Council purported to pass an Act of parliament but did not strictly comply with the 1967 Constitution. It was held that since the Constitution sets out not only who

[1102](Constitutional Appeal-1998/1)
[1103]Constitutional Petition No. 8 of 2014(unreported)
[1104]Constitutional Case No. 1 of 198

exercises legislative power but also how such powers are to be exercised valid legislation can only be made in accordance with the established legislative framework.

Justice Tibatemwa denied the application for severance to the Certificate of Compliance which was presented to the President by the Speaker. Having found that the President assented to a Bill which was a nullity, she held that a court cannot sever a document which has no legal standing.

Justice Tibatemwa's refusal to apply the doctrine of severance was very legally informed. The various legislative procedures that were flouted by the Parliament rendered the bill a nullity ab initio.

VIOLENCE AND ITS EFFECT ON PUBLIC PARTICIPATION

Justice Tibatemwa noted that enactment of an Act of Parliament is not an event. It is a process. In the matter before this Court, the conduct complained of violated the rights of individuals who were engaged in activities directly connected to and/or necessary for the enactment of the impugned Act of Parliament. It was the Speaker who specifically sent out legislators to their constituents for the specific purpose of collecting the views of citizens on proposals which were before parliament. Members of Parliament accessed Public Funds for the purpose. The consultations were no doubt directly linked to the enactment process. The Mugenyi Directive specifically gave orders aimed at interfering with this very process. Justice Tibatemwa found it inconceivable that the court could de-delink the proven violations from the legislative process which resulted into the impugned Act. Justice Tibatemwa was of the view that a court which found that the sovereignty of the people and the supremacy of the Constitution had been violated in that process, would go on to say that "nevertheless" such violations did not vitiate the enactment 5process.

Regarding the Mugenyi Directive it was the unanimous finding of the Constitutional Court that it resulted into disruption of consultations of some Members of Parliament. That the work of some MPS was interfered with thus preventing them from seeking the participation of Ugandans whom they represent in Parliament, on the proposed Bill. It is clear that the Constitutional Court concentrated on the rights of the members of Parliament and said little about the fact that scores of citizens were denied the right to actively participate in issues of governance since they were denied the opportunity to express their views on the proposed amendments. The court emphasized that it had not been proved that that the disruption of meetings was widespread throughout the country. It was for this reason that court declined to make a finding that the unlawful directive rendered the public participation in the Bill nugatory and the entire Bill a nullity. Justice Tibatemwa differed from the reasoning of the Constitutional court.

The rationale was that the right of an individual cannot be rendered inconsequential just because

other citizens were enabled to enjoy their rights. What occurred is contrary to Objective II (i)of the National Objective and Directive Principles of State Policy which states as follows: The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance. The right to participate in the affairs of government no doubt accrues to each and every citizen and its violation cannot on the basis of numbers, be deemed "inconsequential".

APPLICABILITY OF SUBSTANTIALITY TEST IN CONSTITUTIONAL CASES

The substantiality test has been deployed by the Supreme Court in declining to annul election petitions. However, this has been in instances of violating the Presidential Elections Act and not the Constitution. Justice Tibatemwa emphasized a differentiation between contravening the Constitution on the one hand and violating provisions of an Act of Parliament on the other hand. The wording of Section 59 (6) (a) is silent in regard to non-compliance with provisions of the Constitution and only refers to non-compliance with the provisions of the Presidential Elections Act.

The AG did not adduce any evidence to prove that the curtailment of rights in question was justified so as to protect the rights and freedoms of others and/or for purposes of preserving public interest. The AG did not prove that the nature of curtailment of the rights involved was such as is acceptable and demonstrably justifiable in a free and democratic society AS REQUIRED UNDER Article 43 of the Constitution, or what is provided in this Constitution.

It is very clear that even in presidential elections where the substantial effect test is applicable, the test is not extended to violations of Constitutional imperatives. It is limited to violations of an Act of Parliament. The substantial effect test cannot be applied to a violation of a Constitutional right the right of an individual or even of a community.

CONCLUSION

The majority seemed to give leeway for the procedural impropriety that was carried on by Parliament. Secondly, whereas they strongly condemned the violence that was visited on legislators and the citizens of Uganda, they failed to appreciate the qualitative impact that had in vitiating the outcome of the voting on the bill. These were concepts that were well captured by Justice Tibatemwa in her well-reasoned judgement.

Most importantly, Justice Tibatemwa discussed the doctrine of severance in its entirety, differentiating its origins, importance, applicability and non-applicability.

GOSPEL ACCORDING TO MWANGUSYA JSC, VERBATIM

These three appeals were filed separately in this Court. During prehearing, they were consolidated with the consent of the parties since they arose from the same Judgment of the Constitutional Court in consolidated Constitutional Petitions Nos. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018.

In the above Constitutional Petitions, the appellants had challenged the constitutionality of the provisions of the Constitution (Amendment) Act, No. 1 of 2018 (hereinafter referred to as the impugned Act) and the process of its enactment into law. The appellants argued that because the process of enacting the impugned Act and the provisions therein were unconstitutional, the impugned Act should be nullified.

The Constitutional Court found that some of the provisions of the impugned Act were indeed unconstitutional, as I shall highlight later, and accordingly struck them out. The Constitutional Court however found that some of the provisions of the impugned Act were constitutional. Applying the principle of severance, the Constitutional Court retained those provisions it found constitutional and on that basis declined to grant the main relief sought by the appellants which was to nullify the whole impugned Act. The Constitutional Court also found although that there were some procedural irregularities in the course of passing the impugned Act, the irregularities were not substantive enough to nullify the entire Act.

Before considering the submissions and merits of this appeal, it is necessary to provide a brief background to this appeal. The appellants lodged various petitions in the Constitutional Court challenging the constitutionality of the impugned Act. The major contention of each appellant in their respective Petition was that the impugned Act was unconstitutional both in regard to the process of enacting it and to the provisions themselves.

The Attorney General duly filed responses to the Petitions. His response was to the effect that the impugned Act was enacted by Parliament in accordance with the provisions of the Constitution that provide for its amendment and the provisions of the impugned Act were constitutional.

The parties agreed upon fourteen issues for determination by the Constitutional Court. These where:

Whether Sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from five to seven years is inconsistent with and/or in contravention of Articles 1, 8A, 61(2)(3), 77(3)(4), 79(1), 96, 105(1), 260(1), 233(b) and 289 of the Constitution.

And if so, whether applying the said Act retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 5 *77(3)(4), 79(1), 96 and 233(2)(b) of the Constitution.*

Whether Sections 6 and 10 of the Act extending the current life of local government councils from five to seven years is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2) (a) of the Constitution.

4. If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.

Whether the alleged violence/scuffle inside and outside

Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1,2,3 (2) and 8A of the Constitution.

Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/or in contravention of the Articles of the Constitution as hereunder:

Whether the introduction of the private member's Bill that led 20 *to the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.*

Whether the passing of Sections 2,5,6,8 and 10 of the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members of Parliament in the Parliamentary Chambers, arresting and allegedly detaining the said members, is inconsistent with and/or in contravention of Articles 24, 97, 30 *208(2) and 211(3) of the Constitution.*

Whether the consultations carried out were marred with restrictions and violence which was inconsistent with and/or in contravention of Articles 29(1)(a)(d)(e) and 29(2)(a) of the Constitution.

Whether the alleged failure to consult on Sections 2,5,6,8 and 10 is inconsistent with and/or in contravention of Articles 1 and 8A of the Constitution.

Whether the alleged failure to conduct a referendum before 5 *assenting to the Bill containing Section 2,5,6,8 and 10 of the Act was inconsistent with and in contravention of Articles 1,91(1), 259(2), 260 and 263(2) (b) of the Constitution.*

Whether the Act was against the spirit and structure of the 1995 Constitution.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90(2), 90(3)(c) and 94(1) of the Constitution; and in particular:

i) Whether the actions of parliamentary staff preventing some members of the public from accessing the parliamentary chambers during the presentation of the Constitutional amendment Bill No. 2 of 2017 was inconsistent with and/or in contravention of the provisions of Articles 1, 8A, 79, 208(2), 20 *209, 211(3), and 212 of the Constitution.*

Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief Whip, and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 25 *74, 75, 79, 82A, and 108A of the Constitution.*

Whether the alleged actions of the Speaker of Parliament in permitting the ruling party members of Parliament to sit on the opposition side of Parliament was inconsistent with

Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, 83(1)(g), 30 *83(3) and 108A of the Constitution.*

Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members who had become Members of the Committee after the public hearings on Constitutional Amendment Bill No. 2 of 2017 had been held and completed, to sign the Report of the said Committee, was in contravention of Articles 44(c), 90(1) and 90(2) of the Constitution.

v) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee on 18th December, 2017 to submit to Parliament the said

Committee's Report in the absence of the Leader of Opposition, Opposition Chief whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A and 108A of the Constitution.

vi) Whether the actions of the Speaker in suspending the 6 (six) members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

vii) Whether the action of Parliament in:

(a) Waiving the requirement of a minimum of three sittings before the tabling of the report which was also not seconded;

Of closing the debate on the Constitutional Amendment Bill No. 2 of 2017 before every willing Member of Parliament had been afforded an opportunity to debate the said Bill;

Failing to close all the doors leading to the Parliamentary Chamber where Members of Parliament carried on the debate of the Bill, are in contravention of Articles 1, 8A, 44(c), 79, 94 and 263 of the Constitution.

8. Whether the passage of the Bill into an Act without Parliament first having observed 14 days of Parliament sitting between the 2nd and 3rd reading was inconsistent with and/or in contravention of Articles 262 and 263(1) of the Constitution.

Whether the Presidential assent to the Bill allegedly in absence of a certificate of compliance from the Speaker and a certificate of the Electoral Commission that the amendment was approved at a referendum, was inconsistent with and in contravention of Article 263(2)(a) and (b) of the Constitution.

Whether Section 5 of the Act, which re-introduces term limits and entrenches them as being subject to a referendum is inconsistent with and/or in contravention of Article 260(2)(a) of 35 *the Constitution.*

Whether Section 9 of the Act, which seeks to harmonise the seven year term of Parliament with the presidential term is inconsistent with and/or in contravention of Articles 105(1) and 260(2) of the Constitution.

12. Whether Sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/or in contravention of Articles 21(3) and 21(5) of the Constitution.

Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution.

What remedies are available to the parties?

On 26th July 2018, the Constitutional Court partially allowed the consolidated Petitions and declared as follows:

1. By unanimous decision, that sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government

Councils by two years, and for the reinstatement of the Presidential term–limits unconstitutional for contravening provisions of the Constitution.

2. That accordingly, sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, be struck out of the Act.

3. By majority decision that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which remove age limits for the President, and Chairperson Local Council V, to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in 30 *Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni, have, each, been passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.*

The Constitutional Court awarded professional fees of Ug. Shs. 20,000,000/= (Twenty million only) for each Petition (and not Petitioner).

5 The Court however noted that this award did not apply to Petition No. 3 of 2018 since the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person.

The Court further awarded two–thirds disbursements to all the Petitioners; to be taxed by the Taxing Master.

10 Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this

Court. The appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in this Court containing 84 grounds of appeal categorized under different parts. These grounds were:

PART A: GROUNDS RELATING TO DEROGATION OF THE RIGHT TO FAIR AND SPEEDY HEARING BEFORE AN IMPARTIAL COURT

1. All the learned Justices of the Constitutional Court erred in law and fact when they failed to hear and determine the Constitutional petition expeditiously.

2. All the learned Justices of the Constitutional Court erred in law and fact when they evicted the petitioner from court seats occupied by representatives of other petitioners, putting him in the dock throughout the hearing and decision of the petition.

All the learned Justices of the Constitutional Court erred in law and fact when they caused a miscarriage of justice by not giving the petitioner ample time to present his case and extremely and unnecessarily interfered with his submissions.

All the learned Justices of the Constitutional Court erred in law and fact when they derogated the petitioner's right to fair hearing by preventing the petitioner from substantially responding to the respondent's submissions by way of rejoinder.

PART B: GROUNDS RELATING TO OMISSIONS AND FAILING IN THE COURT'S DUTY IN DETERMINATION OF THE DISPUTE.

5. All the learned Justices of the Constitutional Court erred in law and fact when they did not give reasons for their decision not to summon the speaker of Parliament.

6. All the learned Justices of the Constitutional Court erred in law and fact when they did not at any one point mention the existence of or even rely on the petitioner's two supplementary affidavits in support of the petition, rejoinder to the answer to the petition and the supporting affidavit thereto as well as affidavits in rejoinder to affidavits of Jane Kibirige, Keith Muhakanizi and Gen. David Muhoozi, which were on court record.

7. The majority Justices of the Constitutional Court erred in law and fact when they did not determine the legality of the substantial contents in the affidavit of Gen. David Muhoozi, the chief of Defence forces, which were put in issue as hearsay.

8. The majority Justices of the Constitutional Court erred in law and fact when they did not determine the legality of the substantial contents in the affidavit of Keith Muhakanizi, the Secretary to the Treasury, which were put in issue as hearsay.

9. All the learned Justices of the Constitutional Court erred in law and fact when they did not make a clear and specific determination of Issue 6(a) and all submissions made in that regard relating to restrictions on private members' bills imposed by Article 93 of the Constitution.

10. All the learned Justices of the Constitutional Court erred in law and fact when they did not

make a finding on the principle of Constitutional Replacement as ably submitted before them by the Petitioner.

11. All the learned Justices of the Constitutional Court erred in law and fact when they did not determine the point that the Speaker was stopped from presiding over actions and presenting them as lawful which she had earlier found and ruled to be unlawful.

All the learned Justices of the Constitutional Court erred in law and fact when they did not declare unconstitutional Section 1(b) of the impugned Act allowing the Electoral Commission to hold a presidential election on a day different from that of a parliamentary election.

All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on the constitutionality of the presence of armed forces outside parliament and in the entire country.

14. All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on constitutionality of detaining and arresting of Members of parliament from parliamentary chambers.

All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on constitutionality and legality of the action of ejection/eviction of Members of parliament purportedly on orders of the Speaker when the Speaker was out of her chair.

All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on the validity of the Certificate of compliance by the Speaker of parliament which was in issue.

17. All the learned Justices of the Constitutional Court erred in law and fact when they resolved most of the issues without referring to the evidence and submissions of the petitioner.

All the learned Justices of the Constitutional Court erred in law and fact when they did not consider the variety of authorities from within and outside the jurisdiction which were referred to them, supplied and summarized to them by the petitioner.

The learned majority Justices of the Constitutional Court erred in law and fact when they failed to properly evaluate the pleadings, evidence and submissions hence reaching wrong conclusions.

PART C: GROUNDS RELATING TO CONTRADICTIONS AND MISAPPLICATION OF LEGAL PRINCIPLES AND FACTS.

The majority Justices of the Constitutional Court erred in law and fact when they highly contradicted themselves on legal principles and facts of the case and hence reached wrong conclusions not connected to the stated principles and facts on record.

The majority Justices of the Constitutional Court erred in law and fact when they applied statutory substantial effect/quantitative principles applicable to election petitions which do not apply to

principles of determination of validity of a Constitution Amendment Act of parliament.

22. The majority Justices of the Constitutional Court erred in law and fact when they held that the location of an entrenchment provision in the constitution does not matter.

The majority Justices of the Constitutional Court erred in law and fact when they upheld part of the Act in total defiance of the binding Supreme Court decision(s) that a law is null and void upon a finding that the procedure of enacting and assenting to it was incurably defective and flouted.

The majority Justices of the Constitutional Court erred in law and fact when they upheld part of the Act in total departure from Constitutional Court decision(s) to the effect that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it.

PART D: GROUNDS RELATING TO VIOLATION AND MISAPPLICATION OF EVIDENCE AND ITS PRINCIPLES.

25. All the learned Justices of the Constitutional Court erred in law and fact when they suggested answers to Gen. David Muhoozi, The Chief of Defence Forces, a witness who was under cross-examination on oath, prevented him from answering questions and with threats, ordered the petitioner not to ask any further questions.

26. All the learned Justices of the Constitutional Court erred in law and fact when they over-protected Mr. Keith Muhakanizi, The Secretary to The Treasury, a witness under cross-examination and prevented him from answering questions put to him as wells as preventing the petitioner from asking pertinent questions.

The majority Justices of the Constitutional Court erred in fact when they held there was no other evidence to prove that the petitioner was denied access to parliament's gallery.

The majority Justices of the Constitutional Court erred in law when they held that there was need for corroboration of the petitioner's evidence of being denied access to the gallery of parliament.

The majority Justices of the Constitutional Court erred in fact in holding that there was no evidence that the speaker allowed members to cross from one side of the floor to another, in absence of a video.

The majority Justices of the Constitutional Court erred in fact in holding that the motion by Hon. Mwesigwa Rukutana, to suspend the rules of Procedure requiring skipping of at least 3 sitting days after tabling of the Committee Report was at Parliament committee stage and not in a normal plenary sitting.

31. The majority Justices of the Constitutional Court erred in fact in holding that members of parliament obtained a report of the Committee three days prior to 18th December 2017.

32. The majority Justices of the Constitutional Court erred in fact in holding that enough members

and all those who wanted to debate had debated the Bill before voting on the second reading.

PART E: GROUNDS RELATING TO THE CONCEPTUALIZATION AND PROCESSING OF THE ACT BY WAY OF A PRIVATE MEMBER'S BILL.

33. Without prejudice to the above, all the learned Justices of the Constitutional Court erred in law and fact in holding that the Motion to introduce the private members Bill, the bill itself and the entire process did not contravene Article 93 of The Constitution.

The majority Justices of the Constitutional Court erred in law and fact in holding that the initial motion and Bill by Hon. Rapheal Magyezi did not make provision for and/or had effect of a charge on the consolidated fund.

The majority Justices of the Constitutional Court erred in law and fact in holding that there was a requirement for a Certificate of Financial implications instead of government presenting the impugned Bill itself.

The majority Justices of the Constitutional Court erred in law in relying on the provisions of Section 76 of The Public Finance Management Act, 2015, to deviate from the clear provisions of Article 93 of the Constitution.

10 *PART F: GROUNDS RELATING TO FAILURE OF PUBLIC*

PARTICIPATION IN PROCESSING OF THE ACT.

37. The majority Justices of the Constitutional Court erred in law and fact in upholding prevention of the petitioner from attending parliamentary gallery during the proceedings to amend the Constitution.

38. The majority Justices of the Constitutional Court erred in law and fact in holding that preventing members of parliament from debating on the Bill was not fatal in the constitutional amendment process.

39. The majority Justices of the Constitutional Court erred in law and fact in making a finding that in absence of regulations for public participation, parliament was not bound to carry out public participation and/or that what it did was sufficient.

40. The majority Justices of the Constitutional Court erred in law and fact when they, after finding that the constitution prohibits governing people against their will, did not nullify the entire Act to which people were not consulted and which was processed in a tense, chaotic and military manner.

PART G: GROUNDS RELATING TO PARTICIPATION OF ARMED FORCES, VIOLENCE AND RESTRICTIONS ON FUNDAMENTAL HUMAN RIGHTS IN PROCESSING THE ACT.

41. All the learned Justices of the Constitutional Court erred in law and fact when they condoned violation of non derogable rights against torture, inhuman and degrading treatment and validated the resultant outcome which was tainted.

All the learned Justices of the Constitutional Court erred in law and fact in holding that since the members of parliament called violence for themselves, the torture, inhuman degrading treatment against them cannot be held to be unconstitutional and that the resultant Act cannot be invalidated on ground of violence.

The majority Justices of the Constitutional Court erred in law and fact in failing to invalidate the entire impugned Act on the basis of its being processed amidst violence inside and outside of parliament.

The majority Justices of the Constitutional Court erred in law and fact in refusing to invalidate the entire law on the basis of a police circular addressed to and complied with by Uganda Police Force commanders in Uganda.

45. The majority Justices of the Constitutional Court erred in law and fact when they failed to declare the entire impugned Act unconstitutional after making a finding that the restrictions on fundamental rights during the process were not demonstrably justifiable in a free and democratic society.

46. The majority Justices of the Constitutional Court erred in law and fact when they failed to nullify the entire Act after making a finding that the presence of Uganda Peoples Defence Forces in parliament was not called for.

The majority Justices of the Constitutional Court erred in law and fact in failing to nullify the entire Act after making a finding that the police circular which curtailed public participation was unconstitutional.

The majority Justices of the Constitutional Court erred in law and fact when they held that the police circular, which was enforced countrywide, had no effect on the amendment of the Constitution.

49. The majority Justices of the Constitutional Court erred in law and fact in holding that the actions of the Uganda Peoples Defence Forces were demonstrably justifiable in a free and democratic society.

The majority Justices of the Constitutional Court erred in law and fact when they held that the violence in parliament, which they found to be uncalled for and unconstitutional, did not vitiate the entire law.

PART H: GROUNDS RELATING TO NON-COMPLIANCE WITH THE RULES OF PROCEDURE OF PARLIAMENT AND/OR ALIGNING THEM WITH CONSTITUTIONAL PROVISIONS.

All the learned Justices of the Constitutional Court erred in law and fact when they held that the Speaker has sweeping powers to prevent the petitioner from accessing parliament without a resolution of parliament or any rules gazetted for that purpose.

The majority Justices of the Constitutional Court erred in law and fact when they held that the Speaker, solely, has powers to determine the business of parliament and order paper.

All the learned Justices of the Constitutional Court erred in law and fact when they justified and upheld suspension and eviction of members of parliament on the same day of reading out their names.

54. The majority Justices of the Constitutional Court erred in law and fact in holding that non-secondment of the motion to suspend the Rules of

Parliament requiring separation of at least three sittings after presentation of the Committee Report was not fatal to the Constitutional Amendment process.

55. The majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker was justified in entertaining Hon. Raphael Magyezi's motion to present a private members' Bill earlier than the earlier motion of Hon. Nsamba for a resolution for establishment of a constitutional review commission.

The majority Justices of the Constitutional Court erred in law and fact when they upheld the committee report which was signed by members of parliament who did not participate in the hearing of the public and other committee processes.

The majority Justices of the Constitutional Court erred in law in justifying and upholding the Speaker's refusal to close the doors of parliament chambers during the roll call voting on the 2nd and 3rd reading of the Bill.

The majority Justices of the Constitutional Court erred in law when they held that the Speaker of parliament has unfettered powers in parliament.

The majority Justices of the Constitutional Court erred in law and fact in upholding the suspension of rules of parliament during the constitutional amendment process.

The majority Justices of the Constitutional Court erred in law and fact when they failed to apply estoppels against the Speaker in respect of an un-seconded motion and crossing and sitting of members of parliament to the opposite side.

PART I: GROUNDS RELATING TO MULTI-PARTY DEMOCRACY.

All the learned Justices of the Constitutional Court erred in law and fact when they held that in a multi-party dispensation, absence of opposition members of parliament does not render parliament not fully constituted.

All the learned Justices of the Constitutional Court erred in law and fact when they validated the Speaker's arbitrary decision to allow ruling party members of parliament to cross and sit on the opposition side.

The majority Justices of the Constitutional Court erred in law and fact when they, after finding that

under normal circumstances, opposition members of parliament had to be in attendance, went ahead to validate part of the Constitutional Amendment Act.

PART J: GROUNDS RELATING TO REMOVAL OF AGE LIMIT QUALIFICATIONS FOR PRESIDENT OF THE REPUBLIC.

The majority Justices of the Constitutional Court erred in law and fact when they did not find that amendment of Article 102(b) of the Constitution amounted to colourable legislation/amendment of Articles 1, 2 and 3(2) of the Constitution in a manner prohibited by the Constitution.

All the learned Justices of the Constitutional Court erred in law and fact in not finding that amendment of qualifications and disqualifications of a president under our 1995 constitution amounted to a constitutional replacement which parliament had no power to do.

The majority Justices of the Constitutional Court erred in law and fact when they held that qualifications and disqualifications of a president under our 1995 constitution is not one of the core structures embedded in the Constitution.

The majority Justices of the Constitutional Court erred in law and fact in upholding lifting of the age limit on ground that even members of parliament have no age limit.

The majority Justices of the Constitutional Court erred in law and fact when they failed to make a finding that the justifications for the removal of age-limits were flimsy, selfish, irrational and not demonstrably justifiable in a free and democratic society and not allowed by the constitution rendering the amendment null and void.

PART K: GROUNDS RELATING TO GENERAL MISAPPLICATION OF

PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

69. The majority Justices of the Constitutional Court erred in law and fact in not invalidating the Act after making a finding that the process was marred with tension and chaos.

70. The majority Justices of the Constitutional Court erred in law in holding that members of parliaments' right to represent the people is not absolute.

71. The majority Justices of the Constitutional Court erred in law when they applied the substantial/quantitative effect test in determining the validity of the Constitutional Amendment Act.

PART L: GROUNDS RELATING TO SEPARATION OF 14 SITTING DAYS

BETWEEN THE 2ND AND 3RD READING AND PRESIDENTIAL ASSENT 30 *TO THE IMPUGNED BILL.*

The majority Justices of the Constitutional Court erred in law and fact in holding that separation of 14 sitting days of parliament was not mandatory for the entire Bill to pass.

The majority Justices of the Constitutional Court erred in law and fact when they held that the Certificate of electoral commission that a referendum was held in respect of the entire Bill was not

required in respect of the entire Bill.

The majority Justices of the Constitutional Court erred in law and fact in failing to declare the false and legally insufficient Certificate of compliance invalid.

The majority Justices of the Constitutional Court erred in law and fact in failing to declare the entire Act invalid after making a finding that the pre-conditions of a presidential assent were not followed.

PART M: GROUNDS RELATING TO CONTINUANCE IN OFFICE OF A PRESIDENT ELECTED IN 2016 ON ATTAINING 75YEARS.

The majority Justices of the Constitutional Court erred in law when they held that a president elected in 2016 is not liable to vacate office on attaining the age of 75years.

The majority Justices of the Constitutional Court erred in law and fact when they held that the qualifications of a president should not be maintained through his/her stay in office.

PART N: GROUNDS RELATING TO PRAYERS & PLEADINGS.

78. The majority Justices of the Constitutional Court erred in law and fact when they held that the petitioner did not contest particular provisions relating to age-limit, extension of time for Supreme Court to determine a presidential election petition.

The learned majority Justices of the Constitutional Court erred in law and fact when they proposed and granted a remedy of severance which was not pleaded by the respondent both in his answer to the petition and all affidavits in support thereto.

PART O: GROUNDS RELATING TO REMEDIES.

The majority Justices of the Constitutional Court erred in law in 30 *applying the principle of severance of some sections in a single Act in a situation where the constitutional amendment procedure was fatally unconstitutional and defective.*

All the learned Justices of the Constitutional Court erred in law when they denied the petitioner general damages on ground that he did not prove them.

PART P: GROUNDS RELATING TO UN-JUDICIOUS EXERCISE OF DISCRETION.

All the learned Justices of the Constitutional Court erred in law and fact when they unjudiciously exercised their discretion in contravention of basic legal principles by not summoning the speaker of parliament for questioning on her role in the process leading to the impugned Act.

All the learned Justices of the Constitutional Court erred in law and fact when they in exercise of their discretion unjudiciously without any sound reason held that the petitioner is not entitled to professional indemnification.

84. All the learned Justices of the Constitutional Court erred in law and fact when they unjudiciously, without any reasoning held that each petition should receive professional fees of

Ugx. 20,000,000(Uganda Shillings Twenty Million only.)

On these grounds, the appellant prayed for orders that:

The Appeal be allowed.

All the proceedings of the Constitutional court be declared were null and void for derogating the right to fair hearing.

c. The Constitutional Petition be remitted back to the Constitutional Court for expeditious hearing, in compliance with fair hearing principles, before a different panel.

The appellant be granted general damages for inconveniences.

The costs of this appeal and in the court below be paid by the respondent to the appellant.

An interest of 25% per annum be paid by the respondent on the above damages and costs.

In the alternative but without prejudice to the above reliefs sought, the appellant prayed for orders that: *a. The Private Members Bill, Constitution (Amendment) Bill No. 2 of 2017 was barred by Article 93 of the Constitution.*

Failure to comply with mandatory constitutional provisions and the Rules of Parliament, the violence, failure of public participation among other lapses rendered the entire process leading to enactment and assent to the Constitution (Amendment) Act, 2018, null and void and of no effect.

The appellant be granted general damages for inconveniences.

The costs of this appeal and in the court below be paid by the respondent to the appellant.

e. An interest of 25% per annum be paid by the respondent on the above damages and costs.

The appellants in Constitutional Appeal No. 03 of 2018 on the other hand lodged a Memorandum of Appeal containing 24 grounds of appeal. These grounds were framed as follows:

1. The learned majority Justices of the Constitutional Court erred in law and fact in holding that sections 1, 3, 4 and 7of the constitutional (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson Local Council V to contest for election to the respective offices were passed in full compliance with the Constitution of the Republic of Uganda.

2. The learned majority Justices of the Constitutional Court erred in law and fact in holding that sections 1, 3, 4 and 7of the constitutional (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson Local Council V to contest for election to the respective offices did not abrogate, emasculate or destroy the basic structure of the 1995 Constitution of Uganda.

The learned majority Justices of the Constitutional Court misdirected themselves on the construction and application of the basic structure doctrine thereby coming to a wrong decision.

The learned majority Justices of the Constitutional Court erred in law and fact in failing to pronounce themselves on the implied amendment of Article 21 of the Constitution by the impugned

Act.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the President of Uganda validly and lawfully assented to the Constitutional (Amendment) Act, 2018 in the circumstances.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the deployment and/or intervention of Uganda Police and UPDF in the chambers and within the precincts of the parliament by causing eviction of some members of Parliament was justified to enable Parliament to proceed with its Constitutional mandate.

8. The learned majority Justices of the Constitutional Court erred in law and fact in holding that the violence that ensued following the invasion of Parliament by Police and members of the UPDF and other security agencies did not vitiate the process leading to the enactment of the Constitutional (Amendment) Act.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the impugned Bill and the process leading to the enactment of the Constitutional (Amendment) Act did not contravene the provisions of Article 93 of the Constitution.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Ug. Shs. 29,000,000/= (Twenty Million Shillings) doled out to each Honourable Member of Parliament created no additional charge on the consolidated fund.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that there was no evidence to demonstrate that the unconstitutional Directive issued by the Assistant Inspector General of Police, a one Asuman Mugenyi to District Police Commanders on 16th October 2017, curtailing public participation was never implemented and that it had adversely affected the entire consultative process and the passing of the impugned Act.

12. The learned majority Justices of the Constitutional Court erred in law and fact in holding that the public consultation by Honourable Members of Parliament took place fairly well and that the instances of interruption of public consultation and participation of the people in the enactment process of the impugned Act by Police throughout the country did not render the entire Act a nullity.

The learned majority Justices of the Constitutional Court erred in law and fact in finding that the Speaker of Parliament did not violate the rules of Procedure.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker did not breach the Rules of procedure allowing Hon. Raphael Magyezi's motion for leave to introduce a private Member's Bill onto the Order Paper of 26th September 2017.

The learned majority Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent upon which the Speaker and Parliament failed to comply with and/or violated the rules of procedure of parliament.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the extent upon which the Speaker and Parliament failed to comply with and/or violated the rules of procedure of parliament did not adversely affect the whole process of enacting the impugned Act as to render it null and void in toto.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker validly and lawfully exercised her discretion by suspending Members of Parliament from participating in the proceedings in the House.

The learned Justices of the Constitutional Court misdirected themselves in ordering counsel for both parties to proceed with submissions before cross examination of their respective witnesses.

The learned Justices of the Constitutional Court erred in law in denying the Petitioners a right to rejoin after closure of the Respondent's case.

20. The learned Justices of the Constitutional Court in their conduct throughout the proceedings in the consolidated Petitions and all applications arising therefrom acted with material procedural irregularities.

21. The learned Justices of the Constitutional Court erred in law in failing to exercise their discretion to call for the evidence of the Speaker of Parliament, Deputy Speaker, Minister of Justice and Constitutional Affairs, the Chairperson and the Vice Chairperson of the Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi.

22. The learned majority Justices of the Constitutional Court misdirected themselves in law and fact by failing to take into consideration the Respondent's failure to adduce evidence of the Speaker of Parliament, Deputy Speaker, Minister of Justice and Constitutional Affairs, Minister of Finance, Attorney General, the Chairperson and Vice Chairperson of the Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi.

23. The learned majority Justices of the Constitutional Court erred in law by failing to pronounce themselves on a number of the Appellants' prayers and misapplying the doctrine of severance in determining the validity of the Constitutional (amendment) Act, No. 1 of 2018.

24. The learned majority Justices of the Constitutional Court erred in law and fact in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees for each petition including

Constitutional Petition No. 05 of 2018 and two-thirds of the taxed disbursements to all the Petitioners.

On these grounds, the appellant asked for the following orders:

1. That this appeal be allowed.

2.That the majority judgment and orders entered for the Respondent against the Appellants by the learned Justices of the Constitutional Court in the Constitutional Court of Uganda at Mbale be set aside and be substituted with the following:

I. That the Constitution (Amendment) Act, 2018 be annulled.

II. In the alternative, but without prejudice to paragraph (I), the following sections of the Constitution (Amendment) Act, 2018 hereunder listed be annulled;

a) That section 3 of the Constitution (Amendment) Act, 2018 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as

President of Uganda.

b) That section 7 of the Constitution (Amendment) Act, 2018 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as District Chairperson.

That the invasion and/or heavy deployment at the Parliament by the combined armed forces of the Uganda People's Defence Forces and the Uganda Police and other militia in using violence, arresting, beating up, torturing and subjecting the Appellants and other Members of Parliament to inhuman and degrading treatment on the day the impugned Bill was tabled before the parliament amounted to amending the Constitution using violent and unlawful means, undermined Parliamentary independence and democracy and as such was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3) and 259 of the Constitution.

That the arbitrary actions of the armed forces of the Uganda People's Forces, Uganda Police Force and other militia in frustrating, restraining, preventing and stopping some members of Parliament from attending and/or participating in the debate and/or proceedings of the House on the Constitutional (Amendment) Bill was inconsistent with and in contravention of Articles 1, 8A, 20, 24, 28(1), 79, 208(2), 211(3) and 259 of the Constitution of Uganda.

V. That the actions of the armed forces of the Uganda People's

Defence Forces, Uganda Police and other militia to invade the

Parliament while in plenary thereby inflicting violence, beating, torturing several Members of Parliament at the time when the motion seeking leave of Parliament to introduce the Private Members' Bill, Constitution (Amendment) Bill No. 2 of 2017 was being tabled was inconsistent with and in contravention of

Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3), and 259 of the Constitution. The actions of the

armed forces of the Uganda Police force in beating, torturing, arresting, and subjecting several Members of Parliament while in their various constituencies to consult the people on the Constitution (Amendment) Bill, 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3), 259 and 260 of the Constitution. That the arbitrary decision of the Inspector General of the Uganda Police Force of restricting several Members of Parliament to their respective constituencies in their bid to consult their electorates on the constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3) and 259 of the Constitution.

That the process leading to the enactment of the Constitution (Amendment) Act, 2018 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National Objectives and Directive Principles of state policy and other constitutional provisions and as a result was inconsistent with and in contravention of Articles 1, 2, 3, 8A, 79, 91 and 259 of the Constitution of Uganda.

That the actions of Parliament to prevent members of the public, with proper identification documents to access the Parliament's gallery during the seeking of leave and presentation of the Constitutional (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 8A, and 79 of the Constitution of Uganda.

X. That the procedure and manner of passing the Constitution (Amendment) Act, 2018 was flawed with illegality, procedural impropriety and the same was a violation of the Rules of Procedure of Parliament and therefore inconsistent with and in contravention of Articles 79, 91, 94, and 259 of the Constitution of Uganda.

XI. That the actions of the Speaker in entertaining and presiding over the debate on the impugned Bill when the matter on the same was before Court was a violation of Rule 72 of the Rule of Procedure of Parliament of Uganda therefore inconsistent with and in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

XII. That the arbitrary actions of the Speaker of Parliament to suspend the 1st, 2nd,3rd,4th and 5th Appellants who were in attendance in the Parliamentary Proceedings on the 18th day of 25 *December, 2017, a sitting of Parliament where the two reports on the Constitution (Amendment) (No. 2) Bill, 2017 were to be debated was a violation of Rules 87 and 88 of the Rules of Procedure of Parliament of Uganda therefore in contravention of*

Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution of Uganda.

That the actions of the Speaker of Parliament to close the debate on the Constitution (Amendment) Bill No. 2 of 2017 before each and every Member of Parliament could debate and present the views of their constituents concerning the Constitutional (Amendment) Bill was a violation of Rule 133(3)

(a) of the Rules of Procedure of Parliament therefore in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

That the actions of Parliament in waiving Rule 201(2) requiring a minimum of three sittings from the tabling of the Committee Report on the Constitution (Amendment) Bill No. 2 of 2017 was in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

XV. That the purported decision of the Government of Uganda to make an illegal charge on the consolidated fund to facilitate the Constitution (Amendment) Bill No. 2 of 2017 which was tabled as, a private member's Bill was inconsistent with and in contravention of Article 93 and 94 of the Constitution of Uganda.

XVI. That the purported decision of the Government of Uganda to issue a certificate of compliance in regard to the Constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Article 93 and 94 of the Constitution of Uganda.

XVII. That the actions of the President of Uganda to assent to the Constitution (Amendment) Act, 2018 was inconsistent with and in contravention of Articles 1, 2, 8A, 44(c), 79, 91, 94 and 259 of the Constitution.

The appellants also prayed for costs of this Appeal and in the Court below. Lastly, the appellant in Constitutional Appeal No. 04 of 2018 lodged a Memorandum of Appeal in this Court containing four grounds of appeal.

These were:

1. The learned majority Justices of the Constitutional Court erred in law and fact in holding that passing of the Constitution (Amendment) (No.2)

Bill 2017 into law without Parliament first observing 14 days of Parliament sitting between the 2nd and 3rd reading is not inconsistent with the 1995 Constitution of the Republic of Uganda.

The learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment)

Act 2018 did not in any respect contravene nor was it inconsistent with 5 *the 1995 Constitution of the Republic of Uganda.*

The learned majority Justices of Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act 2018 is not invalid for the reasons that some of the sections therein are 10 *inconsistent with provisions of the 1995 Constitution of the Republic of Uganda.*

The learned majority Justices of Constitutional Court erred in law when they found that there were breaches of the Constitution and failed to make orders on the Appellant's prayers.

On these grounds, the appellant prayed for the following orders:

That the appeal be allowed

That the majority judgment and orders entered for the Respondent against the Appellants by the learned Justices of the Constitutional

Court in the Constitutional Court of Uganda at Mbale be set aside and 20 *be substituted with the following:*

That the Constitution (Amendment) Act, 2018 be annulled and declared unconstitutional;

In the alternative but without prejudice to paragraph (i) section 3 of the Constitution (Amendment) Act, 2018 be annulled and declared unconstitutional in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as president of Uganda undermines the sovereignty and civic participation of the people of Uganda and is inconsistent with Articles 1, 8A, 38, 105(1) and 260(1);

iii. that the actions of the security forces in entering Parliament, assaulting and detaining members of Parliament is inconsistent with or in contravention of Articles 23,24 and 29 of the 1995 Constitution of the republic of Uganda;

iv. That the entire process of conceptualizing, tabling, consultation, debating and passing of the Constitution (Amendment) Act, 2018 was inconsistent and in contravention of Articles 1, 8A, 29, 38, 69(1), 72(1), 73 and 79 of the 1995 Constitution of the

Republic of Uganda;

That the passing of the Constitution (Amendment) (No.2) Bill 2017 at the second and third reading without the separation of at least 10 *fourteen sitting days is unconstitutional and inconsistent with Articles 1,105(1), 260(2)(b) & (f) and 263(1) of the Constitution;*

That the actions of Parliament waiving rule 201 (2) requiring a minimum of three sittings from the tabling of the committee report on the Constitution (Amendment) (No.2) Bill 2017 was in contravention of Articles 79,91,94 and 259 of the 1995 Constitution of the Republic of Uganda.

3. That the Appellant prays for costs of this Appeal and in the Court below.

Representation

The appellant in Constitutional Appeal No. 02 of 2018 represented himself. M/S Lukwago & Co. Advocates together with M/S Rwakafuzi & Co. Advocates appeared on behalf of the appellants in Constitutional Appeal No. 03 of 2018. Counsel Wandera Ogalo represented the appellant in Constitutional Appeal No. 04 of 2018. The Attorney General

Byaruhanga William led a team consisting of the Deputy Attorney General Mwesigwa Rukutana, Mr. Francis Atoke the Solicitor General, Ms. Christine Kahwa the Ag. Director Civil Litigation, Mr. Philip Mwaka Principal State Attorney, Mr. George Karemera Principal Senior State Attorney, Mr. Richard Adrole Senior State Attorney, Mr. Geoffrey MadeteState Attorney, Ms. Imelda

Adongo State Attorney, Mr. Johnson Natuhwera State Attorney, Ms. Jacky Amusugat State Attorney, Mr. Sam Tusubira State Attorney and Mr. Allan Mukama State Attorney.

All parties filed written submissions and were allowed to give oral highlights of their cases during the hearing of the consolidated appeal.

Before I proceed to the merits of this appeal, I wish to dispose two issues raised by the Attorney General regarding the competence of Constitutional Appeal No. 02 of 2018.The Attorney General contends that the Memorandum of Appeal contravenes the Rules of this Court and secondly that the appellant filed his petition from which his appeal arose way before the impugned Act had been enacted.

Attorney General's Submission

The Attorney General contended that all the 84 grounds of Appeal in Constitutional Appeal No. 02 of 2018 offended Rule 82 of the Rules of this Court. In his view, the grounds were speculative, argumentative, narrative, insolent and an abuse of Court process.

According to the Attorney General the grounds in the Memorandum of Appeal offended Rule 82 in that they did not specify the points that are alleged to have been wrongly decided by the Constitutional Court, the nature of order they wanted this Court to make and were not concise, but were rather narrative, argumentative and speculative.

In the Attorney General's view, this was an abuse of Court process. He relied on Hwan Sung Ltd V. M&D Timber Merchants & Transporters Ltd, Civil Appeal No. 02 of 2018 to argue that a ground of appeal which does not state in what way the Court of Appeal erred offended Rule 82.

In light of his contentions above, the Attorney General prayed that the Memorandum of Appeal in Constitutional Appeal No. 02 of 2018 be struck out.

The Attorney General submitted that the appellant's appeal should fail since the Petition did not conform to Article 137 of the Constitution. He argued that the Petition was filed in December 2017 before the Bill from which the impugned Act arose had been passed into an Act. He further argued that the appellant did not amend the Petition after the impugned Act had been enacted.

Relying on the authorities of Miria Matembe & 2 Ors v. Attorney General, Constitutional Petition No. 02 of 2005 and Makula International v. His Eminence Cardinal Nsubuga & Anor, Court of Appeal Civil Appeal No. 21 of 2001, the Attorney General argued that this rendered the Petition null and void. On this basis, the Attorney 10 General prayed that this appeal be struck out.

Appellant's Reply

The appellant who represented himself, objected to the manner raising this preliminary objection. He contended that Rule 98 (b) of the Rules of this Court the objection to memorandum of appeal should have been by Notice of Motion.

Without prejudice to his submissions above, the appellant contended that the Attorney General misinterpreted the provisions of Rule 82 by arguing that every ground of appeal must contain in it the nature of the order which it is proposed to ask the Court to make. In his view, grounds of appeal drafted in such a way would lead to an absurdity. The appellant further argued that what Rule 82 requires is that at the end of stating the grounds of appeal, the appellant must state the nature of the order which it is proposed to ask the Court to make. In the appellant's view, he did exactly that as is evident at pages 19-21 of the Record of Appeal.

On the issue of the grounds of appeal being speculative, argumentative, narrative, insolent and an abuse of court process, it was the appellant's contention that Rule 82(1) only prohibits 'argument' or 'narrative' and not 'speculation', 'insolence', and 'abuse of court process' as contended by the Attorney General.

The appellant argued that the purpose of Rule 82(1) was to ensure that the Court adjudicates on specific issues complained of in the appeal. In the appellant's view as long as a ground of appeal points to a specific complaint so as to be able to contemplate what will be argued, such ground is compliant with the Rule. The appellant then proceeded to highlight why his grounds of his appeal were competent. The summation of these highlights was that:

(a) The grounds of objection do not need to be wrongly decided, they can be omissions and errors which may render the decision to be null and void [for instance failure to give a fair hearing in the course of hearing]

Conciseness of a ground depends on the nature of the complaint and the fact that a ground of appeal contains several words does not mean that it is not concise

The grounds of appeal did not need to have prayers in themselves.

The appellant prayed that since he had demonstrated that the memorandum of appeal complied with Rule 82(1) and that the objection was irregularly raised, the Attorney General's objection should be rejected.

In the alternative, the appellant prayed that in the unlikely event that this Court found any merit in Attorney General's submissions, then the Court should find that the Attorney General has suffered no prejudice since he was able to understand the complaints in the appeal and adequately responded to them.

The appellant submitted that the claim that the petition did not conform to Article 137 was unfounded and that the objection was neither raised nor argued in the Constitutional Court and thus cannot be raised at this level.

The appellant further contended that even if the Attorney General's objection was not incompetent, there was a clear failure by the Attorney General in comprehending Article 137 of the Constitution.

The appellant argued that the Attorney General's contention that the petition was incompetent because it was filed before the Bill had become an Act does not make it incompetent in light of Article 137(3) of the Constitution.

Relying on Article 137(3), the appellant argued that his locus arose the moment Parliament prevented him from accessing Parliament and all the subsequent actions up to the purported voting were inconsistent with or in contravention of the Constitution. The appellant, citing some excerpts of his petition submitted that in his petition he clearly challenged the actions of the persons stated in the petition which in his view passed the test under Article 137(3) of the Constitution.

In conclusion, the appellant submitted that the Attorney General's objection lacks merit and should be rejected.

Court's Determination of the Preliminary Objection

I agree with the Attorney General that for the reasons he so ably expounds the appellant's Memorandum of Appeal does not meet the standards set out under Rule 82 of the Rules of this Court. However, as rightly pointed out by the appellant the preliminary point should have been raised at the earliest opportunity which was at the Pre hearing

Conference when apart from consolidating the appeals issues arising from all the memoranda of appeal were framed. After framing the issues court allowed parties to file written submissions which the parties including the appellant complied with. Having allowed the appellant to proceed with the appeal this court cannot strike it out at this stage of the hearing and as rightly pointed out by the appellant the Attorney General would not suffer any prejudice.

The Attorney General also contended that the appellant's petition at the Constitutional Court did not disclose a cause of action since the impugned Act that is being challenged had not yet been enacted.

On the other hand appellant contends that Article 137(3) of the constitution gives a right to any person to lodge a petition to the Constitutional Court as under:-

"A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect and 10 for redress where appropriate."

In Ismail Serugo v. Kampala City Council, Constitutional Appeal No. 02 of 1998, Mulenga, JSC (as he then was) held that a petition brought under Article 137 (3) of the Constitution:

"Sufficiently discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or

which is alleged to have been contravened by the act or omission and pray for a declaration to that effect."

In Baku Raphael Obudra & anor v. Attorney General, Constitutional Appeal No. 02 of 1998, Odoki, CJ (as he then was) while relying on the above ratio held as follows:

*"*In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established."

A review of the appellant's petition shows that he was aggrieved and dissatisfied with numerous acts and omissions of various persons and/or authorities which acts and/omissions, in his view contravened or were inconsistent with various provisions of the Constitution. Some of these acts and omissions were even done before the impugned Act had been assented to by the President. He proceeded to ask for various declarations the climax of which was that the Act which was a product of such a process be declared unconstitutional.

Thus in line with the provisions of Article 137 of the constitution and the ratio in Ismael Serugo (supra), it is my finding that the appellant's Petition disclosed a cause of action warranting its consideration by the Constitutional Court. It therefore follows that the appellant's petition was properly before the Constitutional Court and so is his appeal before this Court.

Principles of constitutional interpretation relevant in this Appeal.

In interpreting the Constitution, one of the principles to be followed is that where the words of the Constitution are clear and unambiguous, then they are given their primary, plain, ordinary and natural meaning. However, where the language of the Constitution is imprecise, unclear and ambiguous, then the same is given a liberal, broad, generous and purposive interpretation so as to give effect to the spirit of the Constitution as a continuing instrument whereby governance is upon principles that are acceptable and demonstrably justifiable in a free and democratic society.

Interpreting the Constitution, requires Court to look at the Constitution as a whole. All the provisions of the Constitution touching on the issue have to be considered together. The Court must give effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so leads to an apparent conflict within the Constitution. Where a Constitutional provision is in conflict or inconsistent with another Constitutional provision, the Constitutional Court has jurisdiction to resolve the inconsistency so that the

Constitution remains whole. See: Ssemogerere & Another v AG: Constitutional Appeal No. 1 of 2002 (SCU). See also: Mtikila V AG: High Court Tanzania Civil Case No. 5 of 1993.

The Constitution must be interpreted in such a way that it does not whittle down any of the rights and freedoms contained in it, unless there are clear and unambiguous words to that effect within the Constitution itself. See Dow –v- AG (1992) LRC (Const) 623 at 668. The interpretation must be directed at ascertaining the foundation values inherent to the Constitution and not merely the literal meaning of its provisions. See: Matison & Others –v- The Commanding Officer Port Elizabeth Prison & Others [1994] 3 BCLR 80 at 87. Interpreting the

Constitution should take account of the context, scene and setting under which it is operating, not necessarily when it was enacted, so as to take account of the growth and the changing circumstances of the society it is regulating. See: Archbishop Okogie V AG (1981) 2 NCLR 337 at 348 (Nigeria COA).

Where Constitutional history is relevant in interpreting the Constitution, particularly so as to point out past mistakes so that they are not repeated or revived, then such a history should be resorted to. Indeed, this is very well brought out by the preamble to the 1995 Constitution that:

"We the People of Uganda:

Recalling our history which has been characterised by political and Constitutional instability";

That *"Recalling of our history"* cannot be left out when interpreting the Constitution. See: Karuhanga vs AG: Constitutional Court Petition No. 39 of 2013.

The principles that govern interpretation of ordinary Statutes also apply to interpretation of a Constitution. However, because of the very important objectives of a Constitution that evolve upon the development and aspirations of the people and being the framework for the legitimate exercise of government power as well as the protection of basic individual rights and liberties, the Court interpreting the Constitution must go further than the one interpreting an ordinary Statute, by reading the words of the Constitution and attaching to them great purposes that were intended to be achieved by the Constitution as a continuing instrument of government. It is only this way that the people can have full protection of their fundamental rights and freedoms as well as that of the whole Constitution: See: Attorney General V Whiteman [1991] 2 WLR 1200 at 1204 and Attorney General of Gambia V Momadu Jube (1984) AC 689 (Privy Council).

Under the purpose and effect rule of Constitutional interpretation, the purpose and effect of an impugned Act go to determine the Constitutionality of that Act. If the purpose or its effect infringes a Constitutionary guaranteed right, then the Act is declared unconstitutional. See: Abuki & Another V AG: Constitution Petition No. 2 of 1997.

Related to the above, is the rule of interpretation that the Constitution must be interpreted to give

logical and practical meaning and effect to its provisions. Hence the right to life guaranteed under the Constitution has been interpreted to include the right to livelihood: See Abuki & Another V AG (Supra) where the Uganda Constitutional Court relied in the Indian Supreme Court decision of Tellis & Others V Bombay Municipal Council (1987) LRC (Const) 351.

In interpreting the Constitution resort is also made, where necessary and relevant, to international and regional treaties and instruments. This is because, in the case of Uganda, paragraph 28 of the National objectives and Directive Principles of State Policy, provides that Uganda is to respect international law and treaty obligations and actively participate in international and regional organizations that stand for peace, well-being and progress of humanity. The Uganda Human Rights Commission under Article 52(i) (h) monitors the Government's compliance with the international treaty and convention obligations on human rights. It follows therefore that under the Constitution the role of the international and regional treaties and Instruments is a recognized one. It is therefore right of the Constitutional Court to hold that in matters of interpreting the Constitution:

" …… we may have to use aids in construction that reflect an objective search for the correct construction. These may include international instruments to which this country has acceded and thus elected to be judged in the community of nations." Per Egonda-Ntende AG JA, in Tinyefuza –v- AG (Supra)."

At pre-hearing conference, 8 issues were agreed upon by the parties and the Court, these are;

1. Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

2. Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of

Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?

Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?

Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?

Whether the learned majority Justices of the Constitutional

Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018

on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?

6. Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?

7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?

8. What remedies are available to the parties?

I shall now proceed to determine these issues starting with issue No.7 because if resolved in the affirmative it may not be necessary to delve into the merits of the appeal which would have been disposed by way of annulment of the entire trial.

Issue 7: PROCEDURAL IREEGULARITIES

This issue was framed as follows:

"7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?"

Appellants' Submissions

MPs submissions on Issue No.7

Counsel submitted that the right to a fair hearing a non derogable right under Article 44 of the Constitution was compromised in a number of ways by the Constitutional Court.

Counsel submitted that one of the salient features of what constitutes fair trial is that it must be before "an independent and impartial Court or tribunal established by law."

In counsel's view, allegations of denial of the right of fair hearing or trial are very serious and should not be made lightly or merely in passing. That they impact on the very core of our trial system.

Counsel submitted on the principle in determining the question of judicial discretion which was succinctly explained in the case of Uganda Development Bank- versus – National Insurance Corporation SCCA No. 28/1995 where court observed that;

"The principles which this court applies when deciding whether to interfere with the exercise of discretion by a Trial Judge are well known and are set out in such decisions as MbogoVs. Shah (1968) E.A. 93 where, Newbold, P. at page 96, stated the principles to be that—

"…a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is

satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

Counsel submitted that Judicial discretion must be exercised on fixed principles: Jetha Vs. Sigh (1931) 13L.R.K.1. Where there has been no improper exercise of discretion, the Judge's decision cannot normally be upset: Devji Vs. Jinabhai (19341 1 E.A.C.A. 87.

That a mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the Court below. There must be shown to be an unjudicious exercise of the discretion or an exercise of discretion at which no Judge could reasonably arrive whereby injustice has been done to the Party complaining Counsel submitted that though there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if such discretion has been rightly exercised.

According to counsel the learned justices of the Constitutional court misdirected themselves when they unjudiciously exercised their discretion by declining to invoke their powers under the law to summon key government officials and individuals who played a key role in the process leading to the enactment of the impugned Act to appear and testify on the same.

That under Rule 12 (3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005;

"The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision."

Counsel relied on the observations of Justice Mulenga (RIP) in the case of Ssemwogerere& Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002 who while considering the nature

and scope of inquiry and investigations which ought to be done by the Constitutional Court, noted that;

"In my view, facts pertaining to constitutional questions ought to be proved with certainty rather than being left to the fate of "hide and seek" between litigants, which the rules on the onus of proof evoke...I would go as far as to say that if the parties failed to do so, it was open to the court……to call direct evidence from the appropriate officer of Parliament without appearing 'to unduly descend into the arena'. The desirability to decide constitutional issues on ascertained facts cannot be over emphasized."

Counsel contended that it is apparent that the Constitutional Court had discretion and a daunting

task of even investigating beyond the evidence adduced before it since constitutional matters are of great national importance, transcending rights of litigants before Court. It was therefore injudicious on part of the Constitutional Court to decline to summon the Speaker of Parliament the Rt. Hon Kadaga Rebecca, without assigning any reason. That the Constitutional Court ought to have exercised its discretion to summon the following persons to testify on these matters where they played a central role;

a) The Speaker and the Deputy speaker to testify on their lead role in the enactment of the impugned Act, the discrepancies in the certificate of compliance, procedural irregularities, arbitrary suspension of the Honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

The Minister of finance to testify on the contradictory Certificates of Financial Implication which were issued from his Ministry in regard to the impugned Act.

The Hon. Magyezi Raphael who was the architect, progenitor, midwife and sponsor of the impugned Act to inter alia testify on the conceptualization and mischief he intended to cure by moving Parliament to enact the said Act.

The President who assented to the Bill which was not accompanied with a valid certificate of compliance.

The Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee who processed the Bill at committee stage.

That Justices of the Constitutional Court erred when they restricted the Appellants' and their counsel on what to be asked in cross examination of the witnesses limiting them to the scope to the averments in the affidavits for the respective witnesses. It was counsel's submission that this was in contravention of the basic principles of evidence law incorporated under Section 137 (2) of the Evidence Act which is to the effect that cross examination of a witness need not be confined to the facts to which the witness testified about

That the mode adopted for submission during the hearing of the petition was also materially defective for the following reasons;

The learned Justices of the Constitutional Court erroneously directed the Appellants' counsel to make submissions before the cross examining the relevant witnesses.

The leaned Justices of the Constitutional Court erroneously denied the Appellants' counsel a right to a rejoinder after the representative of the Attorney had made their submissions in reply.

That all these procedural irregularities occasioned a miscarriage of justice.

b) If so, what is the effect on the decision of the Court?

Counsel submitted that the above irregularities limited the

Constitutional court's scope of investigation thereby failing on its noble duty vested under Article 137 (1) of the Constitution thereby coming to a wrong decision. He relied on the case of Semwogerere (supra) where Kanyeihamba JSC observed that;

"In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."

The Appellants also contended that the Learned Justices of the Constitutional Court erred in law and fact and injudiciously exercised their discretion in awarding UGX. 20,000,000/= (Twenty Million 20 Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which is manifestly meagre considering the nature and significance of the matter.

Submissions of Mabirizi

Mr. Mabirizi submitted that the court was duty bound to determine the petition expeditiously whose failure derogated the right to fair hearing.

He cited Article 137(7) of The Constitutionand Rules 10 & 11 of The Constitutional Court Rules which place a duty on the Constitutional Court to determine a Constitutional Petition expeditiously. That the petition was filed in December 2017 and court heard it in April 2018 and interrupted by unnecessary lengthy adjournments. He cited the case of M/S Mfmy Industries Ltd-Pakistan (supra), where it was held that "justice delayed is justice denied. The courts must… prevent any delays which are being caused at any level by any person whosoever…"

Mr. Mabirizi contended that failure to render judgment within 60 days from 19th April 2018 derogated the right to fair hearing, invalidating the decision. He cited Rule 33(2) of the Court of Appeal Rules and the Uganda Judicial Code of Ethics, Paragraph 6.2 which provides that "…Where a judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so."

Hearing was concluded on 19th April 2018 but judgment was only rendered on 26th July 2018, 97 days after hearing, with no single reason.

He cited the case of Chief Ifezue V. Mbadugha-Nigeria Nigeria Supreme Court Case No. 68 of 1982, where the Justices declared that the Judgment delivered out of the three months allowed by the law was null & void.

Mr. Mabirizi prayed that court be persuaded to find that there was no valid judgment the court could give after expiry of the 60 days from 19th April 2018.

On the evicting the appellant from court seats he submitted there was a derogation of his right to a fair hearing & rules of natural justice

Mr. Mabirizi complained that the court turned into 'defence counsel' through excessive interruptions hence derogating the right to fair hearing.

He cited the case of Peter Michel V. The Queen [2009] UKPC 41- the Privy Council declared the proceedings and judgment a nullity due to incessant interruptions by court. It was inter alia held that the core principle, that under the adversarial system the judge remains aloof from the fray and neutral applies no less to civil litigation than to criminal trial…He must not be sarcastic or snide…he must not make obvious to all his own profound disbelief in the defence being advanced.…this conviction cannot stand.

That failure to grant him ample time to present his case was a failure of fair hearing since ample time is one of the facilities required in fair hearing, as already pointed out in the Kenyan Juma case.

That despite his warning as to the speed, the Justices were sarcastic in their reply and never bothered.

That the denial of the right to a rejoinder derogated the right to fair hearing & Court of Appeal rules nullifying the entire process.

That his right to reply after submissions by the respondent is absolute and not at the whims of court as the court made it to the extent that he had to plead for it. That the DCJ introduced two terms; 'Closing Remarks' and 'New Matter'. Which are not known under any law.

Mr. Mabirizi submitted that court was bound to be patient to enable presentation of the case as required by Principle 6.3 of the Judicial Code of Ethics which provides that "A Judicial Officer shall …be patient and dignified in all proceedings, and shall require similar conduct of advocates, witnesses, court staff and other persons in attendance."

That to the contrary, throughout the proceedings, the learned justices seemed to be so much in a hurry which indeed led to derogation of the right to fair hearing.

Mr. Mabirizi submitted that the Justices of the Constitutional Court did not refer to appellant's pleadings, evidence, authorities & decided cases which was contrary to the rules relating to judgments.

He cited the case of Charles Onyango Obbo and Anor v Attorney General (Constitutional Appeal No.2 of 2002) where Tsekooko JSC noted that "Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases…In the Court below the majority decision did not allude to any of those cases and no reasons were given why."

That in the case of Ssemwogerere V. Ag, (Supra), Kanyeihamba, JSC "…the majority of the learned Justices of the Constitutional Court do not appear to have taken into account counsel's submissions and relevant authorities cited…" Mr. Mabirizi submitted that Court had a duty to

confirm reading of the authorities and their conclusions on them.

That the constitutional court was bound to determine all matters in controversy between the parties before it. He relied on Section 33 of the Judicature Act and referred to the case of Ebenezer & Ors V. Onuma & Anor, Nigeria Supreme Court Case No.213/88, where ESO, JSC, he held that It is the primary obligation of every court to hear and determine issues in controversy before it, and as presented to it by litigants.

Mr. Mabirizi submitted that court was duty bound to determine issue 6(a) in relation to Article 93 of the constitution which was pleaded & argued, that instead, the DCJ dealt with issue No. 6 but did not resolve issue 6(a).

Mr. Mabirizi argued that court failed to make a decision on arresting & detaining members of parliament from the house yet it was in issue 6(c).

That the court was bound to make a decision on his application to strike out the affidavits of Mr. Keith Muhakanizi & Gen David Muhoozi. That except, Justice Musoke, who declined to expunge the paragraphs for reason that Mr. Keith Muhakanizi disclosed the sources of information, the DCJ, Kasule, Kakuru & Barishaki JJCS said nothing about this affidavit and no decision was therefore reached.

Mr. Mabirizi submitted that it was irregular for court to propose answers to witnesses & to prevent the appellant from cross examining witnesses. He referred to Section137(2) of the Evidence Act provides that "…the cross-examination need not be confined to the facts to which the witness testified on his or her examination-in-chief.".

He complained that lower court over-protected Mr. Keith Muhakanizi and made it so impossible for him to give the answers which he wanted. That the DCJ, with threats to evict him prevented Gen. Muhoozi from answering questions to point out that his affidavit was not commissioned.

That the DCJ's interference defeated his intention to strike out the affidavit hence irregular as it derogated his right to cross-examine which is part of the right to fair hearing.

That this court in Mbabazi V. Museveni & 2 Ors, PEP No.1/16, prohibited affidavits of third parties but insisted that an affidavit must be by a person who perceived the actions.

It was his contention that the two affidavits of Gen. Muhoozi and Keith Muhakanizi were nothing but a pile of fabricated lies intended to mislead court which had to be thrown out as was done by Kato JSC, in Tibebaga V. Begumisa & Ors, SCCAPl. No. 18/02, BERKO, JCC, in Ssemwogerere V. Ag, CCP No.3/and in Mubiru V. Ag, CCP No.1/01.

Mr. Mabirizi contended that there is no reason why Patrick Ochailap who Mr. Keith Muhakanizi says is the one who processed the certificates of Financial implications or the commander who commanded the UPDF military operation at parliament did not make their respective affidavits.

Mr. Mabirizi submitted that his desire to have the speaker summoned was well pleaded & the application in court was so contentious that its decision could not go without reasons, but none was given in the Judgment, which amounted to a whimsical exercise of discretion. That failure by court to give reasons for dismissing the application for summoning the speaker was an abuse of discretion.

That at hearing, the effects of not summoning the speaker caught up with the Justices and Attorney General since the Speaker would be the only person to answer questions relating to the invalid certificate of compliance. That without summoning the speaker, court erred in commenting and deciding in favour of & against her without testing the basis and credence of these actions.

ISSUE 7(b): If so, what is the effect on the decision of the Court?

Mr. Mabirizi submitted that the failure to accord him a fair hearing and the procedural irregularities highlighted rendered all the proceedings and judgment null & void.

In the alternative, Mr. Mabirizi submitted that since this court is empowered by Section 7 of The Judicature Act, it can make directions that can remedy the irregularities and grant appropriate remedies.

The Attorney General's submissions

The Attorney General submitted that the 2nd Appellant's submissions are presumptuous and without any basis whatsoever. That at the outset, he points out that the 2nd Appellant did not apply to the Court to examine the Rt. Hon. Speaker of Parliament - or any of the other witnesses that had not sworn Affidavits in respect of the Petition, including those cited herein. The record shows that it was only the 1st Appellant that requested Court to examine the Rt. Hon. Speaker and the Respondent has already dealt with the same ground/issue its submissions in reply to the 1st Appellant and therefore incorporates its arguments in Constitutional Petition No. 2/2018 by way of reference.

The Attorney General cited the case of Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo& 4 Others Vs. The Attorney

General & 4 Others, while considering the power (discretion) of the Constitutional Court to grant leave to allow cross examination of deponents of affidavits under Rule 12 of the Constitutional Court (Petitions and Reference) Rules SI No. 91/2005 at pages 18 – 19 of the decision, the Supreme Court made reference to Mbogo& Others Vs. 5 Shah [1968] E.A.

The Attorney General submitted that beyond making general submissions that the cross-examination was guided by the ground rules established by the Hon. Justices, the Appellants have not demonstrated how they were prejudiced or otherwise denied a fair hearing in the circumstances.

The Attorney General submitted that the Hon. Justices of the Constitutional Court duly heard and

determined the Consolidated Petition according all parties an equal chance to present their respective cases and the record of proceedings demonstrates that the 2nd Appellants – and all the parties in the Consolidated Petitions - fully participated in the proceedings and had ample time to present their case.

On the rejoinder, The Attorney General submitted it was only on new matters raised during the course of the Respondents submissions. The Respondent contended that no prejudice was occasioned by the Court permitting cross examination after submissions had commenced and the Appellants had the opportunity to extensively submit on the matter raised during the cross examination. Additionally, the Appellants did not object to the mode adopted by the Honorable Court and this is therefore an afterthought.

The Attorney General relied on the case of American Express International Banking Ltd Vs. Atul [1990-1994] EA 10 (SCU); in which the Supreme Court of Uganda elaborated the circumstances/tests for interference with discretion, including: -

"i. Where the Judge misdirects himself with regard to the principles governing the exercise of his discretion;

ii. Where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;

iii. Where the exercise of his discretion is plainly wrong - see: The Abidin Daver [1984] All ER 470.

Referring to the case of Mbogo Vs. Shah (1968) EA 10 (Supreme Court of Uganda);

The Attorney General contended that under Article 137(7) of the Constitution requires that upon presentation of a Petition, the Constitutional Court; - "… shall proceed to hear and determine the Petition as soon as possible …" Rule 10(1) of the Constitution Court (Petition and References) Rules SI No. 91/2005 similarly provides; - "… the Court shall, in accordance with Article 137(7) of the Constitution, hear and determine the Petition as soon as possible …"

Accordingly, that the standard established by the Constitution for the Constitutional Court to hear and determine Constitutional Petitions is "as soon as possible". The Attorney General submitted that he five (5) Petitions were lodged respectively in December, 2017 and January 2018.The 1st Appellant specifically lodged his petition in December 2017. On 9th April 2018 several petitions were called for hearing in Mbale and thereafter consolidated for purposes of being heard together with others due to the similarity of the issues raised by the different petitioners in the lower court. The timetable adopted by the Court was implemented.

The Attorney General submitted that the record of proceedings demonstrates that the Constitutional Court considered and determined the Five (5) Consolidated Petitions with due diligence and

expedience in the circumstances considering the multiple claims and multiple litigants and Counsel participating in the Court proceedings.

The Attorney General invited this Honorable Court to find that the Constitutional Court duly expeditiously heard and determined the

Consolidated Petitions as required by the standard established by Article 137(7) of the Constitution and that the Appellants suffered no prejudice whatsoever or derogation of the right to a fair hearing on account of the manner in which the hearing and determination was conducted.

On the eviction of 1st Appellant from Court seats occupied by representatives of other Petitioners and being put in the dock, the Attorney General referred this court to the authoritative and conclusive guidance of the Hon. Deputy Chief Justice which I intend to rely on in this judgment.

The Attorney General prayed that the Honorable Court finds that the 1st Appellant was courteously treated like other litigants and that the record of appeal clearly demonstrates that the 1st Appellant enjoyed and was accorded every opportunity to present his case.

On the excessive interruption, the Attorney General submitted that Court was seeking clarification on the proper construction of the contents of documents and enquiring into the legality of the passage of the Constitutional Amendment Bill, No. 1/2018 as part of its duty under Article 137(1) of the Constitution.

The Attorney General submitted that there was no derogation of the 1st Appellant's right to a fair hearing arising from the procedure adopted by the Hon. Justices of the Constitutional Court and the allegations that the Court acted contrary to International Conventions do not arise whatsoever.

The Attorney General cited the case of Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo & 4 Others Vs. The Attorney General & 4 Others, while considering the power (discretion) of the Constitutional Court to grant leave to allow cross examination of deponents of affidavits under Rule 12 of the Constitutional Court (Petitions and Reference) Rules SI No. 91/2005 at pages 18 – 19 of the decision, the Supreme Court made reference to Mbogo & Others Vs. Shah [1968] E.A. pages 93 and stated that: -

"From the wording of Rules 12(2) above, the Court's power is purely a discretionary one. That being the case, it is well settled that this Court will not, as an Appellate Court, interfere with the exercise of discretion by a lower Court including the Constitutional Court, unless it is shown that the Court took into account an irrelevant matter which it ought not to have taken into account or failed to take into account a relevant matter which it ought to have taken into account or that the Court has plainly gone wrong in its consideration of the issues raised before it."

On the failure by the Constitutional Court to consider evidence, submissions and authorities, he submitted that each and every Hon. Justice of the Constitutional Court acknowledged the pleadings,

submissions and authorities in their respective Judgments.

On the determination all matters in controversy between the parties as required by Section 33 of the Judicature Act, Cap. 13. The Attorney General submitted that the Hon. Justices of the Constitutional Court duly determined and resolved all the issues in controversy as presented in the pleadings, framed in the issues and submitted by the respective litigants.

He cited the case of Supreme Court Civil Appeal No. 1/2012: British American Tobacco (U) Ltd Vs. Shadrach Mwijikubi & 4 Others it was held that

"While it is prudent for Judges to provide explanations for how and why they reached a certain decision, I am of the opinion that this is not an indication that the evidence was not properly evaluated, and is simply, as Counsel for the Respondent asserted, 'a matter of style'. However, I have carefully perused the leading Judgment and found that he actually re-evaluated the evidence of the two principal 10 witnesses in detail and came to his own conclusion before he agreed with the findings of the trial Judge. The learned Justice ensured that he recounted the various points in contention and had them in mind while writing the Judgment."

The Attorney General contended that the Hon. Justices of the Constitutional Court duly considered the matters and issues complained of by the 1st Appellant and the complaints of the 1st Appellant are in respect of style and not substance.

On the proposing answers to witnesses, The Attorney General submitted that the Court has discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matter related to the litigation and surrounding circumstances.

On the failure by the Constitutional court to give reasons for the decision not to summon the Rt. Hon. Speaker of Parliament the Attorney General submitted that a review of the record demonstrates that the 1st Appellant was the only one that sought cross examination of the Rt. Hon. Speaker and the reason for not summoning her was given.

The Attorney General submitted that on not calling the Rt. Hon. Speaker for examination are overtaken by events and any decision of the Court in that regard would therefore be moot. That the verbatim record of Parliamentary proceedings produced in the Hansard is already on Court record together with the Certificate of Compliance. The designated custodian of the records of Parliament is the Clerk to Parliament who fulfilled her duty by making the Hansard and Certificate of Compliance available to Court and the Litigants in the consolidated Petition who had the opportunity to cross examine her at length.

The Attorney General further submitted that neither the 1st Appellant, nor the 2nd Appellant, sought to examine the Rt. Hon. Deputy Speaker of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary Committee of

Legal and Parliamentary Affairs and Hon. Raphael Magyezi. Their submissions on the same was an afterthought and prayed that the Honorable Court finds the Appeal entirely without merit.

(b) If so, what is the effect on the decision of the Court?

The Attorney General submitted that the Appellants participated at each and every stage of the proceedings in the Constitutional Court and duly were accorded a fair hearing in accordance with the Article 28 of the Constitution. The Respondent further contended that the procedures adopted by the Constitutional Court were entirely within their discretion and did not in any way prejudice the Appellant or occasion derogation of such right. In conclusion, he submitted that the Appellants had not proved any of their respective Grounds of the Appeal, prayed that the Consolidated Appeals are dismissed with costs.

Court's Determination of Issue No. 7

Failure to summon the Speaker.

As already stated in this judgement the petition was brought under Article 137 of the constitution. The allegations were that under Clause 3(a) an Act of parliament and under 3(b) a number of acts and omissions were inconsistent with or in contravention of the constitution and the petitioners prayed for annulment of the Act. The petitioners filed affidavits to prove the acts and omissions that would warrant annulment of the Act and the Attorney General filed a number of affidavits in defence of the enactment of the Act. The Attorney General did not find it necessary to include the Speaker or Deputy Speaker among the witnesses to swear affidavits. As a party defending the petition, a decision as who would testify in the case was his prerogative because he knew better the witness that would support the case he wished to present. The acts and omissions in the proceedings in the parliament were well documented by the evidence of the Clerk to Parliament, the Parliamentary Hansard and evidence of some of the petitioners who were in Parliament. So the factual aspect of the case was well covered and there was not so much controversy about what happened in parliament during the enactment of the impugned Act. What was in the controversy was the constitutionality of the acts, omissions and the Act itself.

During the trial at the Constitutional Court, the Petitioners sought the indulgence of the court to summon the speaker for cross examination on a number of matters. The petitioners sought to rely on Rule 12(3) of the Constitutional Court (Petition and References) Rules S.I.91 of 2005 which provides that; -

"The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision."

The appellants argue that apart from the Speaker and Deputy Speaker who should have been called

to testify on their lead role in the enactment of the impugned Act others who should have been called included the minister for finance who would testify about contradictory certificate of financial implications, Hon. Raphael Magyezi who moved the impugned Act, the President who assented to the Bill which was not accompanied by a valid Certificate of compliance and the Chairperson and the deputy

Chairperson of the legal and parliamentary affairs committee of parliament.

On their own motion the court did not find it necessary to call any witness outside those that had filed affidavits. Some of those that had filed affidavits like Mr. John Mitala, Head of the Civil Service, Mr. Keith Muhakanizi, Mr. Frank Mwesigwa, Mr. Asuman Mugenyi, General David Muhoozi and Hon. Nambooze Bakireke were cross examined from the loads of evidence that was filed by both the petitioners and the respondent. With that cross examination of the witnesses the court was equipped with more than sufficient material to make the necessary interpretation as required under Article 137 (3) (a) and (b) of the constitution.

As to the failure by the Constitutional Court to give detailed reasons as to why they found no reason to call the Speaker, the reasons advanced in this court cure the omission because as a first appellate court we are required to do a re-evaluation and come to our own conclusion.

Cross Examination after submissions

I agree with the submissions of counsel that it was irregular of the court to take final submissions of the case before cross examination. The submissions are supposed to be a final act in a trial before judgement. The evidence elucidated during cross examination would be part of the comments during final submissions. In my own view the cross examination after final submissions was not fatal to the trial since the evidence was at the disposal of the justices and it would be taken into account during their own analysis of the case.

Interjections

Interjections by the court should be within limits. Court may wish to clarify a point or even give direction of the trial without appearing to be descending in the arena. The appellants who complain of the interjections were able to present their cases which was not any different from that presented in this court. In fact, Mr. Mabirizi submitted before this court that he was able to present his case with a number of authorities which constitutional court did not acknowledge.

Submissions of Authorities

Mr. Mabirizi complained that he presented his case with a number of authorities which court did not acknowledge. But all the justices supported their findings with a number of good authorities from a number of jurisdictions. This might have been as a result of their own research in addition to the authorities presented by the parties. They might not have mentioned who of the parties was the

source of the authorities but they were assisted by the authorities submitted by all parties including Mr. Mabirizi.

Delay of the trial and delivery of the judgement.

According to Mr. Mabirizi the commencement of the trial and the trial itself were delayed. This court is not in position to comment at why the trial did not start immediately after the filing of the petition as required under Article 137 of the Constitution. In relation to the adjournments of the case during the trial, an adjournment of the case does not necessary mean that because there no hearing in the court room there is no work going on. The hearing of case entails a lot of work during the hearing in court and outside court where there is a lot of reading and research being done.

I have studied Mr. Mabirizi's argument about the consequences of the delayed judgement. He cited the Nigerian case of Chief Ifezue V. Mbadugha, Nigeria (supra) where a judgment was annulled for failure to deliver it within 90 days prescribed by the Constitution. In our case it is a Regulation in the Judicial Code of Conduct Which Courts should endeavor to adhere to. However, I would not go as a far as saying that failure to deliver a judgement within sixty days renders it null and void. A judgement of a court cannot be invalidated by reason of delay. In the instant case the Constitutional court made pronouncement on the constitutionality of the impugned Act and unless it is reversed it remains on the record as the judgement of the court.

Mr. Mabirizi complained that he was made to sit in a dock during the trial of the case. There was an argument as to whether a litigant can sit at the Bar with counsel and court found that Mr. Mabirizi who was representing himself could not sit at the table reserved for counsel. The DCJ Dollo went to a great length to the position and he stated that: -

"… the position is this, Mr. Mabirizi is a Petitioner and he has every right to be heard like other Petitioners, the other Petitioners chose to be heard through learned Counsel, they brokered professional services of learned Counsel and they are called members of the bar with the right to appear here in a particular way. The right to be heard does not mean you choose where to sit. The right to be heard is to be able to present your case, every institution, every profession has got its rules of conduct and rules of procedure. Our Court is not going to be the first to breach those rules of procedure. Accordingly, Mr. Mabirizi will sit with the other litigants and when the time comes for him to present his case we will bring him to sit in an appropriate place where he can present his case."

I agree with the guidance of the court on this point. From wherever he was he was able to present his petition and I do not see how his right to a fair hearing was compromised by being denied a seat at the Bar.

The Appellants submitted that they were restricted on what to ask in cross examination of the witnesses which limited them to the scope to the averments in the affidavits. I am aware of the provisions of Section 137(2) of the Evidence Act which makes the scope of cross examination wide. But where a witness has been summoned with leave of court the court may limit the cross examination to the facts deponed to the 20 affidavit.

The court, in my view inadvertently denied the appellants' counsel and appellant right to a rejoinder after the Attorney General had made his submissions in reply. But no prejudice was suffered by the appellants.

On the affidavits of affidavits of Mr. Keith Muhakanizi and General David Muhoozi being hearsay, my view is that affidavit evidence like any other evidence is subject to evaluation. Upon evaluation court is entitled to accept or reject the evidence if it is worthless it may not be necessary to strike out the affidavits.

I don't find any basis for an award of professional compensation or damages to Mr. Mabirizi.

On whether the Court determined all issues in controversy, I agree with the submissions of the Attorney General that from the consolidated Petitions issues were framed and the Constitutional Court resolved them and if not this court is duty bound to re-evaluate the case and come to its own conclusions.

In conclusion on this issue, I wish to observe that some of the issues raised are valid as I have tried to explain. However, none of the irregularities was fatal to the whole trial as would warrant annulment as prayed by the appellants. The issue is answered in the negative

Issue No.1.

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

Appellants' Submissions (MPS)

Counsel submitted that the basic structure doctrine attempts to identify the philosophy upon which a constitution is based as opposed to a textual exegesis of the same. He submitted that the doctrine has been instrumental in shaping the constitutional jurisprudence of different countries across the world since the case of Kesavananda Bharati Versus State of Kerala, AIR 1973 SC where it was held as follows; "According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the constitution or its basic features." The case was followed in Minerva Mills v. Union of India, AIR 1980 SC 1789, where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a constitution.

Counsel cited cases in other jurisdiction where the doctrine was followed like in Taiwan, where the

Council of Grand Justices of Taiwan announced interpretation No. 499 and stated that; "Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the constitution itself. As a result, such amendment shall be deemed improper."

In Bangladesh the Supreme Court in the case of Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169, held: - "Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament… Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

In South Africa, the South African Constitutional Court in the case of Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) while discussing the applicability of the basic structure doctrine noted as follows:- "There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features 30 of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case; could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."

In Kenya, the court of Appeal in the case of Njoya vs Attorney General and Others (2004) AHRLR 157 held that: - "Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alteration of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained." (Sic)

In applying this doctrine to the instant petition, counsel strongly submitted that the learned justices of the Constitutional Court misconstrued the application of the basic structure doctrine in their finding that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and as such S. 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. He faults the learned Justices in according the basic structure doctrine a narrow and

restrictive application when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of parliament and not to the age limit. To this submission, he relied on the case of *Kesavananda (supra)* where court held that;

"To say that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment is an over-simplification. In certain Constitutions there can be procedural and or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum etc. Besides these limitations, there can be limitations in the content and scope of the power. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly no question of the law-making body being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people."

Counsel for appellant further associated himself with the finding of Kakuru JCC that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. He relied on the dissent judgment of Kasule, JA in Saleh Kamba & others Vs. Attorney General & others; Constitutional Petition No. 16 of 2013 in support of his submission.

In that case the learned Justice held that in interpreting a constitution, court ought to take into account the history of a given country. He further considered the issue of the basic structure of the Constitution and stated as follows:

"Therefore from the historical perspective, the Constitution is to be interpreted in such a way that promotes the growth of democratic values and practices, while at the same time doing away or 10 *restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association…"*

He argued that what constitutes the basic structure of the 1995 Constitution was aptly highlighted by Kakuru JCC in his dissent, where he came up with what he believed were features of the

Constitution that should not be tampered with lest the fabric of the constitution is destroyed

The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.

The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.

Political order through adherence to a popular and durable Constitution.

Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.

Arising from 4 above, Rule of law, observance of human rights, regular free and fair elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.

Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.

Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.

Natural Resources are held by government in trust for the people and do not belong to government.

Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.

Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party."

That it is on that premise that Kakuru JCC makes a finding that;

"Parliament, in my view, has no power to amend, alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under Article 3 (4). This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves. My view expressed above is fortified by the following provisions of the 5 Constitution.

Articles 1 and 2: These Articles establish the foundation of the Constitution upon which all other Articles are anchored therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4). Article 3. This Article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to Uganda the Kelsen Theory of pure law. Under Article 3(4) an amendment by Parliament may have the effect of

abrogating the Constitution even if such an amendment has been enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test."

Counsel therefore invited this Honourable court to consider the finding of Kakuru, JA as a locus classicus on the basic features of the 1995 Constitution and also further relied on the case of Yaakov vs chairman of the Central Elections committee for the sixth Knesset EA 1/65 where the Supreme Court held that:

"The invalidity of a constitutional provision cannot be rejected merely because the provision itself is part of the Constitution. There are fundamental constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms, which do not occupy this rank and contradict these rules can be void because they conflict with them." Counsel contended that the aforesaid key pillars of the 1995 Constitution are reflected and embodied in the preamble to the constitution yet the Majority Justices of the Constitutional Court overlooked the significance and importance of the preamble. Counsel again cited several authorities such as the British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, Kesavananda case(supra) and Minerva case(supra) followed in of Anwar case(supra) that applied the basic structure in emphasising the essence of the preamble in support of his submission.

In British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, the Supreme Court of Belize invoked the basic structure doctrine to strike down a particular constitutional amendment which was at variance with the preamble to the constitution of Belize. The court emphasized that;

"The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of the existence... There is though a limitation on the power of amendment by implication by the words of the preamble and therefore every provision of the constitution is open to amendment, provided the foundation or basic structure of the constitution is not removed, damaged or destroyed. …The preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions…."

In the case of Minerva case (supra) while emphasizing the essence of the 25 preamble, the Supreme Court of India explained that;

"The preamble assures to the people of India a polity whose basic structure is described therein as a sovereign democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential

attributes are recited in the preamble itself."

The Supreme Court of Bangladesh in the case of Anwar case (supra) cited with approval the Indian case of Minerva case (supra) and held that;

"We the people declared the fundamental principles of the constitution and the fundamental aims of the state" this preamble is not only part of the constitution but stands as an entrenched provision that cannot be amended by parliament alone. It has not been spun out of gossamer matters nor is it a little star twinkling in the sky above. If any provision can be called the pole star of the Constitution, then it is the preamble."

Finally, in the Kesavananda case (supra) court observed that the preamble constitutes a landmark in a country and sets out as a matter of historical fact what the people resolved to do for moulding their future destiny.

Counsel therefore invited this Honourable court to take cognizance of the fact that the framers of the 1995 constitution deemed it absolutely necessary to enshrine within the text of the constitution such provision as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy; these included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these lofty provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland.

He argued that by amending Article 102 (b) to remove the presidential age limit, after scrapping term limits, parliament not only emasculated the preamble to the constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger.

Therefore, it is the Appellants' contention that the basic features of the constitution herein mentioned to wit; supremacy of the constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and constitutional stability as well as constitutionalism and rule of law in general were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 constitution. On that account alone the Constitutional Court ought to have invoked the basic structure doctrine to strike down the entire Constitution (Amendment) Act, No.1 of 2018.

Finally, on this issue counsel prayed that this Honourable court be pleased to answer issue 1 in the affirmative.

Attorney General's Submissions.

Attorney General submitted that the learned Justices of the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act do not

derogate from the Basic Structure of the 1995 Constitution.

He contended that the doctrine was defined in the case of Kesavananda Bharati vs. The State of Kerala Petition (Civil) 135 of 1970; (A.I.R 1973 SC 1461) Vol 5 Tab DD page 64, where S.M. Sikri, C. J defined the Basic Structure in the following terms:

"The basic structure may be said to consist of the following features:

Supremacy of the Constitution;

Republican and Democratic form of Government;

Secular character of the Constitution;

Separation of Powers between the Executive;

Federal character of the Constitution;

He pointed out that it is important to note that any amendments have to be done without destroying the spirit and the basic structure and the foundation upon which Uganda was built as a nation.

He therefore contended that the Constitutional Court unanimously found that the framers of the 1995 Constitution clearly identified provisions of the Constitution which are fundamental and form part of the Basic

Structure of the 1995 Constitution. He argued that the framers carefully entrenched these provisions by various safeguards for protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions.

According to the Attorney General, the Safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution.

It follows therefore that Articles 69, 74(1), 75, 260 and 261 of the 1995 Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. Only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

The Attorney General submitted that the Constituent Assembly that took a considerable amount of time to debate and eventually include the peoples' views in what eventually became the 1995 Constitution, was alive to the fact that our society is not static but dynamic and over the years, there would arise a need to amend the Constitution to reflect the changing times.

He further contended that Article 79 of the 1995 Constitution primarily gives Parliament the power to make laws that promote peace, order, development and good governance in Uganda.

Accordingly, Article 259 of the Constitution offers the procedure to the amendment of the Constitution by giving Parliament powers to enact an Act of Parliament, the sole purpose of which is to amend the Constitution by way of addition, variation, or repeal of any provision in accordance

with the procedure laid down in Chapter Eighteen.

Therefore, it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way contravene the basic structure of the Constitution and neither was it inconsistent with or in contravention of the constitution

The Attorney General fortified his submissions by the unanimous decision of the learned Justices of the Constitutional Court where it was found as follows: -

As to whether sections 3 and 7 of the impugned Act derogated from the Basic structure of the 1995 Constitution, Justice Owiny Dollo held as thus;

"…Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the Constitution, I am unable to fault it for the process it took to effect these amendments"

Justice Remmy Kasule noted on Page 77 paragraph 2051- page 78 paragraph 2070, Volume 4 of the Record of Appeal that;

"…The framers of the 1995 Constitution that is the Constituent Assembly, in their wisdom saw it fit to have the age limits of one who is to stand for election as President of Uganda, under the category of the qualifications of the President. They provided for these qualifications under Article 102 of the Constitution. They did not put this Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum.''

The Attorney General submitted that the people's power to elect the President or District Chairperson of their choice is not taken away by lifting their respective age limits. If anything, citizens would be encouraged to aspire to elect leaders of their choice and to actively participate in politics and elections as they will now be presented with a wider choice of people to choose from.

He referred to the judgment of Justice Elizabeth Musoke in support of this submission where she held on pages 794 Vol. 4 as follows:

"…. I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 181 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution.

He referred further to Justice Cheborion Barishaki judgment where he makes reference to the German jurist, Professor Dietrich Conrad, who introduced the basic Structure doctrine to Indian scholars and subsequently Indian jurisprudence in a series of public lectures he delivered in that country, notably his 1965 Public Lecture; Prof. Dietrich Conrad, "Implied Limitations of the Amending Power." He also refers to the landmark decision in Kesavanand Bharati vs State of Kerala (A.I.R 1973 SC 1461) wherein it was subsequently held that principles of democracy and democratic government are part of the basic structure of the Indian Constitution and incapable of

amendment.

The Attorney General agreed with Justice Cheborion JCC on the applicability of the basic structure doctrine to the 1995 Constitution that sections 1, 3 and 7 of the impugned Act were enacted within the reach of the amending power of Parliament and do not derogate from the Basic structure of the 1995 Constitution.

In conclusion, He affirmed his submission that the learned Justices of the Constitutional Court took time to review the basic structure Doctrine and construed it rightly in as far as it's applicable to the 1995 Constitution.

Court's Determination of Issue No. 1

This issue as framed at the Constitutional court for determination as: -

6(g) Whether the Act was against the spirit and structure of the 1995 Constitution.

The Basic Structure doctrine as judicial principle was well defined by all the parties in the Consolidated Constitutional Petition at the constitutional Court as well as in this court.

Both the appellants and the Attorney General seem to agree on the doctrine and in fact the Attorney General agreed with Mr. Lukwago that the basic structure as defined by Justice Kakuru constitutes the basic structure of the 1995 Constitution which should be adopted by this court.

Before we go any further it should be observed that much as there are proponents of the doctrine there are also its opponents.

In the judgement of Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461 there were six dissenters out of the 13 judges that presided over the case. One of the six dissenting judges, Hon. Justice A.N. Ray had this to say:

"*Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system. (see paragragh 960) …*

The problems of the times and the solutions of those problems are considered at the time of framing the Constitution. But those who frame the Constitution also know that new and unforeseen problems may emerge, that problems once considered important may lose their importance, because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another…The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and wellbeing of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the

Constitution. (See para 987).

In quoting the above passage from judgment of Hon. Justice A.N. Ray, Justices Tsekooko in the case of Paul k. Ssemogerere and Ors v Attorney General Constitutional Appeal No.1 of 2002 stated that: -

"This passage indicates that written constitutions are not static and are liable to be amended. There is an obvious implication in this passage that courts have to interpret constitutional provisions to bring the constitution in line with current trends. Implicit in this is the real possibility that one part of the constitution can be harmonised with another part of the same constitution."

In the case of Rev. Christopher Mtikila v Attorney General Misc. Civil 25 Cause No. 10 of 2005, the Tanzanian Court of Appeal found: -

"we are definite that the courts are not the custodian of the will of the people, that is the property of elected members of parliament", so if there are two or more Articles or portions of Articles which cannot be harmonised then it is parliament which will deal with the matter and not the court unless power is expressly given by the constitution.

On the doctrine of 'basic structure' of the Constitution, the Court held in that case that:

We agree with Prof. Kabudi that that doctrine is nebulous, (meaning it is misty, it is cloudy, it is hazy according to the dictionary) as there is no agreed yardstick of what constitutes basic structure of a constitution."

There were attempts by both the Indian court and the Constitutional court to define what the basic structure of our respective constitutions are. In the case of Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461 from which the doctrine has its genesis, never came up with a 10 single structure that would be said to be a useful guide as to determining as to which part/Articles of our constitution is amendable because it is not part of the basic structure and which part/Articles cannot be amended because to do so would lead to the destruction of the Basic structure leading to total collapse of the constitution.

In the same case Chief Justice Sarv Mittra Sikri, writing for the majority, indicated that the basic structure consists of the following:

The supremacy of the constitution.

A republican and democratic form of government.

The secular character of the Constitution.

Maintenance of the separation of powers.

The federal character of the Constitution.

Justices Shelat and Grover in their opinion added three features to the Chief Justice's list:

The mandate to build a welfare state contained in the Directive 25 Principles of State Policy.

Maintenance of the unity and integrity of India.

The sovereignty of the country.

Justices Hegde and Mukherjea, in their opinion, provided a separate and shorter list:

The sovereignty of India.

The democratic character of the polity.

The unity of the country.

Essential features of individual freedoms.

The mandate to build a welfare state.

Justice JaganmohanReddy preferred to look at the preamble, stating that the basic features of the constitution were laid out by that part of the document, and thus could be represented by:

A sovereign democratic republic.

The provision of social, economic and political justice.

Liberty of thought, expression, belief, faith and worship.

Equality of status and opportunity

It can be easily discovered from above that each of the above justices had his own understanding of what formed the Basic structure of the Indian constitution at that time. There was no unanimity as to what constituted the basic structure of the Indian Constitution.

The same can be seen by Ugandan Constitutional Court justices whose attempt to define what the basic structure of the Ugandan constitution suffered the same fate as that of the Indian court.

The Hon. Justice Alfonse C. Owiny – Dollo; DCJ/PCC in his judgement considered what formed the Basic structure and stated that;

“The principal character of the 1995 Constitution, which constitute its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of 25 fundamental rights, and judicial independence.

In the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fetter Parliament's powers to do so and thereby deny it the freedom to treat the Constitution with reckless abandon. Article 259 of the Constitution offers the provision signifying the safeguards to the

Constitution; by providing as follows:

‘(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation, or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament–

The sole purpose of which is to amend this Constitution; and

The Act has been passed in accordance with this Chapter.’

Article 75 of the Constitution prohibits Parliament from enacting a law establishing a One Party State; meaning, in essence, that it is only the people who can do so pursuant to the provision of Article 1(4) of the Constitution. Article 260 of the Constitution lists provisions in the Constitution, the amendment of which Parliament can only recommend; but can only become law upon the approval of the people in a referendum. Similarly, Articles 69 and 74(1) of the Constitution provides for the requirement of a referendum to determine whether there should be a change in the political system to be applicable in Uganda at a given time. Other provisions, such as Articles 260, and 262, require special majority; to wit, two –thirds majority of the entire membership of Parliament in the second and third readings of the Bill for the amendment of provisions referred to under Articles 260 and 261 of the Constitution.

It is only such provision of the Constitution as is referred to under Article 262, which Parliament may amend under the general powers conferred on it to make laws as is envisaged under the provision of Articles 79 and 259 of the Constitution. Otherwise, for amendment of the provisions of the Constitution covered under Articles 260 and 261 of the Constitution, as exceptions to the general rule, there is, respectively, the mandatory requirement of approval by the people in a referendum, and ratification by the specified proportion of 5 District Councils. In addition, Article 263 provides that the votes required in the second and third readings referred to in Articles 260 and 261 of the Constitution must be separated by at least fourteen sitting days of Parliament.

Article 77 (4) for its part, as I will discuss at length below, restricts the extension of the tenure or life of a serving Parliament to six months at a time; which can only be necessitated by either a situation of war, or emergency, rendering holding an election impossible. Furthermore, in addition to the requirement for satisfying the threshold of the stated special majority, and fourteen sitting days space between the second and third readings of the Bill, Article 260 provides that the provisions entrenched therein can only be amended after the people have positively pronounced themselves thereon in a referendum. These provisions, for the people to exercise their original constituent power in the amendment of the Constitution, are clear manifestation of the safeguards inbuilt within the Constitution to secure the provision of Article 1 of the Constitution; which

recognises that ultimate power vests in the people.

Then there is the special provision of Article 44 of the Constitution; which prohibits any form of derogation whatever from the human rights and freedoms specified therein; as follows:

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms–

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

Freedom from slavery or servitude;

The right to fair hearing;

The right to an order of habeas corpus."

It is these non–derogable provisions, protecting fundamental human rights, with respect to which the phrase 'tojikwatako' (do not touch it) – which gained notoriety during the Constitution amendment process, urging members of Parliament not to touch the Constitution – would have been most relevant."

In the judgment of Hon. Justice Remmy Kasule correspondingly attempted to define the doctrine he stated that;

"Therefore, the doctrine of basic structure is embedded in the 1995 Constitution. As the Njoya vs Ag & Others (Supra) case shows, Kenya has also embraced the said doctrine. Tanzania seems not to have embraced it fully, given the Tanzania Court of Appeal decision of AG vs Mtikila: Civil Appeal No. 45 of 2009. But our history of tyranny, violence and Constitutional instability is different from that of Tanzania that has had Constitutional stability since her becoming an Independent State, and it is fitting that Uganda adopted the doctrine of basic structure.

Accordingly, by application of the doctrine of basic structure, the Parliament of Uganda can only amend the Constitution to do away or to reduce those basic structures such as sovereignty of the people (Article 1), the supremacy of the Constitution (Article 2) defence of the Constitution (Article 3), non-derogation of particular basic rights and freedoms (Article 44), democracy including the right to vote (Article 59), participating and changing leadership periodically

(Article 61), non-establishment of a one-party State (Article 75), separation of powers amongst the legislature (Article 77): The Executive (Article 98): The Judiciary (Article 126) and Independence of the Judiciary (Article 128), with the approval of the people through a referendum as provided for under Article 260 of the 30 Constitution."

In his judgment Justice Kenneth Kakuru, JA/ JCC outlined what in his opinion formed the Basic structure of the 1995 Constitution. The structure which is already outlined in counsel Lukwago's submissions was supported by the Attorney General in his submissions. After outlining the structure, he concluded as follows: -

"Parliament, in my view, has no power to amend alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under Article 3 (4). This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves."

This was in spite of his acknowledgement that the doctrine had not yet attained universal acceptance as he explained: -

"Needless to say, the doctrine of basic structure has not yet attained universal acceptance. It was rejected in Tanzania, when the Court of Appeal reversed the Judgment of the High Court that had upheld it in Attorney General vs Christopher Mtikila (Civil Appeal No. 45 of 2009).

It has not been fully accepted in Pakistan or even in South Africa where it has been alluded to but not adopted.

The Supreme Court of Sri Lanka, also rejected it because the language in its Constitution permitted expressly any amendment or repeal of any Constitutional provision. The doctrine has also been rejected in Malaysia, where the Court granted Parliament and unlimited power to amend the Constitution…"

In the judgment of Hon. Lady Justice Elizabeth Musoke, JCC. She took the stance of Justice Jaganmohan Reddy (supra) that in the definition of the doctrine, we must not lose sight of the preamble of the constitution and she proceeded to state that;

"I find that in Uganda the Preamble to the Constitution captures the spirit behind the Constitution. The Constitution was made to address a history characterized by political and constitutional instability…The new Constitution is for ourselves and our posterity, and the Preamble is meant to emphasize the popularity and durability of the Constitution. Further still, a critical aspect of the basic structure of our Constitution is the empowerment and encouragement of active participation of all citizens at all levels of governance. This is the hallmark of the Democratic Principle No. II (i) of the National Objectives and Directive Principles of State Policy.

All the people of Uganda are assured of access to leadership positions at all levels. [See Directive Principle II (i)]. The goal of ensuring stability is echoed in Directive Principle No. III. And pursuant to Article 8A, the Objective Principles are now justiciable.

Another of the basic pillars of our Constitution is Article 1(1), which guarantees the sovereignty of the people by providing that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.

The Bill of Rights to be found in Chapter Four of the Constitution contains fundamental human

rights which are inherent and not granted by the State. The ones in Article 44 are non-derogable and are part of the basic structure which if removed or amended would be replacing the Constitution altogether."

In the judgment of Hon. Justice Cheborion Barishaki, JCC, he stated that the doctrine had been rejected by the Court of Appeal of Tanzania. He made a comparison between the Tanzanian constitution and ours, which I think was not necessary. He stated as follows:-

"By contrast, the Court of Appeal of Tanzania, in Attorney General vs Rev. Christopher Mtikila, Civil Appeal No.45 of 2009 in 2010 (EA) 13 rejected application of the doctrine and overruled the High Court of the said country which had held that the doctrine applies to Tanzania as well. The Justices of the Court of Appeal took the view that the Tanzanian Constitution does not contain any provisions that cannot be amended.

In particular, they seem to have been persuaded by the fact that the doctrine must be expressly legislated since Constitutions of countries such as Algeria, Malawi, Namibia, South Africa, Italy, France and Turkey specifically contain provisions providing that certain clauses of the Constitution are not subject to amendment under any circumstances. A similar provision does not exist in the Tanzanian Constitution.

The Tanzanian Constitution is unique on that account and the unanimous decision of its final appellate Court must be viewed in that regard. The Ugandan Constitution does not contain any clause prohibiting amendment of any provision but it, in my view, differs in major respects from the Tanzanian Constitution. I will enumerate a few unique features which clearly militate against reaching a similar conclusion like the Tanzanian Court of Appeal on applicability of the basic structure doctrine.

Firstly, our Constitution contains elaborate National Objectives and Directive Principles of State Policy that emphasize democratic government, public participation in governance, promotion of unity and stability, respect for fundamental rights and freedoms inter alia. Article 8A of the Constitution requires Uganda to be governed based on the principles of national interest and common good.

Secondly, Article 20(1) of the Constitution, touching upon fundamental rights and freedoms provides that;

"Fundamental rights and freedoms of the individual are inherent and not granted by the State."

In light of the above provision and the Directive Principles of State Policy, can Parliament effect a Constitutional amendment seeking, for instance, to do away with certain rights by scrapping this provision? I will not speculate but clearly, faithful interpretation of our Constitution given its historical background as earlier detailed and in light of its preamble favour the position that the

basic structure doctrine, to a restricted extent, be upheld as applicable in our legal system to govern amendments to the Constitution. We must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy.

I am not convinced that Parliament, in exercise of its powers under Article 79(1) is free to effect amendments that would in effect replace the Constitution resulting from the consensus of the Constituent Assembly with a new one. Consequently, I hold that the Ugandan Constitution is designed to recognise, to a certain extent, the basic structure doctrine in its preamble, national objectives and Directive Principles of State Policy read together with Article 8(A).

In my view, in the Ugandan context the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution.

Amendments to the Constitution should not be introduced or passed in a manner that defeats our country's national objectives and Directive Principles of State Policy without the input of the people in a referendum. Amendments that directly impact on the people's sovereignty enshrined in Article 1 of the Constitution, if passed without a referendum, are deemed to have offended our Constitution's basic structure.

I am persuaded to follow the Kenyan, South African and Indian authorities on this point and respectfully decline to follow the approach of the Court of Appeal of Tanzania. I will therefore determine the extent, if at all, to which the impugned amendments violate the basic structure of our Constitution.

Throughout the trial at the Constitutional court and the appeal before this court there was no suggestion that the Indian Constitution is the same Model as our constitution because our constitution was structured according to our history.

In our constitution there is the whole chapter eighteen with the heading "Amendment of the Constitution", under which there are various Articles including: - Article 259 Amendment of the Constitution, Article 260 Amendments requiring a referendum, Article 261 Amendments requiring approval by district councils and Article 262 Amendments by Parliament which provides: -

A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in Articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than twothirds of all members of Parliament.

These Articles give a framework within which the constitution can be amended. I do not think that it is necessary to agonize as to what the basic structure of the constitution is. As I have already stated both the Indian Court and the Constitutional court attempted to define what the basic structure of the Indian and Ugandan Constitution is but it was an exercise in futility.

My understanding of the basic structure doctrine is that within this framework the constitution is

amendable but it can still be protected from compromise of its own foundation and structure so that every amendment is harmonized with the rest of the constitution and the wishes of the people of Uganda.

The framework provided under Articles 259,260 and 261 of the constitution should not be seen as a licence to the Legislative arm of Government to amend the constitution the way they wish. As to whether this amendment was part of the basic structure it was adequately addressed by the Constitutional court which came to the conclusion that the removal of the age limit would not affect the basic structure of the constitution and I agree with that finding. The issue is answered in the negative.

ISSUE No. 2

This issue was framed as follows:

"Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?" The appellants submitted that the procedure and manner of passing the entire Constitution (Amendment) Act No. 1 of 2018 was flawed and/or tainted with illegalities, procedural impropriety in violation of Articles 28, 42, 44, 79, 91, 92 and 259 of the Constitution and the Rules of Procedure Parliament. Parliament is enjoined under Article 94 of the Constitution to make rules to regulate its own procedure, including the procedure of its committees, subject to the provisions of the Constitution. That Parliament was obliged to follow the provisions of the Constitution and its own Rules of procedure. In support of this argument, they relied on the case of Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14 which was cited with approval in the case of Law Society of Kenya vs Attorney General & Anor [2016] eKLR where court held that:

"*Parliament as a law making body should set standards for compliance with the constitutional provisions and with its own Rules. ... the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it ...*"

The appellantsstated that the net effect of non-compliance of parliament with its own rules of procedure and those laid down in the Constitution rendered the impugned Bill and the resultant Constitution (Amendment) Act No. 1 of 2018 null and void. That the constitution being the supreme law of the land, the procedure for its amendment ought to be sanctified and followed to the letter. They cited the case of Indira Nehru Gandhi vs Shri Raj Narain Civil Appeal No. 887 of 1975 where the Supreme Court of India held that:

"In a democratic country governed by the constitution which is supreme and sovereign, it is no doubt true that the constitution itself can be amended by Parliament but that can only be validly done by following the procedure prescribed by the constitution. That shows that even when the Parliament purports to amend the constitution, it has to comply with the relevant mandate of the constitution itself. Legislators, Minister and Judges all take oath of allegiance to the constitution, for it is by the relevant provisions of the constitution that they derive their authority and jurisdiction and it is to the provisions of the constitution that they owe allegiance."

They therefore invited this Court to answer issue two in the affirmative.

The Attorney General's Submissions in Reply

The Attorney General submitted that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda (and the Rules of Procedure of Parliament).

The issue raises a number of acts and omissions for which the appellants sought declarations and redress under Article 137 of the Constitution. The Article which defines the jurisdiction of the Constitutional Court provides as follows: -

"137. Questions as to the interpretation of the Constitution.

Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

A person who alleges that—

(a) an Act of Parliament or any other law or anything in or doneunder the authority of any law; or (b) any act or omission by anyperson or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional courtfor a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of thisArticle the constitutional court considers that there is need forredress in addition to the declaration sought, the constitutional court may— (a) grant an order of redress; or (b) refer the matter tothe High Court to investigate and determine the appropriate redress.

(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court— (a) may, if it is of the opinion that the question involves a substantial question of law; and (b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with

clause (1) of this Article.

(6) Where any question is referred to the constitutional court under clause (5) of this Article, the constitutional court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision.

(7) Upon a petition being made or a question being referred under this Article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it." (Underling for emphasis)

I deal with each act or omission as raised by the petitioners/appellants to determine the unconstitutionality of the alleged acts and omissions before determining the constitutionality of the Act.

1. Charging the Consolidated Fund contrary to Article 93 of theConstitution

Submission by MPs

In respect to whether or not the Bill had a charge on the consolidated fund contrary to the provisions of Article. 93 of the Constitution, counsel contended that although the Constitutional Court made a finding that the impugned Act violated the provisions of Article 93 of the constitution, it declined to nullify the entire Act on ground that the non-compliance with the Constitutional provision only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years. That the said Sections were introduced by way of amendments that imposed a charge on the consolidated fund.

On the above premise, counsel argued that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated charge as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill which was considered and passed as an integral legislation in the same process.

Counsel further submitted that there was a charge on the consolidated fund by paying each Member of Parliament UGX 29 million as facilitation to carry out consultations with the public regarding the Bill. Counsel invited this Court to make a finding that this exgratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

3rd Appellant's submissions

Counsel submitted that having found some of the provisions in the challenged Act contravened Article 93 of the Constitution, the Constitutional Court would have come to no other conclusion

than nullifying the whole Act. Article 93 provides that;

(a) Parliament shall not……. proceed upon a bill that makes provision for……. the imposition of a charge on the Consolidated Fund or other public fund of Uganda

(b) Proceed upon a motion ... the effect of which would make provision or any of the purpose specified in paragraph "a" of this Article.

In counsel's view, the words "Parliament shall not proceed" should be given their ordinary meaning as was held by this Court in Theodore Sekikubo and others vs. Attorney General Constitutional Appeal No. 01 of 2015. Those words simply prohibit Parliament from proceeding on a Bill or motion. The words in their ordinary interpretation mean "to Stop, do not go forward". Parliament proceeded with the Bill and subsequently enacted the Act. The fact that the offending provisions are later found to be unconstitutional does not change the fact that Parliament proceeded with the Bill and motion in contravention of the Constitution. The provisions of the Constitution deal with a Bill. It is the Bill which was in issue and the Court with respect ought to have made a decision on the constitutionality as at the time of considering the Bill and not after the Bill became law.

The Speaker was required under Rule 113 (2012 Rules) to make a ruling. That it is the responsibility of the Speaker to decide whether a bill contravenes Article 93. In effect the speaker ruled that Article 93 was not applicable because the House was dealing with a committee report and not Bill. This was the wrong way of interpreting the provision. The House was proceeding under a motion for second reading and as such Article 93(b) was applicable.

The House then proceeded with debating the motion. The Speaker reminded members that she had earlier put the question that the bill be read for the second and called for a vote. Members voted. That was proceeding and making a decision on a motion.

Subsequently, Hon. Tusiime brought in amendments to enlarge the life and term of both Parliament and local councils which as the Court found contravened Article 93. At that stage and in line with Article 93 and the Rules of the House the Speaker ought to have made a ruling striking those amendments out and informing the House that the hands of Parliament were tied by the Constitution and they could not proceed with debate in respect of the motions introduced by Hon. Tusiime. Instead, the Speaker allowed the matter to proceed to debate and at the end she put the question and members voted on a motion which created a charge on the Consolidated Fund.

Furthermore, the report of the committee of the whole House contained the provisions which created a charge on the Consolidated Fund. Hon. Magyezi moved a motion for adoption of the report.

The Bill itself, containing the offending provisions was put to a vote and members accepted that the

Bill should pass. It passes. The final approval is given. That is proceeding on the Bill. It is that Bill which is then sent to the President for assent. Parliament has at this stage already breached the Constitution by proceeding with a bill and motions charging the Consolidated Fund and even sending it to the President who then assented to it with the clauses creating a charge on the Fund. Contrary to the Constitution the Parliament considered a bill charging the Consolidated Fund and enacted it into law.

That in the above circumstances, the Constitutional Court could not validate the unconstitutional acts by holding that after all the offending parts of the Bill have been struck down. The question that will still remain is: Did Parliament proceed on a bill creating a charge on the Consolidated Fund? Counsel also faulted the Constitutional Court for not addressing its mind to the provisions of the Constitution and the Public Finance Management Act and thereby came to the wrong conclusion.

Section 76 of the Public Finance Management Act requires every Bill introduced in Parliament to be accompanied by a certificate of financial implications which indicates the estimates of revenue and expenditure over a period of two years after coming into effect of the Bill when passed into law.

The Certificate of Financial Implications in respect of the Bill states that the planned expenditure will be accommodated within the medium term expenditure framework for Ministries Departments and agencies concerned. In so stating the Minister appears to concede that the Bill will have some sort of expenditure. The Minister then states there are no additional financial obligations beyond what is provided in the medium term. Expenditure framework “medium term” is defined in the Act as a period of three to five years.

A medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that a Government is committed to implement during a specific period of between three and five years. It draws on a larger objective such as vision 2025. It may identify priority areas scheduled for implementation during the period, specify economic growth percentage expected policy goals, project sources of financing etc. In short, it is just a plan.

On the other hand, the Consolidated Fund is provided for in Article 153 of the Constitution and Section 2 of the Interpretation Act.

Counsel submitted that Section 76 of the Public Finance Management Act was ignored and not used to determine whether the Bill created a charge on the Consolidated Fund under Article 93 of the Constitution. That therefore the court erred when it whole heartedly embraced the Certificate of Financial Implication as the test of whether the Bill created a charge on the Consolidated Fund.

In respect to the 29 million facilitation, counsel argued that Article 156 of the Constitution requires Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill "which shall be introduced into Parliament to provide for issue from the
Consolidated Fund of the sums necessary to meet that expenditure
...."

Article 154 of the Constitution also provides that no monies shall be withdrawn from the Consolidated Fund except…. where the issue of those monies has been authorized by an Appropriation Act."

The Appropriation Act is in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million did not come from the Consolidated Fund but the account of Parliament. The decision to pay that money was a result of the Motions for the 1st and 2nd second reading of the Bill. Those Motions therefore had the effect of removing 29 million shillings from the Consolidated Fund albeit unconstitutionally.

To hold otherwise would mean that expenditure on Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017.It would mean that at the time preparing budget estimates in 2016

Parliament was aware of this bill and made provision for it. That does seem logical. The logical conclusion is that the Ministry of Finance provided the money. If it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act. The burden to do so lay with the Respondent but it failed to do so.

Mr. Mabirizi's Submissions

Mr. Mabirizi submitted that parliament's power and functions are not absolute or above the law but subject to the provisions of this Constitution as provided under Article 97.

He cited the cases of Oloka-Onyango & 9 ORS V. Attorney General, CCCP No. 8/14, where it was held that "Parliament as a law making body should set standards for compliance with the constitutional provisions and its own rules...The enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it"

The case of Doctors for Life International v. The Speaker of the NATIONAL Assembly & ORS South Africa Constitutional Court Case No. CCT 12/05, it was noted by Ngobo, J that "…Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid…"

The constitutional provisions under application in the American case are couched in the same way like our Article 93 which starts with a prohibition "…Parliament shall not ..." The Article does not give any exception whatsoever. Section 76 of The Public Finance Management Act 2015, has no

single word of a Private Members Bill, it was only designed to guide ministers.

Mr. Mabirizi contended that a prohibited law is null & void only waiting to be struck down. Although Article 94 of The Constitution allows members of Parliament to introduce Private members' bills, they can only legally introduce bills in line with Article 93 of The Constitution.

Mr. Mabirizi contended non-compliance with rules of procedure rendered the outcome null and void. That the justices agreed with him where they relied on Paul Ssemwogerere and Ors Vs Attorney General and Oloka Onyango and Others Vs Attorney General (supra) to find that failure by Parliament to strictly follow laid down procedures in the Constitution and Parliamentary Rules of Procedure will invalidate subsequent legislation even if it be an Act for amending the Constitution.

Attorney General's submissions

The Attorney General begun by pointing out that Article 93 of the

Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill, except when introduced on behalf of the by Government, that had financial implications as provided therein.

The Attorney General further pointed out that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of procedure governing the way it conducted business. Referring this Court to Rule 117 of the Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implication. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implication and did not contravene Article 93 of the Constitution.

The Attorney General further contended that Rule 117 of the Rules of Procedure of Parliament was in *pari materia* with Section 76 of the Public Finance Management Act of 2015. The Attorney General submitted that the evidence on record showed that on 27th September 2017, the Hon. Raphael Magyezi, a Member of Parliament representing Igara County West constituency, tabled in Parliament a motion for leave to introduce a private Members' Bill titled The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that his evidence showed that on 3rd October 2017, the

Hon. Raphael Magyezi moved the House so that the bill could be read for the first time and the same was seconded and laid on the table of Parliament, accompanied by a Certificate of Financial Implications as required under the section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that that Parliament only proceeded with the bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that this position was confirmed by the Constitutional Court. The Attorney General referred this Court to the Judgment of Kasule, JCC and quoted the learned Justices holding thus:

"This Court accepts this Certificate of Financial Implications as being valid in law as a correct certification by Government, through the Ministry of Finance, that the proposed amendments in the original Bill satisfied the provision of Article 93 of the Constitution, the Public Finance Management Act and the appropriate Rules of Parliament."

The Attorney General further referred to the same Judgment of Kasule, JCC were his lordship observed as follows:

"Article 93 of the Constitution and Section 76 (1) of the Public Finance Management Act, 2015 compulsorily require every Bill presented to Parliament to be accompanied by a certificate of 10 *financial implications from the Minister of Finance.*

He also referred us to the Judgment of Cheborion, JCC where his lordship held thus:

"As a consequence, I find that the Bill which was introduced by Hon. Magyezi in respect of amendment of Article 61, 102, 104 complied with the requirements of Article 93 of the Constitution and section 76 of the Public Finance and Management Act 2015 while the amendments introduced by Hon. Nandala Mafabi and Hon. Tusiime did not comply."

Lastly, the Attorney General referred this Court to the Judgment of 20 Kakuru, where his Lordship held as follows:

"None of the Petitioners presented any serious challenge to the constitutionality of the original Bill as first presented. I have already found that it was not in contravention of or inconsistent with Article 1, 2 and 8A of the Constitution. There was evidence that a Certificate of Financial Implications was properly obtained and was indeed available before the motion to introduce the said bill was proceeded with upon in Parliament."

The Attorney General also pointed out that a similar position was reached by Musoke, JCC in her judgment. The Attorney General submitted that the Justices of the Constitutional Court were right to strike out the provisions of the impugned Act that did not comply with the Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of

severance.

The Attorney General invited this Court to uphold the decision of the Constitutional Court that the Bill presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination the Clerk to Parliament ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution. In support of his contention, he referred this Court to the Judgments of Kasule, Cheborion, JCC, Kakuru, JCC and Musoke, JCC.

In conclusion on this point, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government that made provision for financial implications. In his view, the Article did not concern itself with the money used in processing the bill, allowances/facilitations that was paid out to the Members of Parliament to process the Bills.

The Attorney General invited this Court to uphold the learned majority Justices' decision that the money given to members of Parliament as facilitation did not contravene Article 93 of the Constitution.

Determination of the Court.

Article 93 of the 1995 constitution provide as follows: -

93. Restriction on financial matters.

Parliament shall not, unless the bill or the motion is introducedon behalf of the Government—

(a) proceed upon a bill, including an amendment bill, that makes provision for any of the following—

(i) the imposition of taxation or the alteration of taxation otherwise than by reduction;

(ii) the imposition of a charge on the Consolidated Fund orother public fund of Uganda or the alteration of any such charge otherwise than by reduction;

(iii) the payment, issue or withdrawal from the Consolidated Fund or other public fund of Uganda of any monies not charged on that fund or any increase in the amount of that payment, issue or withdrawal; or

(iv) the composition or remission of any debt due to the Government of Uganda; or

(b) proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this Article.

The essence of this Article is to enable the government plan on how such charge or others imposition on consolidated fund can be effectively implemented by it without causing unnecessary restraints on its budget. This is to prevent Parliament from proceeding with Bills and Motions that create charge on consolidated fund unless they are brought by government.

The impugned Constitution (Amendment) Act 2018, had two certificates of financial implications. The first was issued upon the request of Hon. Magyezi and another issued by Ministry of Finance to Hon. Tusiime Michael for an amendment to original Magyezi bill to add a clause for extension tenure of parliament from 5 years to 7 years starting with current parliament. The issue of the second certificate having glitches was properly handled by the Constitutional court which found it to have 30 been irregularly issued. The other amendment of Hon Nandala Mafabi had no certificate of financial implication.

The majority of Constitutional Court justices found that the impugned Act violated the provision of Article 93 of the constitution and they contended that non –compliance only affected section 2,6,8 and 10 of the impugned Act which provided for extension of the term of parliament and Local government from five to seven years which were introduced by the way of amendment that it imposed a charge on the consolidated fund and severed it and saved the original contents of the Magyezi bill as it had no imposition of a charge on the consolidated fund.

I concur with the Constitutional court that the Magyezi Bill had no charge or imposition of the same on the consolidated Fund. The amendments did. Under Article 93(a) of the Constitution debate on the Magyezi Bill should not have proceeded. It was incumbent on the speaker to resolve this issue before proceeding with the debate.

The Article forbids private members from introducing or proceeding with Bills that make a charge on consolidated fund. The language is in mandatory terms.

I therefore find that the process of debating and passing Constitutional (Amendment) Bill 2017 with its amendment that infringed on Article 93 of the Constitution was null and void and vitiated the entire enactment of the Constitutional (Amendment) Act 2018.

On the issue of 29 million.

The Parliamentary Commission spent moneys which were already appropriated. I would leave this matter for the Auditor General to establish whether or not there was misappropriation of the funds much as its source was the consolidated fund.

2. Consultation/Participation

Submissions by MPs

On the issue of Consultation/Public Participation, counsel submitted that the learned majority Justices of the Constitutional Court erred in law and fact when they held that there was proper

consultation of the people of Uganda on the impugned Constitution (Amendment) Bill, 2017. He submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted. He argued that public participation is one of the elements of the basic structures of our Constitution and therefore this being a matter which touched the foundation of the Constitution Specifically Articles 1, 2 and 8A, public participation was paramount.

In support of his submissions above, counsel cited the persuasive Kenyan cases of:

i)Law Society of Kenya Vs. Attorney General, Constitutional Petition No. 3 of 2016 where the Court noted that:

"...public participation in governance is an internationally recognized concept. This concept is reflected in the international human rights instruments. The Universal declaration of Humanrights of 1948 proclaims in Article 21 that everyone has a right totake part in the government of his country, directly or throughfreely chosen representatives..."

The Kenyan Constitutional Court further pronounced that;-

"...To paraphrase Gakuru case (Supra), public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavange for it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of enactment of legislation by making use of as many for a as possible such as churches, mosques, public "barazas", national and vernacular radio broadcasting stations and other avenues where the public are known to converge and disseminate information with respect to the intended action..."

ii) Robert N. Gakuru& Others –Vs- The Governor Kiambu County &10 Others wherethe Court noted that:

"...the obligation to facilitate public involvement is a material part of the law making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my Judgment, this Court not only has a right but also has a duty to ensure that the law making process prescribed by the Constitution is observed. And if the conditions for law making process have not been complied with, it has the duty to say so and declare the resulting statute invalid..."

Counsel stated that the significance of consultations is a fundamental value of our Constitution which was not appreciated by the majority Justices of the Constitutional Court. That the learned

Justices of the Constitutional Court failed in their duty of evaluating the evidence on record and arrived at a wrong decision that the people were consulted on the impugned Constitution (Amendment) Bill, 2017 whereas not.

Counsel expounded that there was overwhelming and cogent evidence on record indicating that;-

a. The process leading to the enactment of the impugned Constitution (Amendment) Act was not preceded by a Consultative Constitutional review exercise as was the case with the promulgation of the 1995 Constitution and the 2005 amendments.

b. The Constitution (Amendment) Bill was presented in Parliament by a private member, Hon. Raphael Magyezi and there is no evidence on record to the effect that he consulted the people of Uganda later on his constituents in Igara West Constituency before tabling the same before Parliament.

c. Much as the Speaker directed that consultations should be conducted, Parliament as an institution never designed a structured frame work or process for public participation or consultation which may have included Parliamentary barazas, public rallies, radio and Television broad castings among others.

d. The Committee on Legal and Parliamentary affairs which was assigned the duty of processing the Bill did a shoddy job.

e. The opposition members of Parliament were denied the opportunity and right to engage the people over the aforesaid bill. The public gatherings for opposition members of Parliament which had been organized countrywide were blocked, ruthlessly and violently dispersed by the police and other security agencies and many Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment

In breaking up the opposition MPs' rallies, Police relied on the directive issued by Asuman Mugyenyi, the Director of operations which directive was unanimously declared unlawful, arbitrary, obnoxious, unfortunate and unconstitutional by the Constitutional Court. Ironically, the Constitutional Court held that there was no evidence to demonstrate that the aforesaid illegal directive was ever implemented and that it had adversely affected the entire consultation process. Counsel submitted that the finding was untenable, both in law and fact as there was overwhelming evidence on record to the effect that the said directive was enforced as illustrated hereinabove. Indeed, Asuman Mugyenyi himself admitted during cross examination that his directive was enforced by all the police officers countrywide.

Despite the fact that Members of Parliament were given exgratia facilitation of Ugx. 29m the purported consultation as argued by the Attorney General was illusory and ineffectual. He invited Court to adopt the finding of Justice Kakuru where he held that, "…the process of public

participation in my humble view is required to pass the SMART test; that is, it has to be Specific, Measurable, Attainable, Relevant and Time bound…"

He further contended that Justice Kakuru, while applying the qualitative test, found that only 7 out of 455 members of Parliament who were on the Roll call, when the bill was passed were proved to have consulted the people in some way and that "…The number of constituencies in which consultations were made appear to have been only 7 out of 290 constituencies representing 2.41% of the total…"

In conclusion on this issue, Justice Kakuru observed that; "…I find that

Parliament failed to encourage, empower and facilitate active public participation of all citizens in the process of enacting the impugned Act in contravention of Articles 1, 2 **and 8A of the constitution and this omission vitiated the whole impugned Act."**

Counsel therefore invited this Court to uphold the finding of Justice Kakuru that the Committee could not sufficiently consult the people of Uganda in a span of only 60 days given the fact that they needed to gather views from 15,277,198 registered voters, 290 Parliamentary /constituencies, 112 Districts, 1,403 Sub-Counties, 7,431 Parishes and 57,842 villages. The committee in its report, indicated that it managed to interact with only 53 groups and individuals, nearly almost of whom are Kampala based.

3rd Appellant's (ULS) submissions

Counsel submitted that the actions of the police during consultations deprived citizens of the freedom to assemble and associate. There was evidence as found by the Constitutional Court of violent dispersing of rallies and stopping citizens from interacting with their members of parliament by the Police. Unfortunately, the Court did not pronounce itself on the infringed rights of citizens

Furthermore, counsel submitted that rights are vested in every individual. Even if only one Ugandan is deprived of a right it remains a contravention of the Constitution. Once proved as the judges clearly found, the burden shifted to the Respondent to show that the actions of violently dispersing rallies and intimidating the population is demonstrably justifiable in a free and democratic society.

Counsel argued that the Attorney General failed to discharge his burden and consequently this proved that the actions of the police contravened Articles 1, 8A, 29 and 38 of the Constitution. Counsel contended that the court erred when it failed to make declarations to that effect.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that there was no way the majority justices could find that public participation was sufficient in the face of violence during the process & restrictions to fundamental rights & freedoms. That participation of the people in legislation processes has historical roots & is

a universally acceptable principle as elaborated by in the case of Doctors for Life International v. The Speaker of the National Assembly & ORS South Africa Constitutional Court Case No. CCT 12/05. It is an integral part of the law making process that the test for determining whether the legislature took all reasonable steps to ensure participation of the people in legislation as stated was not passed by the respondent because parliament was not reasonable in closing out people's participation and in rushing a constitutional amendment which sought to amend Articles that rotate around the sovereignty of the people.

In all fairness, parliament was obliged to consult the people in the amendments and the failure indeed vitiated the entire process. There is a strong rationale for public participation in the legislation process as pointed out in Doctors for Life (supra) by Ngobo, J & SACHS J, The rationale is to ensure that people, who are sovereign retain that sovereignty, in presence of Parliament. Mr. Mabirizi submitted that the effect of failure of public participation renders the resultant law null & void.

Attorney General's submissions

On public consultation, the Attorney General submitted that the majority Learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of conceptualization and enactment of the impugned Act.

The Attorney General also argued that unlike the Constitutions of South Africa and Kenya and the County Governments Act, 2012 of Kenya, the 1995 Constitution of the Republic of Uganda did not provide a standard measure or parameters for consultative constitutional review. Rather that it recognizes various roles of people and bodies in the constitutional amendment process and in so doing, permits amendment of the Constitution in various ways as provided in Articles 259, 260, 261 and 262.

The Attorney General further submitted that other than what is contained in the 1995 Constitution and as rightly observed by the Constitutional Court, Parliament has never enacted a law to guide consultation or set parameters or standard measure against which effectiveness of consultation or public participation can be measured, be it at pre-legislative stage, legislative stage, and post legislative stage. The Attorney General observed that the only exception was in Article 90(3)(a) which gives the committees of Parliament the power to call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.

In light of this, the Attorney General submitted that there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. He argued further that it was dependent on Parliament to determine how best to achieve the participation objective.

The Attorney General also distinguished two cases on public consultation relied upon by the appellants. He argued that the Doctors for Life Case which provided for what to look at while gauging whether a Parliament has met the consultation or public participation requirement, was decided basing on the South Africa Constitution which had mandatory provisions under section 72 that required public participation in the law making process which is not the case in Uganda.

In relation to the case of Robert Gakuru and others v. Governor Kiambu County, Petition No. 532 of 2013, the Attorney General submitted that while it was elaborate on public participation and consultation it is limited in its application to the Ugandan setting because unlike the provisions in the Constitution of Uganda, public participation is elaborately and illustratively provided for in the Constitution of Kenya and in the County Governments Act, 2012 of Kenya. Further that these requirements were clearly stipulated in a mandatory manner in Articles 10, 94, 118, 174, 196 and 201 of the Constitution of Kenya. Furthermore, that the yardsticks to be used to measure compliance with the public participation and consultation requirements were also provided in section 87 of the County Governments Act, 2012 which is not the case for Uganda.

In the Attorney General's view, because of the different legal regime in these countries, it would be erroneous for the cited cases and standards set therein to be deemed 100% applicable to Uganda in the absence of a clear legal regime on public participation.

The above notwithstanding, the Attorney General submitted that at pages 620 – 640 Vol. 3 of the record, he detailed what the Parliamentary Committee on Legal and Parliamentary Affairs did to comply with the requirement for public participation. He adopted the same views. The Attorney General further submitted that the law making process it is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, he argued, the law does not require that the proposed legislation must be brought to each and every person wherever the person might be. In his view, he argues that what was required was that reasonable steps had been taken to facilitate the said participation. In other words, that what was required was that a reasonable opportunity had been afforded to the public to meaningfully participate in the legislative process.

The Attorney General also argued that the appellants' attack on the nature of consultations in terms of quality and quantity was not factual. He argued that notices of invitation were published in the print media inviting all persons who wished to be part of the process. He argued further that fifty-four groups of persons, legal and natural, heeded the invitation, including the President of Uganda and registered political parties. The Attorney General also argued that Parliament could not deny them audience. He however argued that Parliament could not force unwilling participants to come to the committee.

It was also the Attorney General's contention that the committee operated within its powers and conducted open hearings as a means of accomplishing its mandate in relation to legislation. The Attorney General further argued there was no merit in the appellants' contention that because only seven out of 455 members adduced evidence of consultation the Act should be nullified for lack of public participation. The Attorney General submitted that an examination of the relevant Hansard clearly showed that the reports of Members of Parliament through their debating and voting was representative of the consultations carried out.

The Attorney General invited this Court to uphold the majority Judgment of the Constitutional Court that in the circumstances proper consultation was carried out.

Determination of the Court.

As a brief Background I wish to quote paragraph O.22 of the Odoki report where the Constitutional Commission made the following remarks;

"The government also faced its challenge successfully. It created and maintained the atmosphere of peace, security and freedom of expression so necessary for the success of the exercise. It left in full freedom in the organization and direction of our work. At no time did it in anyway interfere with what we were doing. The people everywhere manifested signs of tremendous growth in political maturity. They discussed issues without quarreling or fighting. We observed no hostile tensions in any of the seminars or meetings we conducted as a part of the exercise. Ugandans seems to have agreed that the constitutional making process was the critical exercise for the future peace and stability of Uganda."

The process of consultation and passing of the impugned Act was the exact opposite of the above observation.

The Magyezi bill was from the outset very controversial if what happened in parliament on 26th and 27th September, 2017 is anything to go by. Parliament was polarized. The Hon. Speaker recognized the importance of the bill and adjourned the House to allow consideration by the Parliamentary committee and consultation by members of parliament.

Unfortunately, the consultation by members of parliament was interfered with and interupted by directive by the Inspector General of Police issued by Assistant IGP Asuman Mugenyi which all the Justices of Constitutional court condemned.

I quote a passage in the judgement of Cherborion Barishaki JCC to 20 illustrate the condemnation in very strong words; -

"I must state here that I find the obnoxious directive issued by AIGP Asumani Mugenyi appalling. It does not make any legal or logical sense. The directive restricted freedom of association andmovement of Members of Parliament without any justification whatsoever.

The directive was intended to prohibit Members of Parliament fromholding joint rallies or canvassing support for certain positionsoutside their constituencies. This is unlawful. Firstly, in the currentmultiparty dispensation, most Members of Parliament belong to one party or another. They should therefore be expected to offer supportfor similar minded colleagues in their constituencies. Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

Secondly, there is absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

Thirdly, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. This should have been foreseen and the directive adjusted accordingly. In my view, the directive wasrecklessly and wantonly issued without any regard for the law more specifically Article 29(2) which guarantees the freedom of everyUgandan to move freely in Uganda. Yet, it was issued, ironically, bya custodian of law enforcement.

During cross examination, AIP Asuman Mugenyi explained that their reason for the restriction was based on security intelligence that some MPs were planning to move people from their areas and cause chaos. He testified thus;

"My Lords, we had a reason and this was based on intelligence information pertaining at that time. If I am allowed to explain the genesis of the circular, my lords, we got intelligence information that some members of Parliament were planning to move people outside their constituencies to cause chaos and violence in other constituencies while consulting and as police we are mandated by the Constitution to detect and prevent crimes." There was no evidence adduced to prove that Members of Parliament were planning to cause chaos in the Country.

The directive in issue was clearly calculated to muzzle publicparticipation and debate on the proposed amendments in theoriginal Bill tabled by the Honorable Raphael Magyezi. However, theevidence presented by the Petitioners fell woefully short ofdemonstrating that this directive had that chilling effect in actualfact.

In some cases, the directive was rightly and roundly ignored while in other isolated cases such as parts of Lango and central region, at least based on the evidence on record, meetings and rallies were dispersed. Hon. Odur averred that on 24th October,2017, he with five other MPs were violently and unlawfully stopped from consulting their people and that police dispersed people who

had gathered at Adyel Division in Lira District for consultation by firing live bullets and teargas inflicting severe fear in him (para(s) of his affidavit in support of the petition). Hon. Joy Atim Ongom who was part of the MPs mentioned in Hon. Odur's affidavit report that her consultation in Lira Municipality were interrupted by police with tear gas. She added that Cecilia Ogwal was beaten (see Hansard page at 53). Though isolated, this was most unfortunate. I find that my position would have been different if there was sufficient evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. I would not have hesitated to hold that there was no public consultation and participation thereby rendering the entire Bill a nullity. I do not have such evidence before me." (Underling for emphasis)

There is no doubt that this act was unconstitutional and the Attorney General conceded so. In terms of Article 137 (3) (b) already cited in this judgement, what the Constitutional court was required to do was to make a Declaration to that effect and give redress where appropriate. I do make the declaration the consequences of which are that the process in parliament following infringement of fundamental rights of not only the members of Parliament but also members of the public who might have been interested in participating in consultations vitiates the process.

3. 'Smuggling' of the motion to introduce the impugned Bill onto the order paper

Submissions by MPs

Regarding the issue of Smuggling of the motion to introduce the impugned Bill onto the order paper, counsel submitted that the Bill leading to the enactment of the impugned Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure by virtue of the fact that the same was smuggled onto the order paper.

He faulted Owiny Dollo, DCJ for holding that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such no wrong was committed by the Speaker in amending the order paper to include the motion seeking leave to introduce a private member's Bill.

He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. In the proviso to the said rule the Speaker is only given a prerogative to determine the order of business in Parliament. He contended that the evidence on record specifically under paragraphs 12, 13, 14, 15 and 16 of Hon. Semujju Nganda's affidavit in support of the petition demonstrates that on 19th September 2017 the Rt. Hon. Deputy Speaker assured the house that there was not going to be any ambush to MPs as far as handling the impugned Amendment Bill was concerned because there was a lot of anxiety and that the order paper will reflect the day's business. On 20th September 2017 the Rt. Hon. Deputy Speaker

reassured Members that nothing would be done in secrecy since all business has to go through the Business Committee under Rule 174. However, the bill was never presented in the Business Committee for appropriate action and consideration.

He therefore argued that the Members of Parliament were taken by surprise on the 26th day of September 2017 when Rt. Hon. Speaker amended the order paper on the floor of the house to include a motion by Hon. Magyezi that sought leave to introduce a private member's Bill to amend the constitution. Efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona MP Busiro East and other MPs to raise procedural matters specifically the fact that there were other motions which had preceded this one were futile.

Counsel contended that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. In Rule 29 that there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeon hole and where possible, electronically. All these Rules were flagrantly violated.

Attorney General's Submissions

The Attorney General refuted the appellants' contention that the Bill from which the impugned Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Article. 91, Parliament has power to make law. Further that under Article 94(1), it had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4) the Speaker had powers to determine the order of business in parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4), the Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members' Bill entitled, The Constitution (Amendment) (No. 2) Bill, 2017. The Attorney General submitted that the inception, notice of motion and tabling of the motion was undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25) wherein she had power to set the order of business and that under Rule 7 she presides at any sitting of the house and decides on questions of order and practice. In the Attorney General's view, the Speaker was aware of Rule 25(s) old and 24(q) new that provides for an Order of precedence and therein the Private Members

Bills come before all others.

The Attorney General also asserted that the Magyezi Bill met requirement set by Rules 120 and 121 (1) which allow every Member to move a Private Members Bill. He pointed out that the bill was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days prior. In his view, the Speaker as the Custodian of what gets onto the Order Paper under Rule 24(Old) Rules gave a go ahead to the Magyezi Bill.

In conclusion, the Attorney General submitted that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill required procedure, up to its enactment.

Determination by Court

The allegation of 'smuggling' of the Magyezi bill onto the Order Paper emanate from session of the 7th sitting –first meeting of parliament held on 26th September 2017.The speaker of Parliament Ms. Rebecca Kadaga during communication from the chair, she told the members of Parliament that she was amending the order paper so as to permit those members of eligible motions to amend the communication to present them. She went further and stated that they had been demanding government to present constitutional amendment to parliament but it had failed. That she had been constrained and she could no longer hold on the members who wanted to bring their motions foe constitution amendment.

The speaker went ahead outlined motions which were eligible and had passed the test under Rule 47 and these include;

A motion for leave of parliament to introduce a constitutional amendment by Hon. Raphael Magyezi amend the constitution to provide for time within which to hold presidential, parliamentary and local government election and amend Articles 102 (b) and 183 (2) b to remove the age limit.

A motion for leave of parliament to introduce a constitutional amendment by Hon. Dr. Sam Lyomoki to amend the constitution under Article 98 to provide for a transitional term and arrangements for peaceful, smooth and democratic transition for first president under the 1995 constitution while providing immunities, exemption and privileges to same individual when they cease to be president.

3.A Notice of motion by Hon.Patrick Nsamba for a resolution of parliament urging Government to constitute a constitutional review commission to comprehensively review the constitution.

The speaker went ahead and outlined motions which were not competent and she excluded them

from the order paper because they were not copied to the Clerk to Parliament or did not have a draft motion and draft bill and this include;

A motion for leave of Parliament to introduce a constitutional amendment by Hon. Mbwatekamwa to amend the constitution to remove all academic restrictions imposed in the constitution.

A motion for leave of Parliament to introduce a constitutional amendment by Hon.John Nambeshe to amend the constitution to require members of parliament to relinquish their parliamentary seats once appointed ministers.

A motion for leave of Parliament to introduce a constitutional amendment by Hon.Mbabaali Muyanja to amend the constitution to create a second chamber so that parliament constitutes two houses lower and upper chamber.

4. A motion for leave of Parliament to introduce a constitutional amendment by Hon.Muyanja Ssenyonga to amend the constitution to make provision for the issue of federal.

5. A motion for leave of Parliament to introduce a private members bill by Hon.Dr Sam Lyomoki entitles the Museveni succession transition and immunities bill 2017.

The above amendment of the order paper by the speaker was challenged by the leader of opposition (Ms. Winfred Kiiza) because the Deputy speaker who presided over the 19th and 20th sitting of a parliament had promised members of parliament that they would not be surprised and ambushed. The Leader of opposition was questioned by the speaker, if she was questioning the powers of the speaker. From above it can be seen that each of the Members of Parliament was seeking leave by way of motion to amend the constitution. Three motions were ready and motion were not.

The speaker of parliament is mandated under 25(1) and (2) of the Rules of Procedure of Parliament 2017 to determine Order of business in Parliament. It provides that: -

25. Order of business

The speaker shall determine the order of business of the House and shall give priority to Government business.

Subject to sub rule (1) the business for each sitting as arranged by the business committee in consultation with the speaker shall be set out in order paper for each sitting

It is clear from above that order paper which contains business for each sitting is prepared by Business committee with consultation of the speaker.

I find that the speaker has powers to determine the order of business and even amend the same. As to whether or not the speaker did so with consultation of the business committee of Parliament is an internal matter of the workings of parliament in which court is not going to interfere.

Denying MPs adequate time to debate and consider the impugned Bill.

Submissions by the MPs

In regard to denying MPs adequate time to debate and consider the impugned Bill, counsel submitted that there was overwhelming evidence on record to show that Members of Parliament were not accorded sufficient time to debate on the report of the Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great 20 national importance.

He contended that immediately after the report was "tabled", a resolution was hastily passed suspending rule 201 (2) of the Rules of parliament which required a minimum of three sittings. Each Member was given only 3 minutes within which to make their submissions on the report and hard copies of the said Report were not duly tabled before the House as provided under Rule 201(1) of the Rules of Procedure.

Counsel for the Appellants further contended that the actions of the speaker of Parliament to close the debate on the impugned bill before each and every MP could debate and present their views on the bill was in violation of Rule 133 (3) of the Rules of Procedure of Parliament.

Attorneys General's submissions

The Attorney General submitted that Rule 80 (2) of the Rules of Procedure of Parliament provides that if the question of closure is agreed to by a majority, the motion which was being discussed when the closure motion was moved shall be put forthwith without further discussion. He argued that the requirement is that the majority have to agree to the closure and that this was done in. the Attorney General further argued that there was no requirement that each and every Member of Parliament must debate before closure.

He called on this Court to find that the Constitutional Court rightly arrived at the decision they made and prayed that this Court upholds the same.

Determination by Court

The time given to each Member of Parliament to speak is determined by the speaker. Rule 69 (11) of Rules of Procedure of the Parliament 2017, provide "The speaker may, on the commencement of the proceedings of the day or on any motion, announce the time limit he or she is allowing each member contributing to debate and may direct a member to his seat or her seat who has spoken for period given"

Under Rule 70 Close of debate provides that "No member may speak on any question after it has been put by the speaker, that is after the voices of both Ayes and Noes have been given on it"

It can be seen from the Hansard that the majority of the members who had an opportunity to address the House were timed out. Out of 452 Member of Parliament only 124 members of parliament contributed or debated on the constitution (Amendment) Bill No.2 of 2017 leaving out others notably the leader of opposition pleading for time to debate. The time given for debate and closure of the same is determined by the speaker in accordance with Rules 69 and 70. I can only

comment that the debate was rushed leaving out members of Parliament who still wanted to express their views yet in the first place it was the speaker who had sent them to gather the views of the electorate in accordance with Article 1 of the constitution. There was also no time for debate on other aspects of the Bill relating to electoral reforms as recommended by this court but that again is prerogative of the speaker and court cannot interfere.

4. Suspension of MPs

Submissions by MPs

On the Suspension of some members of parliament and other illegalities committed by the speaker during the Parliamentary sitting of 18th December 2017, counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three honourable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling. Instead at the time of adjourning the house arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members of Parliament from parliament in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that it was unconstitutional for the speaker to suspend members of parliament for several sittings after stating that the bill was dealing with the sovereignty of the people. This in a way disenfranchised not only the members but also their voters. Contrary to court's finding the right of members of parliament to represent people is absolute and stands taller than normal rights, it did not fault the speaker for suspending the MPs. Mr. Mabirizi contended that the constitutional court's justification for suspension of members of parliament at was only based on morals & emotions as opposed to sound constitutional principles. Eviction of a member from the house is not an event as the Speaker did it. It is a process starting with naming for the suspension to begin in the next sitting excluding the one in which he has been suspended and then he is given an opportunity to write a regret. Indeed, one of the purposes of prohibition of an instant exclusion is to enable member table a formal application for review.

Mr. Mabirizi submitted that evicting members from the same sitting in which they were suspended robbed them of their right to request for a reversal. In Uganda Law Society & Anor V. AG, CCCPS NO.2 & 8/02, Kavuma JCC held that "…It is unacceptable that any free democratic society in the modern world, which jealously protects fundamental human rights of all, which Uganda's society is, should ever experience a situation where even one life of an individual can be terminated by a court of first instance without at least a second opinion on whether or not such a life should be terminated.".

Submissions by Attorney General

The Attorney General contended that Rule 7 of the Rules of Procedure of
Parliament provided for the general power of the Speaker. He argued that under Rule 7(2), the Speaker had an obligation to preserve order and decorum of the House. Further that Rules 77 and 79(2) give the Speaker powers to order any members whose conduct is grossly disorderly to withdraw from the house. Furthermore, that under Rule 80, the Speaker is permitted to name the member who is misbehaving and that under Rule 82 the Speaker has power to suspend the member from the service of the House.

The Attorney General submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament and the Speaker properly did so.

The Attorney General further pointed out that once a Member who conducted him/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from the precincts of the House until the end of the suspension period. The Attorney General also argued that Rule 88 (4) gives guidance on the period of suspension of a member and that it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. The Attorney General placing reliance on Rule 88(4) argued that the 3 sittings for which the member was suspended started running from computed from the next sitting of Parliament.

In light of his submission, the Attorney General submitted that the
Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances in this case. He argued that going by the Appellant's arguments, it would be absurd that a Member who was found by the Speaker to have conducted himself in a disorderly manner in the House and is therefore suspended from the services of the House, is then allowed to remain in the House for the day's sitting.

As far as the right to fair hearing was concerned, the Attorney General submitted that Rule 86(2) of the Rules of Procedure of parliament provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the house, except upon a substantive motion made after notice which in the instant case was not made by the suspended Members.

Regarding the contention that the speaker while suspending the Members was out of her chair, the Attorney General submitted that this was not true. In support of his contention, he referred to the hansard of 18th December 2017 [at page 726 of the record] of appeal where the speaker said

"... I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended…"

The Attorney General further submitted that the reason for suspension was at page 731 of the

record of appeal.

The Attorney General submitted that under Article 257 (a) of the Constitution as well as under Rule 2(1) of the Rules of procedure of Parliament define, 'sitting' is defined to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Furthermore, that Rule 20 of the rules of Procedure of Parliament provide that the Speaker may at any time suspend a sitting or adjourn the house.

In light of this, the Attorney General contended that the Speaker only suspended the sitting to 2.00 O' clock and did not adjourn the house, hence there was a continuous sitting and therefore she was not functus officio.

In conclusion on this point, the Attorney General submitted that the Speaker properly acted within her mandate to suspend Members of Parliament for their unparliamentarily conduct. Further that there is no evidence to show that the suspended Members of Parliament moved a substantive motion challenging their suspension. He prayed that the findings of the Justices of the Constitutional Court be confirmed.

Determination by Court

There were two suspensions by the speaker, the first being on Wednesday, 27 September 2017, where by the speaker suspended twenty-five members for gross misconduct which ranged from carrying a firearm into chambers of Parliament and unruly conduct which included failure to listen to the speaker in silence, standing and climbing on chairs and tables and dressing in manner not appropriate. The speaker clearly explained to the members the above reasons before suspending them under Rule (80) (2). This first suspension is what the constitutional court dwelt on and I cannot fault them for finding that the Speaker was right to act the way she did.

There was a second suspension on Monday, 18 December 2017, whereby the Speaker suspended 6 members of parliament who included Hon. Ibrahim Ssemujju, Allan Ssewanyana, Gerald Karuhanga, Jonathan Odur, Mubarak Munyagwa and Antnony Akol without assigning any reason for their suspension.

I am aware that the Rules of Procedure of Parliament clearly show the procedure to take to challenge the Speaker's ruling which is by motion. The members should have taken that course of action and this court cannot intervene where this specific remedy is available and members omitted to take it.

6. *Failure to close doors to the chambers at the time of voting the Bill.*

Submissions by MPs

On the Failure to close the doors to the chambers at the time of voting on the bill, counsel submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament

before voting on the 2nd reading of the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament which fact was also admitted by the clerk to Parliament in her affidavit. According to counsel the rationale of this Rule 98 (4) is to bar Members who had not participated in the debate to enter Parliament and in decision making. The speaker however not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how failing to close all the doors during voting made the enactment of the Act to be unconstitutional and that the rules of procedure were not made in vain. They must at all material times be obeyed and respected save where they have been duly suspended and that noncompliance renders the entire process and the outcome thereof illegal.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted failure to close the doors during the roll call & tally voting was well pleaded. Closing the doors was not at the speaker's discretion as the majority justices held looking at the provisions of Article 89(1) of the Constitution which requires "voting in a manner prescribed by rules of procedure made by Parliament under Article 94 of this Constitution."

Submissions by the Attorney General

The Attorney General submitted that Rule 98(4) of the Rules of Procedure of Parliament provide that the Speaker shall direct the doors to be locked and the bar drawn until after the roll call vote has taken place. Further that the Speaker in not doing stated [at pages 373 of the record citing Hansard dated Wednesday 20th December 2017] that:

"…ideally I was supposed to have closed the doors under Rule 98(4). However, that exists in a situation where all members have got seats. Therefore, it is not possible to lock them out and that is why I did not lock the doors…."

According to the Attorney General, this action by the Speaker was validated by Rule 8(1) where the Speaker can make a decision on any matter *"having regard to the practices of the House..."*

The Attorney General further pointed out that under Rule 8 (2) of the Rules of Procedure of Parliament the Speaker's ruling under sub rule (1) becomes part of the Rules of Procedure of Parliament until such a time, when a substantive amendment to these rules is made in respect to the ruling. The Attorney General contended that the action taken by the Speaker not to close the doors of the House during voting was within the ambit of these powers. The Respondent therefore submits that the court properly arrived at the decision they made.

Determination by Court

By unanimously decision, the Constitutional Court found that the

Speaker gave a sound reason on her failure to observe this rule and this what Hon. Kakuru Kenneth JCC, stated:-

"The Speaker explained why the rule could not be complied with. I find that voting when the doors were open offended the Rule of Parliament cited above, however this did not in any way violate the Constitution and vitiate the enactment of the impugned Act. The Hansard of Wednesday, 20th December 2017 at pages 5264-5269 indicate that all Members of Parliament who were present and wanted to vote, voted and there is no evidence to the contrary. I find no merit in this ground. The issue is resolved in the negative."

I concur with the Constitutional Court that it was hard for Parliament to observe this rule due to space and enormous numbers of the members who could not fit in the chamber. There was also no suggestion that the voting was compromised in any way.

7. *Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill.*

Submissions by the MPs

On the Discrepancies in the speaker's certificate of compliance and the

Constitutional (Amendment) Bill, counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.

Counsel submitted that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. The requirement of a valid certificate of compliance under Article 263 (2) of the Constitution is couched in mandatory terms.

It is apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring inconsistencies and discrepancies. Whereas the certificate clearly indicated that the impugned bill not only amended Articles 61, 102, 104 and 183 of the constitution, the bill itself indicated that parliament had amended in addition to the said provisions; Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel for the appellants vehemently averred that the discrepancies and variations which appeared between the speaker's certificate of compliance and the constitutional (amendment) bill were gross both in content and form; thus in contravention of Article 263 (2) of the Constitution and S.16 of the Acts of Parliament Act and rendered not only the presidential assent to the bill a nullity but even the resultant 10 Act.

However, the Constitutional court wrongly concluded that the discrepancies only affected those provisions forming part of the Constitution (Amendment) (No. 2) Bill, 2017 amending Articles 77,

105, 181, 289, 289A, and 291 of the Constitution which were not included in the speaker's certificate; and, not the entire Act.

Counsel submitted that the Constitutional Court misdirected itself on the legality of the speaker's certificate of compliance in light of the Supreme Court authority of Ssemwogerere & Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002 where court held that:

"In the case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal Assent, invalid and ultra vires."

While citing the foregoing position in the instant matter, Owiny – Dollo DCJ, made held that:

"This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act"

Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional provisions which required for a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Submission by Mr. Mabirizi

He submitted that the presence of the purported certificate of compliance is not conclusive on its validity or compliance with the constitution

Submission by the Attorney General

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. He further refuted the Appellant's contention that the Speaker's Certificate of compliance was materially defective, ineffectual and that this rendered the presidential assent a nullity.

The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General submitted that the learned Justices of the Constitutional Court individually dealt with the discrepancy and variances between the Speaker's certificates of compliance and found that the discrepancies were not fatal. In the Attorney General's view, majority learned Justices came to the right conclusion in holding that the discrepancy in the Speaker's certificate of compliance and the Bill 5 was not fatal.

The Attorney General further contended that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a certificate of compliance as required in Article 263 (2) (a) of the Constitution. He further argued that The Certificate however indicated that four (4) Articles of the Constitution were being amended and yet ten (10) Articles of the Constitution were amended. He noted that the Articles that were indicated in the Certificate were Articles 61, 102, 104 and 183 while the Articles that had been amended but excluded were Articles 77,105,181,289 and 291.

The Attorney General submitted that that the decision of the majority Justices in upholding the validity of the certificate of the Speaker was a recognition that the certificate complied with the form prescribed in section 16 (2) and Part VI of the second schedule of the Acts of Parliament Act Cap 2 since the Articles that were being amended were enumerated 20 thereunder.

The Attorney General further submitted that in holding that the other Articles that had been amended but not included in the Speaker's Certificate to be unconstitutional, the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution.

Determination by Court

Certificate of compliance and Presidential assent are mandatory requirement that must be met before any Bill can become law. See Article 91 and 263 of the Constitution.

Article 263(2) (a) provides that: -

(2) A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by thePresident only if— (a) it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; and

Parliament passed the Constitution (Amendment) (No. 2) Bill, 2017 which in fact amended Articles 61, 102, 104,183, 77, 105, 181, 289, 289A, and 291 of the Constitution. The speaker of Parliament prepared certificate of compliance in which she included Articles 61, 102, 104 and 183 of the Constitution as the only ones amended and excluded Articles 77, 105, 181, 289, 289A, and 291 of the Constitution

The speaker was supposed to send the entire bill with all Articles amended and passed by parliament to the President. The majority of constitutional court justices found her action to beirregular and Hon. Justice Cheborion, JCC stated that;

"There is no doubt in my mind that the exclusion by the Speaker, ofArticles 77,105,181,289 and 291, from the Certificate ofCompliance accompanying the Constitution (Amendment) Bill sentfor Presidential assent is fatal. It is a mandatory requirement under Article 263 that must be met in respect of each amended Article ofthe Constitution and cannot be waived in any circumstance."

In Paul Semwogerere & Others vs Attorney General (supra), JusticeOder held that "It is my view

that the Constitutional proceduralrequirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. Mandatory Constitutionalrequirements cannot simply be waived by Parliament under its own procedural rules".

This omission per se invalidates Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that Articles 77, 105, 181, 289 and 291 had been amended in strict compliance with the provisions of the Constitution. As already determined above, the purported amendments in respect of these Articles were fundamentally flawed and invalid for other reasons already highlighted.

However, I will hasten to add that the Speaker's Certificate is not invalid as asserted by the Petitioners. The only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended."

The learned justice properly explained the importance of certificate of compliance and clearly stated it is mandatory requirement under Article 263 of the Constitution. This position was stated by this court in case of Paul Semwogerere & Others vs Attorney General (supra). With due respect to the majority of the Constitutional Court justices, once it was found that the certificate of compliance was fatal it is contradiction to conclude that it was valid. I therefore find there was no valid certificate of compliance prepared by the speaker.

8. Illegal assent to the Bill by the President

Submissions by the MPs

On the Illegal assent to the bill by the President, counsel submitted that the act of the President assenting to the bill without scrutinizing the same to ascertain its propriety was in contravention of Articles 91(1) (2) and (3), and 263 of the Constitution and Section 9 of the Acts of Parliament Act. He also relied on the decision of the Supreme Court in the

Ssemwogerere case (supra) where court held that;

"The presidential assent is an integral part of law making process. Under Article 262(2), the Constitution commands the President, to assent only if the specified conditions are satisfied. The command is mandatory, not discretionary. It does not allow for discretion in the President to assent without the Speaker's certificate of compliance."

He therefore submitted that the constitutional duty imposed on the President requires him to scrutinize the certificate of compliance and the accompanying Bill as to their regularity before appending his signature.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that presidential assent is an integral part of a law making process & any defect therein renders the law a nullity. S.9 (1) of The Acts of Parliament Act, provides that "The President shall, subject to Article 91 or 262(263) of the Constitution, assent to the bill presented to him."

That any disparity between a certificate & any other related document, invalidates it as it was in Wakayima & Anor V. Kasule, CA EPA NO. 50/16. In light of the disparity between the Hansard, the final bill and the Certificate, the president would have done more before he could assent. That the president was not "guided by considerations of reasonableness, good faith, honesty and diligence" in assenting to the bill since the purported speaker's certificate was not a certificate at all.

That the certificate from the electoral commission is a mandatory requirement whose absence invalidated the act as held in SSEMWOGERERE & ANOR V. AG, by Mulenga, JSC, even if the president assented, the assent does not validate the act which flouted.

That passing of a constitutional amendment act is not only about the majority numbers, it is also about the constitutional due process & integrity. That the amendment process was a sham & an imitation short of any validity.

Submissions by the Attorney General

The Attorney General invited Court to reject the assertion by the Appellants and uphold the findings of the majority that the discrepancy and variances between the Speaker's certificate of compliance and the

Bill at the time of Presidential Assent was not fatal to the Bill

Determination by the court

Having held that there was no valid certificate of compliance it follows that there was nothing valid to assent to. I find that there was no valid assent to the Bill by the president.

9.Failure to comply with the 14 days sitting between the 1st reading and the 2nd reading.

Submissions by ULS

Counsel faults the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution but did not find the contravention fatal that this was not a correct approach. When the clauses in the Bill requiring 14 days separation were passed at third reading they became part of the Act. However, Article 260(1) states that such Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days

In the ordinary meaning of the words "a bill shall not be taken as passed, means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days.

Having amended Article 1 of the Constitution by infection, the proper course was to separate the two votes at second and third reading by 14 days. Thereafter it would be referred to referendum. It is irrelevant that one year later the court declares some of the provisions unconstitutional. Each of the two arms of government namely the Judiciary and the Legislature has its own functions and responsibilities. The one for the legislature is to ensure that there is a 14 days' separation of the two votes. The legislature cannot sit back and say, "These provisions will be struck down by the Constitutional Court; there is therefore no need for us to separate the two sittings with 14 days". The constitutional provisions must be complied with. It cannot be left to speculation what will happen in future.

Article 260(1) is clear that a bill [not some provisions of a bill] "shall not be taken as passed unless…. the votes on the second and third reading……separated by at least fourteen days…."

The motions of passing it at third reading and sending it to the President for assent was all in vain. The bill remained and remains what it was- a Bill. I submit that the court gives effect to the words "shall not be taken as passed" and holds that the failure to separate the two sittings is fatal to the Act. The Act cannot be validated and given Constitutional cover when it never passed. That means validating a constitutional illegality.

Submissions by Mr. Mabirizi

Mr. Mabirizi it was mandatory for the speaker to separate the 2nd & 3rd

5 readings with 14 sitting days of parliament. By unanimously deciding that the Act amended Articles 1,2 & 260 of the Constitution, had the justices keenly looked at the language of the constitution which uses the word 'Act' as opposed to the word 'Section', they would have not saved any part of the law. Article 257(1)(a) provides that "Act of Parliament" means a law made by Parliament;" it does not define it as a section, subsection or part of the law made by Parliament.

Mabirizi relied on the authority of SSEKIKUBO V. AG, CHOWDHARY V.UEB SCCA No. 27/10 and KASIRYE V. BAZIGATTIRAWO, CAEPA No.03/16, where Court held that it was evident that the voting could not take place without separating the sittings with 14 sitting days.

Submissions by the Attorney General

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined by the Constitutional Court. In support of his contention he relied on the

Judgments of Cheborion, JCC and Owiny-Dollo, DCJ.

He submitted that the majority learned Justices came to the right conclusion in holding that the non-observance of the 14 days sitting as well as the failure to accompany the Speaker's certificate of compliance and the Bill was not fatal.

He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. Further that in the same vein, the Bill did not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

He further pointed out that as the learned Justices found, it is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution. Thus, that having found that the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution and therefore null and void, the learned Justices were right to apply the severance principle and severed those Articles that offended the Constitution from those whose enactment would not require the separation of the second and third reading by 14 days as well as those ratifications of such a decision through a referendum.

He invited Court to reject the assertion by the Appellant and uphold the findings of the majority Justices. Determination by the Court

The majority of the Justices of Constitutional Court found that sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 required fourteen days' separation between the second and third readings followed by approval in a referendum. On the other hand, Sections 1,3,4,7 and 9 which did not amend any of the Articles covered by Articles 260, 261 and 263 did not require the second and third readings of the Bill to be separated by fourteen days.

The contention of the appellants is that failure to observe the constitutional requirement renders the Constitution (Amendment) Act No. 1 of 2018 nullity. While the argument of the Attorney General is that the two sets of laws were severable. I deal with the principle in this judgement but it suffices to state that the Act was passed as one and the original bill lost it originality at the Committee stage when the amendments which required 14 sitting days of Parliament between the 2nd and 3rd reading were introduced. Upon introduction of this provisions Parliament was bound to observe Article 263 of the constitution which require the fourteen sitting days between 2nd and 3rd reading of the Bill.

Debating in absence of Opposition Leader

Mr. Mabirizi contended that the absence of leader of the opposition, opposition chief whip & other opposition members & allowing ruling party members to sit on opposition side was well pleaded

without any rebuttal That parliament was not properly constituted in absence of the leader in opposition.

Mr. Mabirizi argued that the reasons given by the Constitutional Court for justification of proceeding without opposition have no constitutional basis since The fear that parliament may be taken at ransom by opposition when a decision is made that it is not properly constituted is without any legal basis. It actually goes against the very purpose of multiparty democracy which is to promote tolerance of divergent minority views as opposed to a single party system which is prohibited in the Constitution.

Submissions by the Attorney General

The Attorney General submitted that Rule 24 of the rules of parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of parliament shall be one third of all Members of Parliament entitled to vote. In his view, it followed that the business of parliament can go on in the absence of the leader of opposition and opposition Members of Parliament as long as there is the requisite quorum in Parliament and under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership. Determination by the Court

On this issue, Justice Owiny Dollo, DCJ had this to say:-

"The evidence regarding the absence of the Leader of Opposition when certain proceedings took place is quite interesting. When the Speaker ruled that she should sit down, the Hon. Leader of Opposition took offence, and on her own volition, walked out of the Chamber of Parliament. I do not understand why anyone should blame the Speaker for the Leader of Opposition's free willed choice to evacuate herself from the Chambers of Parliament. If every time a Member walks out in protest, the Speaker must suspend proceedings, I can envisage a situation where Parliament would always be held at ransom; thus paralyzing the work of Parliament."

The rest of the Justices of the Constitutional court were in full agreement with DCJ Owiny Dollo. The Constitutional Court rightly found that leader of Opposition on her own volition exited the House. The speaker's stance to proceed in her absence was the correct one.

11. Crossing the Floor of Parliament

Mr. Mabirizi submitted the speaker was estopped from allowing members to cross the floor yet she had punished others for doing the same. The fact of crossing the floor was not in issue and members did not cross for purposes of voting as found by Justice Musoke & Barishaki, JJCC hence Barishaki, JCC's call for a video was not required. That contrary to what Justice Kasule, JCC held the powers of the speaker do not involve violating the Administration of Parliament Act and Rules that prohibit crossing the floor.

He submitted that it applied to Parliament, the Speaker cannot exercise her general power is the face of clear provisions Rule 9 which prescribes sitting arrangements and Rule 82(1)(b) providing that "During a sitting— a Member shall not cross the floor of the House or move around unnecessarily;" That the finding that no evidence was adduced that the crossing prejudiced any members was unexpected of a constitutional court in light of the above stated constitutional provisions and Rules of Parliament which call for Members of Parliament to be accountable to the electorate. Mabirizi argued that if there is no prejudice in casual crossing of the floor, why is it prohibited and punishable?

Therefore, Justices Musoke & Barishaki, JJCC were wrong to assume that the point in issue before them was actual switching of political sides yet it was a breach of rules of procedure because if it was membership, the right court would be the high court and not the constitutional court.

Submissions by the Attorney General

On this point, the Attorney General submitted that Rule 9 (1) of the Rules of Procedure of Parliament obligated the speaker to as far as possible reserve a sit for each Member of Parliament. Further that Rule 9(4) on the other hand obligates that speaker to ensure that each Member has a comfortable sit in Parliament.

The Attorney General submitted that since the members of the opposition walked out leaving empty seats, the Speaker was justified in the circumstances to permit Members of Parliament to sit on the available sits in the chambers of Parliament. The Attorney General further argued that embers taking up available sits as had been directed by the speaker did not amount to them joining the opposition and did not contravene any rules of procedure of parliament and therefore the Justices of the Constitutional Court rightly found so.

In light of his submissions above, the Attorney General submitted that the majority learned Justices of the Constitutional Court did not err in law and fact when they held that entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda (and the Rules of Procedure of Parliament) and pray that court finds as such.

Determination by the Court

On this issue, Justice Cheborion, JCC had this to say:-

"It has not been proved that by inviting Members of Parliament to sit on the seats left vacant by the opposition members of Parliament, who had stormed out of Parliament, the Speaker in essence allowed Members of the Ruling Party to Cross to the Opposition. In my view "crossing the floor" of Parliament must be with the intention of joining the Opposition or otherwise as envisaged in Article 83 of the Constitution. I am of the considered view that even if members crossed the floor

that would not render the Act unconstitutional."

I concur with the unanimous decision by the Constitutional court that permitting members from Ruling party to sit on Opposition side did not any way amount to crossing the floor. Crossing is a mental and not a physical and there was no suggestion that after that particular sitting members had changed parties.

12. Signing of the Report by Non-Committee Members

Mr. Mabirizi submitted that there was ample evidence that members who did not participate in committee proceedings signed the report. The majority justices misconstrued the law & acted casually in failing to nullify the report signed by members who never participated in the proceedings of the committee. Rule 187(2) of the Rules of Procedure relied on by Barishaki JCC to find that the committee had quorum does not apply because the Legal and Parliamentary Affairs Committee is not a select committee. Select committees are set up under Rule186 and they are temporary Committees. That the legal and parliamentary Affairs Committee is a sectoral Committee established under Rule 183(1) & 2(g). Contrary to the justices stated members' minimum, under Rule 184(1), the minimum number for a sectoral committee is. Had the justices keenly looked at Article 90(2) & (3) of The Constitution, they would not have treated the matter the way they did.

Mr. Mabirizi submitted the majority justices erred in relying on Article 94(3) which does not apply to committees of parliament because Article 94(3) deals with the entire Parliament and not Committees which are provided for under Article 90. Article 257(1)(u) provides "Parliament" means the Parliament of Uganda;" and does not include committees. The compliant before court was whether it was in line with the Constitution for members who never participated in the proceedings of the committee to sign a report but they veered off the rail when they started going into issues of vacancy and participation of none-members which were not in issue.

Submissions by the Attorney General

On this point, the Attorney General submitted that the Committees of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, that Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. Furthermore, that Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectoral Committee of Parliament shall consist of not less than fifteen Members not more than thirty Members selected from among Members of Parliament.

The Attorney General further placed reliance on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initialed by at least

one third of all the Members of the Committee. The Attorney General argued that the Members who constituted the Legal and Parliamentary Affairs Committee were listed in the report of the Legal and Parliamentary Affairs Committee and were 26 members.

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

The Attorney General submitted that in his affidavit in rejoinder to the affidavit of Jane Kibirige, the Clerk to Parliament, Mr. Mabirizi submitted that that the report of Legal and Parliamentary Affairs Committee was not valid since it had delayed in the Committee beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Procedure of Parliament.

The Attorney General submitted that it was crucial to note from the outset that the appellant did not specifically plead this issue in his 10 petition but only brought it up in an affidavit in rejoinder. According to the Attorney General, this explains why he could not respond to it.

The Attorney General further argued that this also constituted a departure from pleadings and should be disregarded.

Without prejudice to his submission above, the Attorney General submitted that Rule 128 of the Rules of Procedure of Parliament provides that whenever a Bill is read the first time in the House, it is referred to the appropriate Committee for consideration, and the Committee shall report to the house within 45 days.

He further pointed out that Rule 140 (1) provides that no Bill shall be in the Committee for more than 45 days. Further that Rule 140 (2) provides that if a committee finds itself unable to complete consideration of any Bill referred to it, the Committee may seek extra time from the Hon. Speaker

The Attorney General submitted that the basis of the appellant's argument was that the Bill was referred to the Committee on the 3rd of October, 2017 and the 45 days run out on 17th November 2017 yet the committee reported to the House on 14th December, 2017 after expiry of 45 days.

The Attorney General submitted that had this matter been raised in time, he would have led evidence to prove that the committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the house was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker, therefore, the days could not start running until the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon Speaker on the 3rd November 2017. That both letters are annexed. Further that the 45 days started running from the 3rd November

2017. In the Attorney General's view, this meant that the days would expire on 16th December 2017. Thus, the Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

He added further that in any event none compliance with the 45 days' rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General submitted that the report of the committee was duly presented to the whole House within the period stipulated under Rules 128 and 140 and alternatively, if it delayed, which is denied, the delay did not vitiate or invalidate the enactment of the constitutional amendment Act No.2 of 2018.

Determination by the Court

This matter was first raised by Hon Ssekikubo shortly after the chairperson of the committee on legal and a parliamentary Affairs was presenting the majority report of the committee. He noted that two Hon members of Parliament, namely Hon Lilly Akello and Hon Akampurura Prossy who signed the report of the majority were members of committee of Defence and Internal Affairs and that they were brought as mercenaries to append their signatures. The speaker later on the evening told members that the said members had been designated to that committee by the Government chip whip on the 29th November 2017.

It is on record that the Constitution (Amendment) bill 2017 was read for the first time on 3rd October 2017 by the Hon. Raphael Magyezi and subsequently referred to committee on legal and a parliamentary affairs for scrutiny .The committee started its work without the effort and input of the said members of parliament .It was almost two months when they were sent to committee by the Government Chief whip and it was correctly argued by the Hon Ssekikubo on floor of parliament that these 20 members were sent there to sign the report and form the majority.

The Constitutional court justices had their take on this and held that;

The Hon. Justice Owiny Dollo, DCJ stated that "In the same vein, thefact that people who were known not to be members of the LegalCommittee signed the report is not fatal to the process; though it was irregular. First is that, on the evidence, they did not participate at the hearings; but merely signed after the conclusion of the proceedings. Second is that even if they are removed from the list of those who signed the report, there would still be sufficient members who attended the Committee propceedings, and signed the report. Lastly, Article 94 of the Constitution covers this type of situation, since it provides as follows:

"(3) The presence or the participation of a person not entitled to be present or to participate in the

proceedings of Parliament shall not, by itself, invalidate those proceedings."

The Hon. Justice Kasule, JCC Stated that;

"It was not clearly established at what stage these members beganparticipating in the deliberations of the committee. Some of thesemembers, it was asserted, signed the report of the committee. This, if true, was irregular. However, Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings.

Accordingly, the proceedings of the Legal and Parliamentary Affairs Committee cannot be invalidated because of the signing of the report by those very few members who joined the committee late."

The Hon. Justice Kenneth Kakuru, JCC held that;

"From the above excerpts, it is very clear that some Members of Parliament who were not originally on the Legal and Parliamentary committee when the impugned bill was sent to it for consideration, later joined it while they were still Members of other committees.

With all due respect, to the Rt. Hon. Speaker, her Ruling that the issue should be treated as simply indiscipline had no legal justification. It is clear from the excerpts above that some members who signed the Legal and Parliamentary Affairs Committee report in respect of the impugned bill which was later enacted into law, were not legally members of that committee. This is a legal matter that has an impact on the validity of the process of enacting legislation.

It is not an issue of discipline. I am, however, unable to find that, in ordinary circumstances failure to comply with Rule 155 of the Rules of Procedure of Parliament, would vitiate the proceedings of a Parliamentary committee in view of the provisions of Article 94 (3) of the Constitution."

The Hon .Justice Musoke, JCC stated that;

"Act of the Legal and Parliamentary Affairs Committee of Parliament allowing some Committee members to sign the Report after the public hearings on the bill.

I am inclined to agree with the Respondent's submission that thefact that 8 members joined the Committee at a later stage, did not negatively affect their participation in the proceedings of theCommittee because they were adequately briefed.

From perusal of the Report and the signatures attached, I find that with or without the additional 8 members to the Committee of Parliamentary and Legal Affairs, the original members who signed the Report constituted a third of the total number. The report was, therefore, validly signed since under subsection (2) of Rule 201, the decision of the Committee is collective.

I therefore resolve this issue in the negative."

The Hon. Justice Cheborion, JCC stated that;

"The participation of the new members that were added to theCommittee, even if irregular, cannot invalidate the Committeereport because even if their number was deducted, the majorityreport still had enough signatures to pass it. Rule 187(2) of the 2017 Rules of Parliament sets the quorum of a select committee of Parliament if the committee consists of more than five members to be 1/3 of all the members. In this case, even if the members complained of were not to be considered, still the quorum would be met. I therefore answer issue 7(d) in the negative"

I have endeavored to reproduce Constitutional Court finding on this issue, in order to demonstrate that it was unanimously held that the added 8 members of a parliament were not originally members of the committee when the bill was sent to it. They were brought to sign the report without actual participation in proceedings and hearing of the said committee that drafted the final report.

All the justices found this to be irregular and relied on Article 94(3) of the Constitution to effect that it validates their act. I also agree with the Constitutional court that signatures of the members who had not participated in the discussion did not vitiate the report.

13.Waiving the requirement of a minimum of three sittings from the tabling of the Report and Non-Secondment of the motion Mr. Mabirizi submitted that majority justices were dishonest in finding that the motion to suspend rule 201(2) by Hon. Rukutana was at the committee of the whole house stage yet the evidence prove that it was at plenary. The speaker was estopped from claiming that secondment is not essential yet she had earlier made it essential. The failure to second the motion by Hon. Rukutana was an illegality that rendered subsequent proceedings invalid, in line with Makula International Ltd V. CARDINAL Nsubuga & ANOR (1982) HCB 11.

Mr. Mabirizi submitted that the finding by majority of the Constitutional Court justices that MPs had obtained the committee report 3/4 days prior to 18/12/17 had no evidential basis according to Section 8(2) and (4) of The Electronic Transactions Act The words of Hon. Rukutana that "…this report has been on our ipads for the last five or more days…" did not pass the test of the report being delivered to the ipads contrary to the finding that there was evidence that members of parliament were prevented from debating the bill and that only 28% of the house debated.

Submissions by the Attorney General

The Attorney General refuted the Appellants' assertion that the suspension of Rule 201 (2) of the Rules of Procedure of Parliament and non seconded of the motion to waive Rule 201 adversely affected the whole process of enacting the impugned Act. He further disputed the appellants' assertions that the suspension of Rule 201(2) deprived Members sufficient time to debate the report of the Legal and Parliamentary Affairs Committee in that they were given only 3 minutes to debate and that hard copies were not duly tabled before the house as 20 provided in Rule 201 (1).

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Right Hon. Speaker informed the House that on the preceding Thursday, she directed the Clerk to upload all the on their ipads and that therefore the highlighted
25 Rule did not apply. The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonso Owiny-Dollo, [DCJ at page 176] and Cheborion, JCC [at Page 95], the Attorney General submitted that Members of Parliament had adequate notice as to the contents of the report (four days before debating the same) and that therefore the purpose of Rule 201(2) was achieved

He prayed that since, the Members of Parliament received the report of the Committee three days before the debate, this Court should uphold the finding of the Constitutional Court that no prejudice was put on the members.

Regarding the issue of secondment of the motion by the Deputy Attorney General, the Attorney General submitted that this issue was extensively interrogated by the learned Justices of the Constitutional Court before making their findings. He argued that all the Justices of the Constitutional Court found that found since Parliament was proceeding as a Committee of the Whole House, the failure to second the motion of Hon Mwesigwa Rukutana offended no Rule at all.

The Attorney General contended that the Constitutional Court came to the right conclusion on this matter and asked this Court to find that the Constitutional Court came to the right decision as far as the secondment of the motion for suspension of Rule 201 was concerned. He invited this to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Without prejudice to his submissions above, the Attorney General submitted that Rule 59 of the Rules of Procedure of Parliament does not prescribe the manner of seconding a motion. Rather that it simply required a motion to be seconded. I the Attorney General's view, considering that the Rules are silent on the manner of secondment, the practice that has been adopted by the House is for Members who are seconding a motion to either rise up in support when a motion is proposed or if the motion is with notice, the designated Members stand up and speak to the motion in support. He further argued that the adoption of such practice was premised on the authority of Rule 8 of the Rules of Procedure of Parliament which allows the adoption of practices of the House, the Constitutional provisions and practices of other Commonwealth Parliaments in so far as they are applicable to Uganda's Parliament.

He then concluded that since in Parliamentary practice, secondment of a proposed motion acts only as an indication that there is at least one person besides the mover that is interested in seeing the motion considered and debated by the House and the motion by Hon. Rukutana to suspend Rule 201 (2) of the Rules of Procedure of Parliament satisfied the requirements of Rule 59 of the Rules of Procedure of Parliament

Determination by the Court

Rule 201(2) of The Rules of Procedure of parliament 2017 provides that:-

Debate on report of a committee on a bill, shall take place at least three days after it has been laid on the Table by the chairperson or the Deputy Chairperson or the member nominated by the committee or the speaker. The purpose of the rule was well articulated by Hon.Justice Cheborion when he stated that:-

"The purpose of the rule is clearly, to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament."

It was the argument of the speaker and the Constitutional court justices that the requirement of the said rule was met when the work of the committee was loaded on the MPs Ipads four days before. I find this rule to be in mandatory terms "shall", it calls for strict adherence. This was well stated Justice Kakuru JCC that:-

"The Speaker of Parliament with all due respect failed to apply Rule 201(2) which is mandatory. I accept the submission of Counsel in this regard that "laying on the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. I note that, Parliament amended and adopted new Rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore, the submissions of the Hon. The Deputy Attorney General on the floor Parliament that when the Members of Parliament were availed with Ipads Rule 201 no longer serves any useful purpose has no legal basis

.I therefore, find that, Parliament while passing the impugned Act, failed to comply with Rule 201(2) of its Rules of Procedure, which is mandatory. I find that failure contravened Article 94(1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018."

The Hansard of Monday 18, December 2017, shows that the Chairperson of the committee on legal and parliamentary affairs stated that;-"Madam Speaker, I beg to lay on the table a copy of the main report before I make the presentation, which is accompanied by the minutes of the proceeding of

the committee."

At that point the Hon Karuhanga rose on point of procedure and pointed out Rule 201 (2) was being flouted by Parliament. The speaker overruled him pointing that the report was uploaded on iPads and the rule did not apply.

In addition to what Justice Kakuru stated I wish to add that if indeed the introduction of the iPads had rendered the rule inapplicable evidence should have been adduced to show that a number of motions and reports had been laid on table through that method. But if following the introduction of the iPads Parliament continued to follow the physical laying on the table there was no reason why the practice was not followed in this case.

I also need to comment on motion that was moved by The Deputy Attorney General to suspend Rule 201(2).This motion was moved after the Chairperson of committee had stated reading out part of his report to House. Parliament was not in committee stage as stated by majority of the justices of the Constitutional court. It was receiving and debating the report of the committee and therefore there was need for secondment of the motion which was not done. Failure to second the motion means that there was no substantive motion moved by Deputy Attorney General to suspend Rule 201(2) hence the violation of Rule 59(2) of the Rules of

Procedure which I find that vitiates the subsequent legislative process and the enactment of the Constitutional (Amendment) Act .2018.

14. On Severance

Appellant's submissions

Mr. Mabirizi submitted that court granted the remedy of severance, which was not pleaded. That no issue was framed on whether none compliance affected the act in a substantial manner, or even whether court should sever some parts of the act from others because both parties knew that failure to comply leads to nullification. The court originated the 'pleading' & 'prayer' of severance it is the court that originated the discussion of un-pleaded matter relating to severance and court indeed turned into the pleader for the respondent who never pleaded any alternative prayer that severance be adopted or even that the nonecompliance did not affect the amendment in a substantial manner.

He contended that court had no power to frame sub-issues of whether severance can be applied & whether the none-compliance affected the act in a substantial manner which did not arise out of the pleadings. He submitted that the court could not originate issues of whether the amendment affected the Act in a substantial manner or whether there would be severance. That it was contrary to fair hearing for court to apply the principles & grant un-pleaded remedy of severance.

Mr. Mabirizi further that it was erroneous for the Constitutional Court to rely on Article 2 of the constitution & the case of Salvatori Abuki v AG; Constitutional case No. 2 of 1997 to support

severance. That the Court relied on Salvatori Abuki v AG; (supra), which was not relevant to this case because as per the issues laid out in the lead judgment of Manyindo, there was no issue of the procedural validity and constitutionality of the Witchcraft Act 1957 which was passed by the colonial regime when there was no democracy to talk about or even rule of law. The petitioner's complaint was on the exclusion order under Section 7 of The Act and no other provisions or the enactment process.

That the decision in Ag For Alberta V. Ag For Canada (1947) AC503 AT518 relied upon by Justice Kasule to support severance was quoted out of context because from the facts as summarized by Viscount Simond at it is clear that the only point in contest was whether the legislature could legislate on 'Banking' and not whether the procedure adopted in the legislation was contrary to that laid down by the law granting powers to the legislature. This decision would have instead helped him to find for him on Article 93.

That the decision of Matiso V Commanding Officer, Port Elizabeth Prison was not relevant to the facts before court. Justice Kasule relied on it but the facts as summarized by KRIEGLER J, reveal that the petitioners therein were not challenging the process of enacting legislation. They were challenging some parts of the Magistrates Courts Act, enacted prior.

That the decision of Lord Denning, In Kingsway Investment (Kent) Ltd V. Kent County Council (1969) 1 ALLER 601 AT 611 was misapplied by Justice Barishaki, because in the circumstances of this case, no severance could be done because the law depended on the process. Looking at the facts as stated at, the issue before court was whether the provisions of the urban authority outline planning permissions were in line with the law at the time and the effect of invalidity of a clause of a permission or license. It is also clear that severance was only used in reference to a building permission and not to a statute making process.

That Justice Barishaki's reliance on the decision of South Africa National Defence Union Vs Minister of Defence & another Constitutional Court Case NO. 27 OF 1998 was misconceived because looking at facts as summarized by O'REGAN, J at what was under challenge was only Section 126B of the South Africa Defence Act 44 of 1957, which was stated to be in contravention of the 1994 South African Constitution. That there was no challenge on the procedures and processes adopted in enacting the Act as it is here.

MP's submissions

Counsel submitted that the Constitutional Court made a finding that the impugned Act violated the provisions of Article 93 of the constitution but declined to nullify the entire Act contending that noncompliance only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years as from the date of the last

elections since they were introduced by way of amendments that imposed a charge on the consolidated fund. They accordingly applied the doctrine of severance to strike out the said provisions.

He submitted that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated charge as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill was considered and passed as an integral legislation in the same process.

ULS Submissions

Counsel Wandera Ogalo submitted that all the authorities the Respondent cited and relied like Abuka Silverori vs Attorney General, Kauesa vs Minister of Home Affairs, Matiso vs. Commanding officer of Port Elizabeth, Attorney General for Alberta vs. attorney general for Canada, Kingsway investments vs. Kent County and South Africa National Defence Union vs. Minister of defence on the principle of severance to justify the refusal to nullify the whole Act by the lower Court were foreign and non-binding authorities for the following reasons.

That those authorities interpreted the witchcraft Act, Regulations under Police Act, the Magistrate Courts Act, the Alberta Act and Defence Act respectively in their respective jurisdictions. None of those authorities were amending the Constitution. Different standards and procedures apply in enacting an ordinary law as opposed to the Constitution.

That in Uganda the produce of enacting legislation is to be found in rules 112 to 136 of the rules of procedure of the House. That all bills have to comply with those rules. However, in respect of constitutional amending legislation, Articles 259 to 263 are applicable in addition to rules 112 to 136. An ordinary legislation does not go through the process laid down in Articles 259 to 263.

Counsel contended that all legislations cited above were enacted by respective Parliaments using the rules of procedure of the House and not their national Constitutions. Authorities applying the principle of severance to legislation enacted under the ordinary rules of procedure of Parliament are not applicable to legislation enacted under a procedure prescribed by the Constitution. Those authorities apply parliamentary regulations fundamentally different from the one in the instant case.

That in all the cases cited above, the process followed by Parliament was never in issue. What was in issue was simply the final product as it appeared on the law books viz-a viz the Constitutions.

That in all the cases cited, Parliament was not warned that it was about to enact unconstitutional

law but nevertheless went ahead to enact the law as is in the case now before the court. That in the cases relied upon the challenged and severed sections were not arrived at as a result of constitutional breaches. The severance maintained the purpose of the Bill, it is not a valid reason because purpose of a Bill can change after it is introduced in Parliament. Rule 133(20) allows Parliament to amend the long title to reflect amendments made to the Bill. It is therefore not a sound reason to justify severance on maintaining the original purpose of a Bill. Counsel prayed that this court to hold that the principle of severance is not applicable in the present case.

Attorney General's Submissions

The Attorney General submitted that the Court was right in making reliance on the provisions of Article 2 of the Constitution while applying the principle of severance. That the Constitution of Uganda allows for the application of the Doctrine of Severance under Article 2(2).

The Hon, Alfonse Owiny Dollo cited the authority of Salvatori Abuki V Attorney General; Constitutional Case No. 2 of 1997 where the Constitutional Court considered the constitutionality of Sections 3 and 7 of the witchcraft Act Cap 108. Justice Remmy Kasule stated that; - 'I also hold and order that sections 1,3,4, and 7 of the Constitution (Amendment) Act No. 1 of 2018, …hereby retained as constituting the said Act by reason of their having been enacted in compliance and in conformity with the Constitution.'

Also that Justice Cheborion Barishaki, applied the authority in South African National Defence Union vs Minister of Defence& Another Constitutional Court Case No. 27 of 1998, the same approach was applied as is evident from this passage,

"The offending provisions, however, can be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of t section 126 B….."

He also stated that "In the circumstances, I hold that section 2, 5, 8, 9 and 10 of the Constitution (Amendment) Act 2018 are hereby struck down and expunged from the Act. Section 1, 3, 4 and 7 of the Act are upheld since they are constitutionally valid.''

That the Hon. Justice Elizabeth Musoke applied the principle of severance when she declared that section 1, 3, 4, and 7 of the Constitution (Amendment) Act No. 1 of 2018 are not inconsistent with and/or in contravention of the 1995 Constitution.

It is the Attorney General's submission that Justices of the Constitutional Court properly applied the principle of severance when they upheld sections of the Act that had been validly passed into law and invite this Court to uphold the decision of the Constitutional Court.

The Attorney General submitted that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3)(b) and 137(4) provide for the grant redress within the discretion of the Court based on the circumstances pertaining. Accordingly,

while declarations are the primary duty the Court may grant redress including the remedy of severance either at the pleading or prayer of Counsel or a Litigant or exercising its own discretion.

The Court has the discretion to require Counsel or litigants to address it even on under pleaded issues and remedies and even to accordingly frame issues for Counsel and litigants to address. Severance is a wellestablished legal remedy and there is no bar to the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance. The Respondent addressed Court on the remedy of severance, the 1st Appellant had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and was duly accorded a fair hearing.

The Attorney General submitted that in the course of a Court conducting its enquiry the Court has wide discretion to draw on existing

Constitutional and legal principles and both pleaded and not pleaded depending on the circumstances of the case and it is the duty of the Court to apply the relevant principles for the ends of justice. The Hon. Justices of the Constitutional Court in applying the remedy of severance relied on Article 2(2) of the Constitution as well established authorities. The principles considered and applied by the Court are well established Constitutional and legal principles which the 1st Appellant had opportunity to address Court on. No prejudice was occasioned and the 1st Appellant was accorded a fair hearing.

Additionally, the 1st Appellants arguments are misconceived because authorities cited related to litigants being bound by facts and matters pleaded. They do not preclude a litigant from relying on the abundance of legal principles to advance their cases

Court’s Determination on Severance

The majority of Constitutional Court Justices applying the principle of severance, severed the amendments which were introduced by Hon Tusiime Michael of the extension of tenure of parliament and that of Hon Nandala Mafabi of Term limits at Committee stage of the whole House from the original Magyezi bill.

I don’t agree with Mr. Mabirizi that because the principle was not pleaded or argued by any of the parties at the trial the Constitutional Court was precluded from applying it. To me if court, through its own research finds a principle that may have been missed by the parties but is helpful in solving a case there is nothing to stop the court from relying on it.

The concern to the parties should be whether the principle is actually applicable or the court was misconceived in applying it.

The above two amendments emanated from the Legal and Parliamentary Affairs committee’s general recommendations where by the committee recommended for reinstatement of the

presidential Term Limits and expansion of the term of president from five to seven years.[1105]

During the debate of the report of the committee some of the members of parliament supported the above amendment which influenced debate as shown below:-

The Hon James Waluswaka NRM Bunyole County West Butaleja stated that "…My people told me that we restore the term limits not only for the president but for all elected members of parliament. There are members of parliament who have been for several years but they do not want to leave. Why don't they serve two terms and go? That is what they told me…"

The Hon Kenneth Luboogo NRM Bulamogi County Kaliro stated that "Madam Speaker the report talks of about reinstatement of term limits and entrenching and expanding the same. I agree with the reinstatement and entrenchment of the same but disagree withexpansion from five to seven years…I think we should we maintain the five term and restore term limits"

The Hon. Violet Akurut NRM woman Representatibe Katakwi stated that

"I did consult my people of Katakwi we have ten sub counties and out of ten sub counties, seven agreed to the amendment of the constitution and other three did not.as a safeguard, however theyalso recommended that term limits be reinstated in theconstitution… Thank you."

The Hon Norah Bigirwa NRM Woman Representative, Buliisa stated that

"The people of Buliisa are saying that they look forward to seeing us, as country adhering to what is embedded in the constitution. Theyrequested me to go ahead and restore the term limits and entrenchthem within the constitution because they feel that these are some of the things that will help us to run this country..."

The Hon. Alex Byarugaba NRM Isingiro County South states that "it wason that basis that I took my consultative meetings to the five sub-counties in my constituency with a population of about 220,000people. I traversed all the sub counties and collected the following: yes sometime in the parliament, term limits were removed. My people instructed me to come back and share with you that we mustkeep this country together and that term limits must be reinstated and entrenched."

The Hon. Eric Musana NRM Buyaga County East Kagadi stated that "I also support the committee's recommendation of establishing the constitution review commission. We have a number of serious issues that must be incorporated and this commission will help us to bring all these warring parties and Uganda to a better consensus. I am alsoin support of reinstating term limits. This was paramount in myconstituency…"

The Hon.Dononzio Kahonda NRM Ruhinda county Mitooma stated that

"Madam Speaker on the issue of term limits, it was raised at Kabira Sub County by lay Canon, that it should be reinstated to address the issue of transition that all Ugandan have been yearning for."

[1105] see parliamentary Hansard of 18 December 2017 at page 32-33.

The Minister of State for Health (General Duties) Hon. Sarah Opendi stated that "Madam Speaker, the people however said we should restore term limits. I am glad that this is clearly contained in report of the committee."

The Hon. Gilbert Olanya FDC Kilak County south, Amuru stated that "I would like to stand firm in this ground and support the position of the committee to reinstate terms limits."

There were some members of parliament who were totally against the reinstatement of the terms limit and the following were their views

The Hon. Patrick Opolot NRM Kachumbala County, Bukedea stated that

"… if a leader is very good, the people will decide to continue renewing his mandate. If the people find a leader unworthy-maybe if he is a drunkard-even the leader himself can decide to abandon power. It has ever happened in 1985, a leader abandoned power here because he saw that he could not manage it. Therefore, I don't support the reinstatement of term limits in our constitution. I begto submit madam speaker"

The Hon. Joseph Kasozi (NRM Bukoto County Mid-west Lwengo) started that "Madam Speaker on issue of reinstating terms limits. I remember very well 12 years ago this parliament removed terms limits. My question is what mischief was meant to be cured by the removal of term limits? Has that mischief been cured so that it requires us to reinstate term limits once again as proposed by the committee?"

Later when it comes to second reading of the Bill, The Hon Beatrice Anywar stated that "Madam Speaker on lifting the term limits I vote 'yes'." she was called back by the speaker to vote properly and she voted yes but her support for the Bill was clearly influenced by the return of term limits.

I am of the opinion that the amendments introduced were not foreign to the Magyezi bill. The members of Parliament were sent out by the speaker and she emphasized that they should properly consult the people in accordance with Article 1 of the constitution. The members during the debate clearly demonstrated that their voters had strictly demanded for reinstatement of the term limits in the constitution. At the committee stage of the whole house, the Hon Tusiime sought permission to chairperson to introduce his amendment to original Bill. His amendments were on Articles 61, 77,181,289 291 of the constitution. His proposal of the amendments were debated by members of Parliament, some of them like Hon. Nandala Mafabi were strictly opposed to the 30 amendment.

The chairperson put a vote on it and her words she stated "Honorable members, I put the question that new clause be introduced as proposed." the Hansard show shows (Question put and agreed to).

Towards the end of proceeding of the committee, the Hon.Nandala Mafabi sought leave of the chairperson to add amendments on Article 105 of the constitution and introduce the terms limits which were to be entrenched. Again the chairperson put the question to members and stated

"Honorable members, I put the question the question Article 105 be amended as proposed." the Hansard show that Question put and agreed to. Later on the Hon.Nandala requested the amendment be re-entrenched and question was put and agreed upon by members.

The Deputy Attorney General moved to block the amendment by Hon. Mafabi because it was not debated and that it was matter of referendum that would reinstate them. He was overruled by chairperson since the matter had been voted on.

After the committee stage, the chairperson put question to members the title to do stand part of the bill and Hansard shows that question was put and agreed to.

From above it is crystal clear that the two amendment were proposed and voted upon by entire members of parliament in the committee and agreed that the form part of the original Magyezi Bill. From this moment up to the conclusion of the process the amendments become an integral part 20 of the Bill judging from the report of Raphael Magyezi indicates below:-

At report from the committee of the whole house, the Hon Raphael Magyezi stated that "Madam Speaker, I beg to report that the committee of the whole House has considered the Bill entitled, 'The

Constitution (Amendment) No.2 Bill,2017' and passed the entire Bill with amendments and also introduced and passed new clausesamending Articles 77,181,29,291,105 and 260. I beg to report."

At the motion for adoption the report from the committee of the whole House and the again the Hon. Magyezi sated "Madam Speaker, I beg to move that the report of the committee of the whole House be adopted."

The speaker put question to members that the report of the committee of the whole house be adopted and the Hansard shows that the question was put and agreed to.

The bill went to third reading. The Hon Magyezi moved that the bill be read for third time and do pass and speaker put the question to member and voting for the third reading started.

On the third reading it is important to note that bill was voted on as a whole without separately voting on each clause. The pattern of the vote also indicates that the amendments influenced the vote as a few example will show the Hon. Deputy Attorney General who fought 'tooth and nail' to block the amendment of Hon. Nandala Mafabi voted yes to the Bill and so do did other members like Hon. Joseph Kasozi and Hon. Patrick Opolot who were categorically against the return of term limits. Interestingly the

Hon. Nandala Mafabi who substantially contributed to the Bill by adding an amendment to it voted No to the Bill.

The third voting as shown from above was done on the Bill as a whole. After the voting the Clerk to Parliament tallied the votes which were 315 vote in favour of the bill and 62 voted against. The

speaker declared The constitutional (Amendment) No.2 Act,2017 had been passed.

I have reproduced the above part of Hansard to show that the amendments by Hon.Tusiime and Mafabi were passed by members of Parliament and allowed to be added on Original Magyezi Bill at the committee stage. Secondly the report of the committee of the whole house which contained the amendments was adopted by Members of Parliament. Thirdly the third voting on the Bill was done as one. Fourthly the Act was passed as one by Parliament and lastly some Members of Parliament as seen from above were sent by their people (electorates) and instructed to reinstate the term limits and that must have greatly influenced their third time voting on the Bill.

The Constitutional Court Justices with due respect misconstrued the doctrine of severance because from time of the introduction the amendment, the bill become one. The speaker left out the contents of the amendment in her Certificate of compliance which rendered the certificate invalid as already determined in this judgement.

The second point about the misapplication of the principle of severance is that well before the introduction of the amendments to the Bill, the

5 process of enacting the Act was already tainted with acts of unconstitutionality already discussed in this judgement.

Both Justice Kasule JCC and DCJ Dollo followed the case of Silvatori Abuki v Attorney General; Constitutional Case No. 2 of 1997, Where the Constitutional Court considered the constitutionality of Sections 3 10 and 7 of the Witchcraft Act, Cap 108.With due respect, the case of Abuki is different from the present case because it was not concerning the enactment of Witch Craft Act as whole being null and void and it be said that Act must be have been enacted according to the law but had the two sections inconsistent with constitution which is not the case we have now where by the whole Act was not passed according to Constitution.

In conclusion having found that some of the acts and omissions vitiated the enactment Constitution (Amendment) Act 2018 the doctrine of severance was wrongly applied by the Constitutional Court. The Act was passed as one and I find the principle inapplicable. I answer issue No.2 in the positive.

ISSUE 3: VIOLENCE

This issue was framed as follows:

"Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?"

Appellants' Submissions

Submissions of MPs

Counsel submitted that the Constitutional Court rightfully established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act.

According to counsel, use of force to amend the Constitution is not only prohibited but is also treasonable.

Counsel contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting was unconstitutional because the effect of the said directive was to curtail and restrict the conduct of consultative meetings. The same was calculated and aimed at muzzling public participation and debate on the proposed amendment bill.

Counsel averred that the bill was passed amidst violence within and outside Parliament, and also in the whole Country during public consultations thereby vitiating the entire process, and thus making it unconstitutional.

That It was as a result of the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House that prompted the Speaker of Parliament to write a letter addressed to the President of Uganda inquiring into the existence of armed personnel in the perimeters of Parliament.

That the unlawful invasion and/or heavy deployment at the Parliament by combined forces of the Uganda People's Defence forces, the Uganda 25 police force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the Constitution using violent means, undermined Parliamentary independence and as such was inconsistent with and contravened the Constitution.

Counsel submitted that the learned Justices of the Constitutional Court acknowledged that security forces committed acts of violence in and out of Parliament but held that those acts were not sufficient to vitiate the enactment. Their Lordships applied the qualitative test. It was erroneous for the learned justices of the Constitutional Court to apply and/or misapply the qualitative test on grounds that where the prohibited conduct amounts to an offence, like in the instant case, then the qualitative test is inapplicable. The moment Court found as proved that security forces violently restrained or stopped many people from participating in the enactment of the impugned amendment, then the offence was proved.

Counsel criticized the Constitutional Court finding that the violence was not as prevalent as to vitiate the enactment process. Submitting that the violence had a chilling effect on other members of the public that wished to participate and other members of Parliament that would have wished to

oppose the amendment.

It was imperative for the learned Justices of the Constitutional Court to find that the amendment was begotten from violence inflicted on persons opposed to the amendment, and therefore contravening to Art 3 (2) of the Constitution.

Counsel contended that all the five justices of the Constitutional Court held that public participation is one of the basic structures of our constitution and cannot be wished away nor taken lightly.

Counsel cited the case of In Doctors for Life International & Ors -Vs- The Speaker of National Assembly & Ors. Constitutional Court (of South Africa) 12/05, the South African Constitutional Courtemphasized the concept of participating democracy (as is found in Art.1 of our Constitution) "… therefore our democracy includes as one of its basic and fundamental principles of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory … and makes provision for public participation in the law making process …"

In conclusion counsel submitted that the invasion of Parliament by the combined armed forces of the Uganda People's defence forces, the Uganda police and other militia was unwarranted and uncalled for as rightly found by the learned Justices of the Constitutional Court. It was unjustified in the circumstances which later on had an adverse effect of curtailing several persons and Ugandans at large from participating in the process leading to the enactment of the Constitution (Amendment) Act. Counsel invited court to answer this issue in the affirmative and find that the learned trial justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Submissions of Uganda Law Society

Counsel submitted that the violence inside Parliament included the arrest, assault detention of members of Parliament and their forceful exclusion from representing the Constituents. The actions complained of violated several provisions of the Constitution. That the constitutional Court erred in failing to come to definite conclusions that Article 23 24 and 29 were contravened. As a result the Court neither made any declarations nor granted redress as required by Article 137 of the Constitution for the contraventions.

There was no attempt whatsoever to bring the actions of the security forces within the defenses stipulated in Article 43 instead court embarked on rationalizing the limitations on the member's right to liberty. That there is no evidence whatsoever of misconduct being a basis for the constitutional limitations on their liberty. On the contrary it is the speaker's orders which should be faulted as the events of 26th and 27th September show.

Counsel submitted that the court erred when it held that the Members misbehaved and this led to loss of liberty. If Court came to correct conclusion that there was no misbehavior, it would have come to a different conclusion. It would not have held that exclusion from debate, assault and detention was necessitated by the member's bad conduct. Instead it would have found that the suspension of the member by the Speaker is what was unjustified. The invitation of the police was therefore without foundation and the eventual trespass by Special Forces uncalled for. Consequently, the limitations to the fundamental rights of the members to liberty and to represent their constituents and was unjustified.

Applying the test laid down in Onyango Obbo and another Vs Attorney General he submit that the continuance of debate in Parliament on that particular day was not particularly important to warrant overriding the fundamental rights. Debate could have taken place on another date. The debate continued for only 46 minutes and adjourned at 5.00p.m. There was nothing important about a debate. A member was simply seeking permission of Parliament to introduce a bill. I submit there is nothing particularly important in that debate to justify the limiting of fundamental rights.

The limitation of the fundamental rights cannot be rationally connected to the object. How misbehavior in the House is linked to limiting MPs fundamental rights. That is not rational. It is arbitrary and unfair. The rules of the House provide for a procedure to follow in case of misbehavior. It does not include inviting in the army and police. The limitations were therefore unjustifiable

The means used to impair the right were not necessary to accomplish the object of eviction. The record is full of evidence of assault inhuman treatment and deprivation of liberty. All those were not necessary to remove the members.

Counsel submitted that had the Justices in the lower Court addressed themselves to the pleadings and affidavits there would have held that there was contravention of Article 24 and would have made a declaration to the effect and given redress.

Counsel submit that the redress to the violations has to be related to reasons his submissions which were to start the Age Limit bill on its path without the voices of opposition. The product is as good as the process.

That product is tainted with deliberate and planned constitutional violations and this Court ought not to allow it to stand. The ghosts of unconstitutionality will only go back to sleep if the Act is struck down. If it is not, those ghosts will disturb the country for a long time to come.

Submissions of Mabirizi

Mr. Mabirizi submitted that violence which was well pleaded/ deponed to in the affidavits was not rebutted by the respondent but as could be seen the justices had a pre-conceived mind that violence

was justified.

He submitted that it was erroneous to approach the violence as a disciplinary measure by the speaker yet parliament had been suspended.

The Chamber ceased to be the House and her directions to Sergeant-At Arms could not be implemented because no parliament was sitting, the Sergeant at arms could only act in the sitting and under supervision of the Speaker.

Mr. Mabirizi contended that violence, whether real, perceived or attempted vitiates not only legislation but also any action done pursuant to it. Violence is defined by BLACK'S LAW Dictionary, 8th Edition The use of physical force, usu. accompanied by fury, vehemence, or outrage; esp., physical force unlawfully exercised with the intent to harm...and veiled threats by words and acts." Violent is defined at pg 4857 as "…relating to, or characterized by strong physical force….2. Resulting from extreme or intense force…3. Vehemently or passionately threatening..."

That the Amendment of the Constitution through violence was foreseen by the framers of the Constitution who made a strong prescription against violence of any kind in the constitutional amendment process and invalidated each and every thing arising out of violence and created an offence of treason. The perpetrators of violence in the Constitutional amendment process committed the treason envisaged under Article 3 of The Constitution.

All the provisions rhyme well with the language in Article 3 of the Constitution against violence because in every offence where violence is an element, the maximum punishment is either death or life imprisonment, including heavy punishments for attempts. Therefore, there was no way the justices could justify violence simply because the MPs could have originated it.

He cited the cases of THE EAST AFRICAN COURT OF JUSTICE in KATABAZI & ORS V. THE SECRETARY GENERAL, East African Community & ANOR, Reference No.1/07], SADC REGIONAL COURT in CONGO & ANOR V. ZIMBABWE, (supra) & THE CONSTITUTIONAL COURT ITSELF in DR. BESIGYE & ORS V. AG, CCC Petition No.7/07 have set precedents that violence & arbitrary rule invalidates the resultant or intended benefit and the constitutional court was bound by this authority.

He submitted that the court erred in applying a subjective test as opposed to an objective test approved by this court in onyango obbo's case at in dealing with the violence and prayed that court reverse it.

The Attorney General's Submissions

The Attorney General submitted that Learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act 2018 did not amount to a breach the 1995 Constitution of the Republic of

Uganda sufficient to justify a declaration of the whole process as unconstitutional and prayed that this Honourable Court does uphold the decision of the Court on this matter.

He pointed out that it is factually incorrect for the Appellants to state that the learned Justices of the Constitutional Court found that the UPDF, Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act. It was the unanimous decision of the Court that the intervention of the Uganda Police Force was lawful and there was never any reference to militias as alleged by the Appellants should make factual references to the Judgments of the Court.

The Attorney General contended that the evidence on record clearly illustrated that the proceedings of Parliament on the 21st, 26th and 27th September 2017 was characterized by unprecedented chaos, disorder and misconduct from the Hon. Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. However, the Hon. MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-at-Arms.

That Article 79(1) of the Constitution gives Parliament power to make laws on any matter for the peace, order and development and good governance of Uganda under Article 94(1):

Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees. In line with the above Constitutional Provisions; Part XIV of the Rules of Procedure of the Parliament of Uganda was enacted that provide for Order in The House and Regulation 85. Rule 88 (6) Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force 83 is necessary in order to compel obedience to his or her direction, and the Sergeant At Arms shall be called upon to eject the Member from the House.

It was the Appellants' case that there was an unlawful invasion and/or heavy deployment at the Parliament of the armed forces on the day of tabling of the impugned bill before Parliament which action amounted to amending the Constitution using violent means, undermined Parliament independence and was therefore inconsistent with the Constitution.

The Attorney General submitted that from the authorities cited above it is apparent that the Rt. Hon. Speaker is legally mandated to ensure that order and decorum is maintained in the House and she clearly had the powers as derived from the 1995 Constitution to suspend the MPs who perpetuated violence in the Parliamentary chambers.

The Attorney General prayed that this Honourable Court upholds the decision of the Learned

Justices of the Constitutional Court that in the circumstances as presented by the evidence, the Rt. Hon. Speaker acted within her powers and in accordance with the Constitution to evict the 25 names 25 Members of Parliament as a it was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

It was apparent from the findings of the Constitutional Court that their Lordships considered the evidence on the record and came to the appropriate conclusions on this issue of the alleged violence against the members of the public.

The Attorney General faulted the Appellants for allegation that the Constitutional Court did not address this issue and the evidence was evaluated and yet it was found that an overwhelming number of Members of Parliament carried out their meetings of consultations with the people in an uninterrupted manner and they were then able to come and vote on the Constitutional Amendment Bill No. 2 of 2017.

That the Appellants, as was the case in the Constitutional Court, have not illustrated any evidence to show that there was a group of Ugandans whose right to participate in the process leading to the enactment of the Constitutional Amendment Bill No. 2 of 2017 was curtailed by the security forces. He invited this Honourable Court to confirm the finding of the Constitutional Court that the consultative process was not marred with violence by the security forces against the people and there is no need to invalidate the same.

The Attorney General argued that the Appellant had raised a new argument on appeal that force was used to amend the Constitution and as a result the Respondents are in breach of Article 3(2) of the constitution.

That Appellants never raised this issue at the Constitutional Court and they are therefore precluded from raising this argument at the Supreme Court. Rule 82 (1) Judicature (Supreme Court Rules) Directions S.I. 13, he submitted that this particular argument cannot be raised by the Appellant as it was never raised at the Constitutional Court level and there is no decision on the same to be appealed against. However, in the event that this Honourable Court accepts to consider the ground of appeal in the manner that has been raised by the Appellant, the evidence as has been led by the Respondents clearly illustrates that the amendment was done with the full participation of the Members of Parliament and this contention should be dismissed. The Attorney General prayed that this Honourable Court finds that the Appellants severely misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of Constitutional Amendment Act No. 1 of 2018.

The Attorney General in conclusion prayed that this Honourable Court finds that the Constitutional Court correctly found that the violence inside and outside Parliament was not sufficient to warrant a finding of inconsistency with the Constitution.

The Attorney General submitted that the Appellant had misconstrued the Speaker's order to have been effected when the house was not in session and it was his contention that the order could be implemented when the House was suspended and there was no misdirection on either Law or fact by the Learned Justices of the Constitutional Court.

He referred this Honourable Court to page 165 of the record of Appeal where the Rt. Hon. Speaker clearly explains that the suspension of the MPs was for actions that had occurred the previous day the 26th September 2017 and goes ahead to direct them to leave the House which they objected and she chose to leave the House to enable them to be removed by the Sargent at Arms. Clearly, the House was still in session and regardless the Speaker did have powers to evict the errant MPs.

That his Lordship the DCJ Owiny Dollo at page 2431 paragraph 2 line 7 and Her Lordship Justice Elizabeth Musoke at Page 2563 of the record of proceedings, paragraph 5, Line 976 found that the Rt. Hon. Speaker is empowered to maintain order, discipline and decorum in the House. We pray that this Honourable Court accepts our submission that based on the enabling Laws cited above, the Speaker was mandated to maintain order, discipline and decorum in the proceedings in Parliament and is at liberty to use *Rule 77 and 80(6) of the Rules of Parliament* in order to achieve this purpose.

He further contended that such internal mechanisms, control and disciplines in Parliament of Uganda will be able to maintain effective discipline and order during debates. The essence of debate in a multi-party dispensation in Parliament is that Peoples' representatives are allowed to engage in debates and once its concluded, vote on the matter and that would be the conclusion of the particular issues.

It was the Appellant's submission that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under *Article 3(2) of the 1995 Constitution*.

That the Appellant had severely misconstrued this *Article 3 (2) of theConstitution* as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional Amendment Act No. 1 of 2018 was carried out strictly in accordance with the Constitution.

He argued that the public interest was the debate on such an important issue as the Constit*utional Amendment Bill No. 2 of 2017* which needed to be conducted in a manner that promoted debate by members across the political spectrum as the matter were clearly of high national importance. The orders of the Speaker to maintain decorum should have been adhered to by the offending Members

of Parliament.

He contended that the test of consideration of the phrase "acceptable and demonstrably justifiable" under *Article 43(2) of the 1995 Constitution* was defined in the case of *Charles Onyango Obbo & Andrew Mujuni MwendaVersus Attorney General.* In C.P. 15/1997. See page 33: paragraph 2: that illustrates the criteria in assessment of what amounts to establishing limits in a free and democratic society.

The Attorney General prayed that this Honourable Court finds it appropriate to adopt the finding of His Lordship Justice Cheborion Barishaki at page 2727 of the record of appeal and specifically paragraph 10 line 25 when he found that the intervention of Uganda Police was to enable parliament to execute their mandate.

He further prayed that in resolving these issues, Court should employ the principle of harmony and completeness in the interpreting the Constitution as one whole singular document with no particular provision destroying the other but each sustaining the other.

Refer to *Hon. Lt. (Rtd) Kamba Saleh & Anor Vs Attorney General & Four Others Consolidated Petitions Constitutional Petition No. 16 Of 2013*

The Attorney General submitted that the MPs must not confuse their right to legislate to mean it extends to disruption of other peoples' representatives right to debate and the disruption of the conduct of Parliamentary business. The enjoyment of *Articles 1, 2, 3(2), 8A, 97,208(2), and 211(3)* must be read together with *Article 43(2)(c)* and it is our submission that Court should confirm the findings of the Constitutional Court that the actions of the Uganda Police passed the proportionality test and did not in any way contravene the 1995 Constitution in trying to ensure that the debate went on smoothly.

The Attorney General submitted that it is important to note the nature of our political system is that it is a multi-party dispensation. The implication of this fact is that each party and every Member of Parliament must have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. In the event that these rights are curtailed, the very notion of our constitutional democracy is abused.

However, in the exercise of the debate in a multi-party dispensation there can be no doubt that the Speaker's authority under Part XIII of the Rules of Procedure is wide enough to enable Parliament to maintain internal order and discipline in its proceedings by means which the Speaker considers appropriate for that purpose.

In the case of Twinobusingye Severino Versus Attorney General Constitutional Petition No. 47/2011 in the Judgment of the Court at page 24, paragraph 2 the Court observed that;

"We hasten to observe in this regard, that although members of Parliament are independent and

have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media.

As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

It was the Attorney General's submission that this Honourable Court should adopt the persuasive reasoning of the Constitutional Court in finding that the Rt. Hon. Speaker was well within her powers to order the eviction of the errant Members of Parliament.

It is not in dispute that the MPs enjoy rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and enjoy the privileges as enshrined in the 1995 Constitution. However, the enjoyment of such rights as illustrated above is valid only if it is done in a manner that is "acceptable and demonstrably justifiable in a free and democratic society" as illustrated in Article 43(1):

It was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

Submissions in rejoinder for MPs

That on the record there is no explanation whatsoever that was given either by the sergeant at arms or by the police or any security officer or even the addressee the president himself never responded to that letter and it is very clear that the parliament was invaded. The speaker calls it invasion of parliament by strangers.

Court's Determination of Issue No. 3

The Constitutional court unanimously found and rightly so in my view that given the gross indiscipline of some members of Parliament who were involved not only in a shouting match in complete disregard of the decorum of parliament but also in a brawl all in full view of the speaker, the speaker was left with no alternative but to wield the stick and suspend the offending members of the House. As a court we should not be seen to interfere with the discretion of the speaker to reign on errant members of parliament to protect the integrity of the House as the Circumstances prevailing warranted.

However, what I find disturbing and of concern to this court is that after the speaker had pronounced her punishment the execution of her orders was bungled by what she describes as

strangers in her letter to His Excellency the president which I reproduce hereunder.

"Your Excellency,

RE: INVASION OF THE PARLIAMENT PRECINTS BY SECURITY AGENCIES ON THE 27TH SEPTEMBER 2017

As you may be aware there were some disruptions of parliament proceeding by some rowdy members of parliament on the 21st September, 26th and 27th September 2017.

I took action to suspend members of parliament from the service of the house for three (3) sittings.

However, after I had requested the Sergeant At Arms to remove the members from the precincts unknown people entered the chamber beat up the members, including those not suspended and a fight ensued for over one hour. I have had the opportunity to view camera footage of what transpired and noticed people in black suits and white shirts who are not part of the parliamentary police or the staff of the Sergeant At Arms beating members.

Additionally, footage shows people walking in single file from the office of the president to the Parliament precincts.

I am therefore seeking an explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted the Members of Parliament.

I am also seeking an explanation why the members were arrested and transported and confined at police stations.

I would also like to know the commander of operations was since the Parliamentary Commission/Speaker did not request for any support.

Yours faithfully

Rebecca A. Kadaga (MP)

SPEAKER OF PARLIAMENT OF UGANDA

cc. Rt.Hon. Prime Minister

cc. Minister of Internal Affairs cc. Inspector General of police cc. Commander of the Special Forces Command"

I do not need to go any further than this communication from the Hon. Speaker as to the unconstitutionality of the actions by the strangers.

There is no evidence that anybody responded to her concerns which raises a question of interference of one branch of Government into the activities of another branch which is a breach of the constitution.

The second question it raises is that the Members of Parliament including those who were not on the Speaker's list were assaulted, thrown on police vehicles, detained and released without charge all of which amount to inhuman treatment which is in contravention of the Constitution. In terms of

Article 137 clause 3 (b) of the constitution I would interpret both the acts of interference with the work of Parliament as complained about by the speaker and the mistreatment of members of Parliament as unconstitutional. The provision of the constitution does not require this court to inquire into the consequences of an unconstitutional 'act' as the constitutional court did and neither is it required to make an order for redress. The unconstitutionality the act vitiates the process. I find issue No.3 in the positive.

ISSUE 4: SUBSTANTIALITY TEST

This issue was framed as follows:

"Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?"

Appellants' submissions

Submission of MPS

Counsel submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of Procedure of Parliament as well as the invasion of Parliament. According to counsel the test is only applicable in Electoral matters.

Counsel further submitted that it is an absurdity and indeed a paradox that the Constitutional court, whose primary mandate and duty is to jealously guard and defend the sanctity of the Constitution to suggest that there can be room for certain individuals and agencies of government like Parliament to violate the constitution with impunity which is charged with the duty of protecting the constitution and promoting democratic governance in Uganda under Article 79 (3) of the Constitution. He relied on the decision of this Honourable court in *Paul K. Ssemogerere & 2Ors versus Attorney-GeneralSCCA. NO. 1 OF* 2002; where it was held that the constitutional procedural requirements are mandatory.

Submissions of Mr. Mabirizi

Mr. Mabirizi submitted that under Article 137 of the constitution, the constitutional court has no jurisdiction to apply the 'substantiality' test. He contended jurisdiction of the constitution court is to determine whether the actions complained of are inconsistent with and/or in contravention of the Constitution and if so to make declaration and give redress or refer the matter to investigation.

He cited the case of Centre for Health, Human Rights & Development (CEHURD) V.AG, SCCA No.1/13, Kisaakye, JSC, stated "…the Constitutional Court…may, after hearing the parties, grant the declaration that such an act or omission is inconsistent with or contravenes the provision(s) in question" "…the Constitutional court was established and given powers under Article 137(1) and

(3) to consider these allegations and determine them one way or another. Indeed, the Constitutional Court as had no problem in the past in dealing with such kinds of problems before...with striking out the Referendum and other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution…the Anti-Homosexuality Act 2014 on ground that it was passed by Parliament while it lacked the requisite quorum required."

He contended that it is only the presidential & parliamentary elections acts which provide for 'substantial test' & there is no law enabling it in constitutional petitions. The substantial test is found in two specialized laws; S. 59(6)(a) of Presidential Elections Act, 2005 and S.61(1)(a) of The 25 Parliamentary Elections Act, 2005 and in no other law.

Submissions of ULS

Counsel for the appellant submitted that the Court misunderstood the test laid down by the Supreme Court and therefore misapplied it to the facts of the Constitutional Petition resulting in a wrong decision. He faulted the Court for the following reasons;

The Election Petition case of Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001 interpreted Section 65(a) of the Presidential Election Act which lays down the principle that an election cannot be set aside unless the non-compliance with the Act affects the result in a substantial manner. Counsel contended that it relates to standard and burden of proof in election petitions and in a Constitutional Petitions where Article 137(3) and (4) as well as the usual rules of evidence which apply.

The allegation of facts in the Besigye case was that the number of voters on the voters roll was unknown, voters were disfranchised and not verifiable and the petitioners agents were not allowed an opportunity to scrutinize the voters roll or safeguard the interest of the petitioner at polling stations. Counsel asserted that the Court was required to interpret the Act to determine whether proved facts were widespread. The facts in the present case are infringement of constitutional rights i.e. limitations to free speech and expression, movement and participation. According to counsel, the Court is not required and there is no legal basis for it to determine the extent of proved facts.

The Supreme Court was called upon to determine the result of an election while in the present case the court was called upon to determine the constitutionality of particular acts. According to counsel, one considers nominations campaigns polling counting tallying and declaration of results, the other considers policemen running all over the country unleashing violence and violating the Constitution. In one the Court inquiries into a legal process while the other it inquiries into an illegal process. The test cannot be the same.

Substantial effect was defined as the effect must be calculated to really influence the result in significant manner" Counsel argued that, if that was applied to the present set of facts, it would mean proof that the action of the police were calculated to influence the consultation in a significant manner. That with greatest respect shows the inapplicability of applying the test. According to counsel, the constitutional limitations were intended to impact the Members of Parliament and not the process and its results.

If the test is applicable, then the Court would have to determine what the result of the consultation was. Can the views on a bill be quantified the same way votes can? I submit not. How would one handle a view which says;

"I support removal of age limit provided term limit is reinstated: or I support the inclusion of the recommendations of the Supreme court but I do not support the removal of the age limit?".

According to counsel, the outcomes of the consultations cannot be equated to the number of votes obtained by candidates.

Lastly counsel submitted that unlike in election petitions it is impossible to prove the extent of the constitutional limits imposed by police, the degree of such limitations and the substantial effect they had on the outcome of the consultations. Counsel contended that it is impossible to measure the degree of curtailed speech or restricted movement of a member of parliament. A right cannot be quantified the same way votes can. How does the failure of a member to go to a particular constituency because of limitations be related to result of the consultations? Clearly the test cannot apply.

Counsel for the appellant submitted that the wrongful application of the test prevented the court from applying the proper test which is whether the limitations imposed by the police were justified. He argued that where a directive by any organ of the state is sent to all districts of Uganda requiring police officers all over the country to breach the Constitution and indeed there is evidence that the directive was complied with in any part of the country, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or that it was in public interest to do so. Where the respondent fails to do so, as was in this case, the petitioner has proved breach of the Constitution. All that remains is the remedy.

Counsel submitted that it cannot be argued that violations of the Constitution have to be widespread throughout the country for the Court to invalidate the Constitutional Amendment Act (the subject of the constitutional breaches). That the test ought to be whether the violations contributed or had the effect of contributing to the enactment of the Act. If in the affirmative the Act ought not to stand. According to counsel, there is abundant evidence that the violations in and out of Parliament had that effect.

He submitted that the directive speaks for itself. It reminds all Regional Police Commanders, District Police Commanders, Directors, the IGP, the Deputy IGP that there is a proposal to amend the constitution" to remove presidential age limits" (it does not refer to the other provisions of the Bill). Only the age limit.

Counsel further submitted that the directive then requires all police officers to all over Uganda to stop any Member of Parliament moving or "intending to move" to a constituency other than his or hers. "A member consulting in any other constituency must be stopped……". According to counsel, it was in furtherance of this that the police violated the Constitution. He argued that the subsequent actions of the police cannot be separated from the age limit specifically mentioned in the directive. The author of the directive wants the recipients to know that limiting fundamental human rights they are called upon to do is linked to the passage of the Bill.

The limitations were calculated to increase the chances of removing the age limit from the Constitution. The constitutional violations cannot be delinked from section 3 of the Constitution Amendment Act. Since the constitutional limitations were intended to facilitate its passage, the redress the court can give must be in relation to that section. According to counsel, the only remedy available is to strike that section down.

Counsel submitted that if the court had not applied the substantiality test, it would have come to this conclusion. To hold otherwise is to send a message that the Court will tolerate violations of the Constitution. That is the surest way for us to return to our dark past ably spelt out in the Preamble to the Constitution i.e. our history being characterized by political and constitutional instability. A message has to go out that it is expensive to breach the Constitution and there will be a price to pay. A slap on the wrist is to play around with the future of our children and their children. This Court ought not to countenance that. Only then will the rule of law and continued stability be guaranteed. The Constitutional Court is the Guarantor but with the greatest respect it failed to protect us and future generations. It emboldened those who will breach the Constitution.

He contended that once the Court found Constitutional violations as it did, it was required to make a declaration to that effect and grant redress.

Counsel prayed for court to substitute the order of the Constitutional Court with one striking down section 3 of the Act.

Attorney General's Submissions

The Attorney General submitted that the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

He relied on the finding of Odoki, C.J in Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001, the learned Chief Justice, where he stated the evaluation tests for the effect

of noncompliance on an election. He stated,

"In order to assess the effect, court has to evaluate the whole process for the election to determine how it affected the result and then asses the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustment for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial".

The Attorney General submitted that the substantiality test is used as a tool of evaluation of evidence. To fault the Court for applying the substantiality test in a constitutional petition meant that a court in interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it, that proposition would be absurd.

He contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether it is constitutional court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of Nanjibhai Prabhudas& Co. Ltd versus Standard Bank Ltd [1968] E.A 670 where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In my view the alleged non-compliance is a procedural irregularity, which is not of a most fundamental nature, as to render a law null and void. The import from the above is that there was general compliance with the constitutional requirements and procedure for the enactment of the impugned Act.

He pointed out that it was pertinent to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. The Court's evaluation of evidence and resulting decision is not exclusively based on the quantitative test. The Court considered the nature of the alleged noncompliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation must were not sufficient to satisfy nullifying the entire process.

He argued that the facts of this case, the process in Parliament was not negatively affected as was observed by the majority Learned Justices of the Constitutional Court. That the Learned Hon Lady Justice Elisabeth Musoke, JA applied the Quantitative Test (verifying the impact of noncompliance or inaccuracy on the actual vote numbers and final outcome).

The Attorney General submitted that the qualitative requirements appraise the entire legislative process prior to and during tabling motion for leave, tabling bill for First Reading, consideration by

the Committee, debate, voting and assent to the Bill. There was thus substantial compliance.

The two tests were expounded in Winnie Babihunga v. Masiko Winnie Komuhangi & Others, HTC-OO-CV-EP-004-2001 where it was stated;

"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

He therefore argued that the learned Justices of the Constitutional Court found that the few instances of irregularities did not adversely affect the process of passing the impugned Act.

The Attorney General submitted that the question that begs an answer is therefore whether the Court was wrong to use that test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

He contended that a perusal of the pleadings (petitions and affidavit) of the Appellant showed that he was seeking the Constitutional Court to determine the effect of certain events/actions/commissions that occurred during the process of enacting the impugned Act on the entire Process/Promulgation of the Constitution (Amendment) Act, No. 1 of 2018.

That the Appellant pleaded and argued in the Constitutional Court that the entire process of amending the Constitution from the tabling of the Bill, to the passing thereof, were compromised and the whole process was marred/tainted with such illegalities, irregularities and violence.

He therefore argued that the Petitioners did not adduce credible evidence to show that such violence and intimidation affected the validity of the Constitution (Amendment) Act, No. 1 of 2018.

He also pointed out that the big question that should be raised is what then is the standard of proof in dealing with Constitutional matters, most especially where the matters touch on amendment and breaches of the Constitution? Is the standard of proof different from the usual on the balance of probabilities?

The Attorney General submitted that it was not in dispute that the common law concept of burden of proof that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. In this case therefore, it is common ground that it is the Appellant who bore the burden of proving to the required standard that, there were such irregularities/violence that affected the result of the entire passing of the Bill into law and should be nullified.

He noted that the form of evidence that was presented during the hearing of the Petition was both affidavit and oral evidence. A scrutiny and evaluation of the above evidence did not support the Petitioners' assertion of such widespread/massive irregularities and violence that would have led

Court to nullify the entire resultant Act.

He concluded by supporting the conclusion of the Court that the evidence did not disclose any profound irregularity in the management of the legislative process for the enactment of the impugned Act, nor did it prove that the participation of some members of Parliament was gravely affected. The parts that were so affected were rightly severed by the Court. He submitted that in this particular case, the Constitutional court was right to inquire into the extent of the alleged massive irregularities and in so applying the qualitative and quantitative test, it considered whether the errors, and irregularities identified sufficiently challenged the entire legislative process and lead to a legal conclusion that the Bill was not passed in compliance with the requirements of the constitution.

In conclusion, Attorney invited this Court to uphold the finding of the Constitutional court that certain irregularities/errors were mere technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the Constitution (Amendment) Act, No. 1 of 2018.

Court's Determination of Issue 4

The Substantiality test as applied in Election Petitions simply means that even if court was to find that an election was not conducted in accordance with the principles laid down in those provisions, it is required to find that non-compliance affected the results of an election in a substantial manner.

Section 62 of the Parliamentary Elections Act (2005) as amended

62. Grounds for setting aside election

(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

(a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure toconduct the election in accordance with the principles laid down inthose provisions and that the non-compliance and the failureaffected the result of the election in a substantial manner;

(b) That a person other than the one elected won the election; or

(c) That an illegal practice or any other offence under this Act wascommitted in connection with the election by the candidatepersonally or with his or her knowledge and consent or approval; or

(d) That the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

(2) Where an election is set aside, then, subject to section 64, a fresh election shall be held as if it were a by-election in accordance with section 4 of this Act.

(3) Any ground specified in subsection (1) of this section shall be proved on the basis of a balance of probabilities.

Section 57 of the Presidential Elections Act as amended

57. Challenging a presidential election.

Any aggrieved candidate may petition the Supreme Court for an order that a candidate declared elected as President was not validly elected.

A petition under subsection (1) shall be in a form prescribed by the Chief Justice under subsection (11) and shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its finding not later than thirty days from the date the petition is filed.

Where no petition is filed within the time prescribed under subsection (2), or where a petition having been filed, is withdrawn by the person who filed it or is dismissed by the Supreme Court, the candidate declared elected shall conclusively be taken to have been duly elected as President.

After due inquiry under subsection (3), the Supreme Court may— dismiss the petition; declare which candidate was validly elected; or annul the election.

The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

non compliance with the provisions of this Act, if the court issatisfied that the election was not conducted in accordance with theprinciples laid down in those provisions and that the non compliance affected the result of the election in a substantial manner;

That the candidate was at the time of his or her election not qualified or was disqualified for election as President;

That an illegal practice or any other offence under this Act wascommitted in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

Nothing in this section confers on the Supreme Court when hearing an election petition power to convict a person for a criminal offence.

Where upon hearing a petition and before coming to a decision, the court is satisfied that a recount is necessary and practical, it may order a recount of the votes cast.

Where it appears to the Supreme Court on hearing an election petition under this section that the facts before it disclose that a criminal offence may have been committed, it shall make a report on the matter to the Director of Public Prosecutions for appropriate action to be taken and shall state in the report the name of the person, the nature of the offence and any other information that the court may consider relevant and appropriate for the Director of Public Prosecutions.

Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.

The Chief Justice shall, in consultation with the Attorney General, make rules providing for the conduct of petitions under this Act. (Underlining provided)

It was a misdirection for the Constitutional Court to apply the substantiality test as it is applied in Electoral matters. Secondly the Parliamentary Elections Act and Presidential Elections Act make a clear distinction between an illegal practice where the substantiality test is applicable and an electoral offence where the test is not applicable.

I would put an unconstitutional act in the category of cases where it is impossible to apply the substantiality test as I illustrate below from the Attorney General's argument.

The Attorney General argued that the substantiality test is used as tool of evaluation of evidence and I agree, however the purpose for which the evaluation is required becomes relevant. If the evaluation of evidence is for determination of an election result the test is specifically provided for by the statutes cited in this judgement. If the test was for general application in evaluation of evidence it would not be necessary to specifically provide for it in election related matters. On the other hand, if the evaluation of evidence is related to interpretation of the Constitution under Article 137 Clause 3 of the Constitution, the substantiality test is irrelevant because once a petitioner makes a case that an 'act' or 'Act' is inconsistent with or in contravention of a provision of the Constitution the proof of inconsistency or contravention does not require application of the substantiality test.

In my view a constitutional infringement in relation to any 'act' or 'Act' that is declared unconstitutional under Article 137 (3) (b) of the Constitution cannot be subjected to the substantiality test. An infringement on the supreme law which is the Constitution is a grave matter. Its interpretation does not go beyond the declaration unless there is need for redress under Article 137 (4) of the constitution.

Issue No. 5

This issue was framed as follows:

"Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?"

Appellants' Submissions

Submissions of MPs

The MPs argued this issue together with issue 4

Submissions of ULS

Counsel for the appellant had in paragraph 1(d) of the Petition in Constitution Petition 3 of 2018

challenged the removal of the age limit and supported it with the affidavits of Professor Sempebwa, Professor Latigo and Francis Gimara. The issue was also argued in the lower Court. Counsel's complaint is that none of the evidence was evaluated nor the arguments considered. The challenged provision was not tested as against Articles 8A and 38. Counsel submitted that if the court had considered the Appellant's case, it would have come to a different conclusion.

Counsel submitted that peaceful transfer of power and orderly succession of Government is a principle of democracy which ought to be used in interpretation of the Constitution. He cited the case of Sekikubo and others vs. Attorney General (supra) for application of democratic principles. According to counsel, the Court below did not consider this argument and therefore made no decision on it.

Counsel referred to the affidavit of Professor Sempebwa which refers to the Constitutional Review Commission which was specifically mandated to examine sovereignty of the people, democracy and good governance and how to ensure that the country is governed in accordance with the will of the people. However, as found in the evidence of Professor Sempebwa, Professor Latigo and Francis Gimara there was abuse of human rights, violence, harassment, humiliation, assault and illegal detentions all of which negate a conducive atmosphere to genuinely seek the views of the people.

He submitted that those reasons advanced in respect of term limits equally apply in respect of a non-limit on age.

Counsel argued that the evidence of Professor Sempebwa is also to the effect that the conflict in Uganda is instigated by unchecked executive power and unlimited incumbency to the position of president.

Counsel referred to the Odoki Commission report on the questions of orderly succession and clinging to power via disregard of constitutional provision.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict of with orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1, 8A and 38 of the Constitution. According to counsel, the Court would have nullified the Act if it has considered all these facts.

Counsel submitted that the process of consultations invalidates the Act inclusive of Section 3. He referred to the authority of Robert Gakuru which deals with public participation. The following are the discerned principles;

(i) Invitation must be given to those participating sufficient time to prepare

(ii) In Adequate time must be given to the public to study the Bill consider their stand and

formulate representatives to be made

The legislature should facilitate public involvement

Parliament should create conditions that are conducive to the effective exercise of the right to participate

(v) Parliament should designate places where consultations would be held.

Counsel submitted that there were no consultations in contravention of Articles 1, 8A and 38 of the Constitution that invalidate the Act. He argued that, since the consultations were primarily in respect of the age limit, Section 3 cannot stand.

Submissions of Mabirizi

Mr. Mabirizi submitted that removal of the age limit under Article 102 was a 'constitutional replacement' which has no place in a constitutional democracy. He referred to Carlos Bernal's Article, Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement doctrine, published in International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, Pages 339–357, which demonstrated what the standard for determining Constitutional Replacement. Bernal laid down the seven-tiered test. According to Mabirizi the Constitution (Amendment) Act 2018 is nothing more than a partial constitutional Replacement which cannot stand.

Mabirizi submitted that, in the instant case, the essential element of the constitution which is at stake is the qualifications/capacity of the president/fountain of Honour which is underpinned under 63 provisions of the Constitution.

That the element of qualifications/capacity of the president/fountain of Honour is essential because of the huge powers and duties vested in the president. Those powers were balanced in such a way that the president is neither too young nor too old. Removal of such may have grave consequences on exercise of such powers in the 63 provisions. Although the element of qualifications of the president are essential, that is not to say that they are eternal, not capable of amendment but can only be amended in a compliant and careful way not to destroy the entire constitutional system & base. That the essential element of the restricted qualifications of a president has been opened-up and the unrestricted qualities of a president is in conflict with restricted qualifications.

That the powers to remove the age limit only rests in a constituent assembly not parliament since it amounts to a constitutional replacement. Mabirizi contented that, upholding of section 3 of the Act will deharmonize the constitution so as to render among others Articles 51(3), 144(1)(a) & (b), 146(2)(a) &163(11) unconstitutional, which is against the spirit of the Constitution. That it will open a flood-gate of private members' bills to amend those Articles which have age restrictions.

Attorney General's Submission in Reply

The Attorney General submitted that the appellants challenged the removal of the Age limit from the Constitution in Constitutional Petition No.5 of 2018. That the appellants contend that that section 3 and 7 of the impugned Act which scrapped the age limit qualification for election to the office of the President and district Chairperson amended Article 1 of the Constitution by infection. They further contend that Parliament also amended Article 21(3) of the Constitution creating another form of discrimination to wit; age.

The Attorney General contended that the Justices of the Constitutional Court correctly directed themselves to the law by holding that amendment of Articles 102(b) and 183(2)(b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Parliament is enjoined to make laws under Article 79 and 259 and this power is exercised through bills passed by Parliament and assented to by the President. (see Article 91(1) of the Constitution)

The Attorney General submitted that the Justices of the Constitutional Court were unanimous and rightly held that this power extends to Articles 102 and 183. The Justices of the Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). He contended that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the respondents agree with the finding of the Court that in amending Articles 102 (b) and 183 (2) (b), the sovereignty of the people is not infected at all.

In contrast, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to the office of the president. According to counsel, the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

The Attorney General agreed with the finding of the Constitutional Court that the amendment of Article 102 (b) did not in way infect the provisions of Article 21 (3) of the Constitution.

The Attorney General submitted that the appellant in C.A No. 2/2018 advances the theory of Constitutional replacement. That the appellant argues that the amendment of Article 102 to remove the age limit qualification for election to the office of the President amounts to Constitutional replacement. He labours to justify this assertion by citing various Constitutional provisions which he claims vest so much power in the office of the president and goes on to peddle without any proof or authority the notion that a president must not be too young or too old as a justification for the

restriction on age as a qualification for election to the office of the President.

The Attorney General concurred with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. He averred that Article 102 (b) provides that; - a person is not qualified for election as President unless the person is not less than thirty-five years and not more than seventyfive years of age. According to counsel, the amendment of Article 102(b) did not undermine any of the 63 provisions of the Constitution cited by the petitioner or any other provision of the Constitution. Counsel contended that the learned Justices of the Constitutional Court rightly directed themselves to the law in holding that amendment of Article 102 (b) did not amount to Constitutional replacement of Article 1.

The Attorney General submitted that Article 1 (1), 1 (4) illustrates that power belongs to the people and is exercised through elections of their representatives. According to counsel, the Justices of the Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). He cited Article 259 of the Constitution which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. That the Justices of the Constitutional Court were unanimous and rightly so that this power extends to Articles 102 and 183. Counsel entirely concurred with the Constitutional Court that the qualifications for election to the office of the President and Local Council V Chairpersons can and should be amended by the people's representatives where circumstances that necessitate the change arise. He added that the appellant's argument that upholding section 3 of the Amendment Act will disharmonize Articles 51(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. According to counsel, it is not against the spirit of the Constitution and upholding the appellant's argument would curtail the right of Members of Parliament to bring bills in accordance with Article 94 (4)(b) of the Constitution.

The Attorney General argued that the amendment of Article 102 (b) was not a Constitution making process that requires a Constituent Assembly. According to counsel, it was an amendment process which the peoples' representatives are empowered to do in accordance with Chapter Eighteen of the Constitution.

The Attorney General agreed with the finding of the Constitutional Court that the amendment of Article 102(b) and 183 did not contravene any provisions of the Constitution.

The Attorney General submitted that the appellants raised no grounds in reference to this particular issue. That their submissions are therefore not premised on any grounds contrary to the provisions of rule 82 of Judicature (supreme Court Rules) Directions which are mandatory.

The Attorney General prayed that the Appellants' submissions to this particular issue be

disregarded by this Court. That without prejudice to the above, the appellants challenged the removal of the Age limit qualification for election to the offices of President and District Chairpersons respectively from the Constitution in Constitutional Petition No.3 of 2018. In their submissions they allege that the Constitutional Court did not consider her evidence thus reaching a wrong conclusion. They claim that if the Constitutional Court had considered their submissions in regard to the infection of Articles 8A and 38 of the Constitution by the amendment to Article 102 (b), Court would have come to a different conclusion.

According to the Attorney General, the amendment did not in any way take away the people's right to choose who leads them in free and fair elections held regularly every five years. That it is on this basis that the Constitutional Court found that the enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 0f 2018 did not infringe on the basic structure of the Constitution and therefore was not inconsistent with and or in contravention of the Constitution.

Submissions in reply by ULS

The 3rd appellant challenged section 3 which removed the 75 years age limit.

In Ground 2 of its memorandum of appeal the 3rd appellant objects to the finding by the lower court that the entire process of conceptualizing and enactment of the Constitution [Amendment] Act did not contravene the Constitution. In its prayer the 3rd appellant specifically prays that section 3 of the Constitution [Amendment] Act 2018 be annulled and declared unconstitutional

Counsel submitted that in the consolidated the petitions in the lower court, this particular issue was argued both under issues 6 and 12[volume 1 pages 136, 195, 257, 288, 355 and 404] As seen from prayer 2(ii) in the memorandum of Appeal it is specifically prayed that section 3 of the Act be declared unconstitutional for inconsistence with Articles 1, 8A, 38, 105(1), and 260(1). This prayer arises from ground 2. This is also in line with the petition of the appellant.

Counsel submitted that it was framed as an issue and agreed to by the Respondent. He argued that it is rather late for the Respondent to attack an issue agreed upon as arising out of the grounds of appeal and argue it as never raised.

Counsel submitted that Rule 82 is not applicable. It amounts to raising a preliminary objection in reply to submissions. Further this offends the whole purpose of scheduling at which issues to be submitted on were agreed upon. In any case Rule 98© allows a ground set forth or implicit in the memorandum of appeal. All is required is an opportunity for the respondent to be heard which the respondent has done.

Court's Determination of Issue No.5

In my finding in issue No.1 above, I have opined that the constitution is amendable as longer as the procedure laid down in Chapter 18 of the constitution is followed. Under Article 79 of the

Constitution, Parliament is mandated to carry out the following functions; -

Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.

The petitioners/appellants put forward arguments against removal of age limits while the Attorney General Vehemently defends their removal. I would not go into the merits or demerits of the removal of age limits because if the people of Uganda through their representatives decide to remove them the debate goes to the legislature and not to the Constitutional Court. Evidence was adduced of what transpired during the debate in parliament and it is very clear that is where the debate belongs. The issue is answered in the negative.

Issue 6

This issue was framed as follows:

"Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?"

Appellants' Submissions

Submissions by Mabirizi

Mr. Mabirizi submitted that, had the learned justices harmonized Article 83(1)(b) with 102(b) of the constitution, they would have found that the president elected in 2016 ceases to hold office on attaining 75 years of age.

He adopted his submissions in the lower court on this issue and added that by calling upon court to make an interpretation that a president ceases to be qualified to hold office the moment he/she ceases to posess the qualifications which were the basis of his/her qualifications, he called upon them to perform their duty of harmonization as elaborated by Odoki CJ in the case of Ssemwogerere when he stated that: *"...It is not a question of construing one provision as against another but of giving effect to all the provisions of the' Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution."*

Mr. Mabirizi submitted that this is because the constitution, sets similar qualifications for the holders of all national elected offices and Local council V chairman but they do not repeat them in every Article. They are pegged on that of a member of Parliament the reason why Article 102(c) for president states that "a person qualified to be a member of Parliament" and Article 183(2)(a) for

District Chairperson goes that "qualified to be elected a member of Parliament', 108A(1) for Prime minister states that 'persons qualified to be elected members of Parliament', 113(1) for ministers reads that 'persons qualified to be elected members of Parliament'

Therefore, with proper intentions of interpretation and harmonization of the Constitution, no one can divorce the qualifications and disqualifications of a president from those of a Member of Parliament, prime minister, minister or a district chairperson, unless the constitution is explicit on that difference.

Just like how Article 80 prescribes what is expected of a person at nomination, Article 102(b) prescribes the nature of a person to appear for nomination. This has nothing to do with what happens after nomination and possibly elections. He prayed that this issue be answered in affirmative, in the spirit of posterity of our constitution and to ensure that all its provisions are harmonized.

Respondent's Submissions

The Attorney General submitted that this issue was only raised by Mr. Male Mabirizi. It arises from grounds 76 and 77 of the appellant's memorandum of appeal in C.A No. 2/2018. The Learned Justices of the Constitutional Court rightly directed themselves to the law when they found that Articles 102 (b) which provide for the qualifications of a person wishing to stand for election to the offices of President, purely relate to the qualifications prior to nomination for election and not during the person's term in office. Article 102 (b) of the Constitution before the amendment provided that; A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age;

The Attorney General emphasized that the Constitutional Court considered the provisions of Article 102 and unanimously found that the provisions therein purely relate to the qualifications prior to nomination for election and not during the person's term in office. In interpreting the Constitution, the basic principle to be followed is that where the words of the Constitution are clear and unambiguous, then they ought to be given their primary, plain, ordinary and natural meaning.

That from the onset, Article 102 is clear that it provides for the qualifications for a person to be elected President. In other words, one must be seized with these qualifications prior to being elected to the office of the President. The learned Justices of the Constitutional Court were unanimous that this issue had no merit and rightly resolved that Article 102 refers to qualification prior to being elected as President. See Judgment of Justice Keneth Kakuru, Justice Remmy Kasule at and Justice Owiny A.C. Dollo.

The Attorney General concurred with the finding of the learned Justices of the Constitutional Court that a President elected in 2016 is not liable to vacate office on attaining the age of 75 years.

Court's Determination of Issue No.6

This issue was framed at Constitutional court as Issue No.13 and stated as:-

"13. Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in ntravention of Articles 83(1)(b) and 102(c) of the Constitution."

All the Constitutional Court Justices found that the office of the President does not become vacant on the incumbent attaining the age of 75 years.

One of the principles of the Constitutional interpretation already stated in this judgement and explained by the Attorney General in his submissions is that where the words of the constitution are clear and unambiguous they ought to be given their primary, ordinary and natural meaning.

I am in full agreement with the Constitutional court and my interpretation of Article 102(b) of the constitution is that the Qualifications referred to are pre- nomination qualifications and not midterm. I do not think that the framers of the Constitution intended for example that a seventy four year old person would be qualified for elections but a year later he or she no longer qualifies and the Country goes through another election.

Article 102(b) of the constitution should be read together with Article 105 which provides that:-

105. Tenure of office of the President.

A person elected President under this Constitution shall, subject to clause (3) of this Article, hold office for a term of five years.

A person may be elected under this Constitution to hold office as President for one or more terms as prescribed by this Article.

(3) The office of President shall become vacant—

on the expiration of the period specified in this Article; or if the incumbent dies or resigns or ceases to hold office under Article 107 of this Constitution.

So quite clearly the office of the president does not become vacant on attainment of seventy five years of age of the incumbent. The issue is answered in the negative.

Issue 8

This issue was framed as follows:

"What remedies are available to the parties?"

Appellants' Submission

The MPs submission.

The counsel prayed that the appeal be allowed in the terms and prayers specified in the Memorandum of Appeal and specifically that the Constitution (Amendment) Act, No. 1 of 2018 be annulled and that the Respondent pays costs of this Appeal and in the Court below.

In the alternative but without prejudice to the foregoing, they prayed that if court answers issue 7 in the affirmative a retrial should be ordered.

Submissions by ULS

Counsel relied on the authority of Tinyefuza vrs Attorney General Appeal 1 of 1997 Oder JSC at page 37 which cited with approval the case of Troop vs. Dulles where the Supreme Court of the US stated that:

"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital. Living principles that authorize and limit government power in our nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not the words of the Constitution become little more than good advise"

Oder JSC then went on to say

"These remarks were cited with approval in Zimbabwe Supreme Court in the case of A Juvenile vrs the State [1989] LCR [Const.] 774 at 789 by Dumbutshena CJ. I agree with the remarks of the US Supreme Court. It is the duty of this Supreme Court of Uganda to enforce the paramount commands of this Constitution. I have already said in this judgment that, following highly persuasive opinions from courts in the commonwealth, that court should apply generous and purposive construction of the provisions of the Constitution that give effect to and recognition of fundamental rights".

Counsel went on and submitted that Article 20(2) requires all organs and agencies of government to uphold and promote rights and freedoms enshrined in the Constitution

That Article 137(4)(a) of the Constitution provide that Court may grant an order of redress in addition to the declarations sought.

That the Petition before the court shows that the violations and limitations to the fundamental rights and freedoms do not even come near any of the possible defenses in Article 43. That there is callousness and extreme disregard for humanity in the manner the violations were carried out.

He noted that the Judges lamented over the conduct of Constitutional violators. Elizabeth Musoke JCC at line 1789 page 70 stated "therefore although the said violence and restrictions in themselves are to be condemned in the strongest terms……. Cheborion Barishaki JCC at line 25 page 210 makes it clear that the treatment of members of Parliament was inhuman and degrading and their arrest and detention uncalled for. Owiny – Dollo Dy CJ castigates military intervention page 545 as does Kasule JCC.

That clearly the court appears to appreciate that the security forces crossed the red line. Indeed, in many instances the Court holds that the constitutional limitations were not justifiable though no declarations are made.

It was his submission that this was not just violation of the Constitution, it was a well thought out strategy to facilitate enactment of the Act as he submitted above. That it was calculated to end a message to the Members of Parliament and their constituents that opposition to the Bill was a red line for government. Counsel submitted that it was intended to instill terror and fear.

In addition, he also submitted that also the emboldened of the army that grievously beating up our Members of Parliament to an extent of long hospitalization is now acceptable. It is for these reasons that he submits that redress must be tied to the Act. That the country must know that there is a price to pay for contravention of the Constitution. Nullifying the Act is the only remedy. That then in future individuals in government shall not look at violence as a means of achieving their objectives, there will always be the fear that the objective will not be achieved.

Counsel prayed that the Petition be allowed. Declarations and redress as stated herein above be granted. That Issues 2 3 4 and 5 be answered in the affirmative. That just as in the lower Court the Appellant in Appeal Number 4 of 2018 did not seek costs of the Appeal but prays for disbursements only.

Submissions by Mabirizi

He prayed that court nullifies the entire process in the Constitutional Court for reasons stated above. That however, given the nature of this dispute, in the alternative court nullifies the entire law in order to reassert the relevancy of courts in Constitutional development of this country as was done by this court in Ssemwogerere V. Ag(supra), the Constitutional Court in Oloka-Onyango & 9 Ors V. Ag(supra) and the then Constitutional Court in Ssempebwa V. Ag(supra).

That the above position is supported by Nwokoro & Ors V. Onuma & Anor-Nigeria(supra) where ESO, JSC, held that

"It is a fundamental principle of legality that where an act or course of conduct fails to meet with the requirements prescribed by law, such that the non-compliance renders the act or course of conduct devoid of legal effect no legal consequences flow from such acts or course of conduct…"

It was his submission that since it is clear that the entire process of introducing, processing and enactment of The Constitution (Amendment) Act 2018 was flawed, in addition to other factors discussed above, the entire process was vitiated rendering the Act unconstitutional, null and void.

He prayed for general damages and full costs of the case in this court and the court below with an interest of 25% per annum from the date of judgment till payment in full, putting in mind the Ugandan experience as expressed by Twinomujuni, JA in Akpm Lutaaya V. Ag(supra) that "…from Ugandans experience, he is likely to chase the proceeds of this decree for yet many years to come."

The Attorney General's Submissions.

The Attorney General contended that the Appellants have not made out any case on appeal to justify this Court reversing and/ or varying the decision of the Constitutional Court of Uganda of 26th July 2018 in the Consolidated Constitutional Petitions. In the premises, the Attorney General prayed that the Honourable Court finds that the appeal lacks merit and thereby dismisses the appeal accordingly with costs to the Respondent and declined to grant all prayers specified and orders sought in the Memoranda of Appeal.

The Attorney General further prayed that this Honourable Court be pleased to affirm and uphold the findings of the majority Justices of the Constitutional Court of Uganda in their Judgment of 26th July 2018 that sections 1, 3, 4 and 7 of the Constitution (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson of Local Council V to contest for election to the respective offices and for implementation of the recommendations of the Supreme court in

Presidential Election Petition No. 1; AmamaMbabazi vs. Yoweri Museveni were lawfully enacted in full compliance with the Constitution and valid provisions of the Constitution (Amendment) Act, No. 1 of 2018.

In regard to the alternative prayer that the court orders a retrial, it is ontended for the Attorney General that this prayer is, with all due respect, misconceived and ought to be denied as the Appellants have not adduced evidence before this Honorable Court to warrant issuance of an order for a retrial. The respondent prays that the prayer for a retrial be denied.

Regarding the prayer for general damages with interest at 25% per annum from the date of judgment that it is trite that general damages are awarded to restore a party to a position he or she was in before he suffered injury, loss or inconvenience arising from a breach of duty or obligation. That general damages are awarded to fulfil the common law remedy of restitutio in integrum meaning the innocent party is to be placed so far as money can do so in the same position as if he had not suffered loss or inconvenience arising out of a violation.

It is contended for the Attorney General that the Appellant has not proved or adduced evidence to show that he suffered any material inconvenience or at all a loss by the passing of the Constitution (Amendment) Act No. 1 of 2018. Damages are usually measured by the material loss suffered by a party. It is thus submitted for the Respondent that the Appellant's claim for general damages with interest at 25% per annum from the date of judgment until payment in full is misconceived and ought to be denied.

Court's Determination of Issue No.8

It follows from my finding that as a consequence of a number of 'acts' that infringed on the

Constitution in the process of enactment of the

Constitutional (Amendment) Act 2018, the Act cannot be allowed to stand 20 and is hereby annulled.

It also follows from my findings and declarations that there were 'acts' which were inconsistent with and in contravention of the constitution the prayer for nullification of the entire Constitutional (Amendment) Act of 2018 is granted.

On costs I would order that each party meets its own cots.

Dated at Kampala this ..... day of ..... 2019. .....

JUSTICE ELDAD MWANGUSYA

JUSTICE OF THE SUPREME COURT

EXEGESIS OF THE GOPSPEL ACCORDING TO MWANGUSYA, JSC

In 2017, Hon. Raphael Magyezi, a Member of the 10th Parliament of the Republic of Uganda, brought a Private Member's Bill (Constitutional Amendment Bill No. 2 of 2017). On the 27th December, 2017, Parliament passed the Bill eliminating Presidential Age Limit and extending Parliamentary Term. The Ugandan Parliament passed an amendment to the Constitution which, among other measures, aims to eliminate the requirement that candidates vying for the presidency be under 75 years of age.

The court again by a 4-1 majority upheld the larger Bill applying severally the doctrine of severance to save the repeal of the age limit even though all the justices unanimously found unconstitutional means that were used to stifle the MPs' access to their constituents through the police.

Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this Court. The Appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in the Supreme Court containing 84 grounds of appeal categorized under different parts. Issues for court's determination were framed out of the consolidated appeals.

MWANGUSYA, JSC

One of the considerations on appeal of the age limit petition was whether Article 102(b) constituted part of basic structure of the Constitution. Justice Mwanguya did not find it necessary to set down an exhaustive list of what constitutes the basic structure of Uganda's Constitution as he thought it as an exercise in futility. Amending Article 102 (b) and 183 (2) (b) did not violate the basic structure of Uganda's Constitution.

The Basic Structure Doctrine and the Preamble in Uganda

Given our history, the 1995 Constitution sought to bring a stop to cries that prior to its adoption were cries attributed to instructions of governance in Uganda. The 1995 Constitution looked backed at history and not in admiration of what it saw committed itself to building a better future. This it said could be achieved by establishing a socioeconomic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. The 1995 Constitution was verily an instrument that could lead Uganda to a better future but its failure to pass the test of time clouds the better future the Constitution intended to achieve with doubt.

The preamble to a Constitution has grown from serving as a mere introduction or preface to the substantive part of the Constitution to emerging as the document that lays down the basic structure of the Constitution. The preamble contains the fundamental values and guiding principles on which the Constitution is based. A preamble presents the history behind the Constitution's enactment, as well as the nation's core principles and values. It serves as a guiding light for Constitutional Judges to interpret the Constitution in its light. The Preamble is part of the Basic Structure of our Constitution and the authority of Parliament to amend a specific provision in the Constitution must be tested against the principles in the preamble.

The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of the existence. There is though a limitation on the power of amendment by implication by the words of the preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. The preamble is the root of the tree from which the provisions of the Constitution spring.

In the case of Anwar case, the Supreme Court of Bangladesh cited with approval the Indian case of Minerva and held that: "…this preamble is not only part of the Constitution but stands as an entrenched provision that cannot be amended by Parliament alone. ... If any provision can be called the pole star of the Constitution, then it is the preamble."

The Constitution gives the parliament the function to protect the constitution and promote democratic governance of Uganda, this makes the legislature the custodian of the people's volition hence giving it the responsibility to make the 1995 Constitution pass the test of time. Disappointingly however in the exodus of escaping the claimed upshots that Article 102 brings that called for its amendment, members of parliament were unsighted to the vision intended by the 1995 Constitution to yield democratic governance. The members of parliament traded the people's volition at a price of satisfying of their own desires when a torrent of accusations arose that NRM

members of parliament in support of the removal of age limits where distributed cash to give the amendment a shove. This disappointingly is not the first amendment claimed to only be possible due to parliament's jobbery.

In reliance on the above-mentioned exposure of jobbery parliament alone cannot be relied on to ensure protection of the 1995 Constitution to achieve democratic governance in Uganda, as provisions of the Constitution that could help to achieve this goal fall one after the other, what can be done to ensure that the constitution is protected and democratic governance is promoted? Is the question to rise? And the answer to the raised question can be generated from Article 3(4) of the 1995Constitution that provides for the duty to protect the Constitution. In consideration that this duty extends to the Judiciary the Basic Structure Doctrine is that equipment the judicial organ of the government can activate in Uganda to cause there being a second well-armed organ of government to facilitate protection of the 1995 Constitution, make it durable and promote democratic governance of Uganda.

In the 2013 case of Saleh Kamba and others v Attorney General[1106] and others a reasoning of the learned Kasule JCC in his dissenting judgment in consideration of the Basic structure doctrine which he concluded that owing to the historical perspective compelled that the Constitution be interpreted in manner that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party State or make in – roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association, makes this case a reference most relied on by applicants in cases that followed. This conclusion was certainly an attempt by the judge in hindering excellence of the 1995 Constitution from being forfeited on the altar of worthlessness; it clearly articulates the result that can be achieved if this doctrine is to be employed.

The Basic structure doctrine has no rule that limits it to protect only particular provisions of the Constitution. The doctrine roams freely during the protection of the Constitution and offers its protection to any provision in the constitution that it has been deemed to be essential to form part of the constitution's basic feature.

A Missed opportunity to apply the Basic Structure Doctrine?

The Basic Structure Doctrine (BSD) is Judge made law and implies tacitly, a limitationon the power of Parliament to amend the Constitution. The Basic Structure Doctrine is to the effect that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not extend to authority to produce an output which alters the country's Constitutional order. The Legislature should not engage in amendments which can be described as a Constitutional

[1106] Constitutional Petition No. 8 of 20012

replacement. This is because the power to replace a Constitution with a different one belongs to the people.

This doctrine was enunciated by the Supreme Court of India in one of its most important decisions ever, in the 1973 case of Kesavananda Bharativs. The State of Kerala[1107].The doctrine is to the effect that a national constitution has certain basic features which underlie not just the latter, but also the spirit of that constitution, and any amendment, which purports to alter the constitution in a manner that takes away that basic structure, is void and of no effect. The rationale of the decision was that an amendment, which makes a change in the basic structure of the constitution, is not really an amendment, but is in effect, rewriting the new constitution, which Parliament has no power to do. The court held that as the Supreme Court of the land, it had a limited power to review and strike down amendments which went to the very heart and core of the constitution, by seeking to alter its basic structure.

In its wisdom, the Court did not lay down a list of provisions it considered to constitute the basic structure. The claim of any particular feature of the constitution to be a "basic structure" is left to be determined by the court on a case by case basis. The basic structure doctrine has since been upheld and relied on in subsequent decisions in that country, for example, in Minerva Mills Ltd y. Union of India (1980) and Indira Nehru Gandhi v. Raj Narain (1975). It has also been widely accepted, adopted and cited with approval in many other commonwealth countries, or what we call common law jurisdictions.

In the process, the courts have suggested various guidelines which can be relied on to determine whether an amendment touches the basic structure of a particular constitution and is, therefore, void. Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, the decisions I have cited show that in answering this important question, courts will consider factors such as the preamble to the constitution, national objectives and directive principles of State policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the constitution that led to the given provision, and the likely consequences of the amendment.

In Kenya, the court of Appeal in the case of Njoya vs. Attorney General and Others held that: "*Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity of the existing one"*

[1107]AIR1973SC1461

THE PROCEDURE AND MANNER OF PASSING THE ENTIRE CONSTITUTION (AMENDMENT) ACT NO. 1 OF 2018

In Oloka Onyango& 9 Ors vs Attorney General[1108] the Constitutional Court held that:

"Parliament as a law making body should set standards for compliance with the constitutional provisions and with its own Rules. ... the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it ..."

Public Consultation

Justice Mwanguya declared that the infringement of fundamental rights of not only the members of Parliament but also members of the public who might have been interested in participating in consultations vitiates the process. Public consultation is an essential ingredient in constitution amendment and plays a legitimation function. Citizens have a right to participate in such processes. Public consultation in constitution amendment is an affirmation of the 'constituent power' of the people and of participatory democracy.

The obnoxious directive issued by AIGP Asumani Mugenyi was appalling. The directive restricted freedom of association and movement of Members of Parliament without any justification whatsoever. The directive was intended to prohibit Members of Parliament from holding joint rallies or canvassing support for certain positions outside their constituencies. It was unlawful. In the current multiparty dispensation, most Members of Parliament belong to one party or another. They should therefore be expected to offer support 30for similar minded colleagues in their constituencies. Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for support for their views and positions or carry out consultations not only from their constituencies but throughout the country. There is absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

The failure to consult deprived the public of the constitutional right to a fair hearing.

Discrepancies in the Speaker's certificate of compliance and the Constitutional (Amendment) Bill.

The constitution made the Speaker's certificate a condition precedent to the presentation of an amending bill for presidential assent, and non-compliance would invalidate the purported Act. The requirement of a valid certificate of compliance under Article 263 (2) of the Constitution is couched in mandatory terms. It is apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring inconsistencies and discrepancies. Whereas

[1108][2014] UGCC 14; Cited with approval in the case of Law Society of Kenya vs Attorney General & Anor [2016] e KLR where

the certificate clearly indicated that the impugned bill not only amended Articles 61, 102, 104 and 183 of the Constitution, the bill itself indicated that parliament had amended in addition to the said provisions; Articles 105, 181, 289, 291 and in fact created another provision.

The certificate of compliance indicated that only four Articles in the Constitution had been affected by the amendment. The Constitution (Amendment) Act No. 1 of 2018 assented to by the President showed ten Articles were affected by the amendment.

SEVERANCE

Severance refers to the ability of courts to strike out a portion of 10a statute if that portion is held to be unconstitutional. There are two types of unconstitutional legislation – legislation that violates procedural constitutional requirements and legislation that violates substantive constitutional requirements. Controls on the procedure of the legislative process are featured in most state constitutions. These types of restrictions regulate only the process by which legislation is enacted. Examples of procedural regulations on legislation include limitations on the purpose, subject, or title of the bill. Each of these restrictions is "designed to eradicate perceived abuses in the legislative process, such as hasty, corrupt, or private interest legislation." Abuses of these restrictions are called procedural constitutional violations.

First, severance is inappropriate when the unconstitutional and constitutional provisions are "so essentially and inseparably connected" that a court cannot presume that the legislature would have enacted the valid provisions without the unconstitutional one. Second, severance is inappropriate when the valid provisions cannot be executed in accordance with legislative intent as a result of incompleteness after severance.

For procedural constitutional violations, "the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." To determine whether or not the provisions that are part of the added subject pass this test, the court considers "whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill."

Justice Mwanguya differentiated the application of the doctrine of severance in the case of Salvatori Abuki v Attorney General[1109], where the Constitutional Court considered the constitutionality of Sections 3 and 7 of the Witchcraft Act, Cap 108 from the case before the Court. He differentiated the case of Salvatori Abuki from the present case because it was not concerning

[1109]Constitutional Case No. 2 of 1997

the enactment of Witch Craft Act as whole being null and void and it be said that Act must be have been enacted according to the law but had the two sections inconsistent with constitution which is not the case we have now where by the whole Act was not passed according to Constitution. He concluded that having found that some of the acts and omissions vitiated the enactment Constitution (Amendment) Act 2018 the doctrine of severance was wrongly applied by the Constitutional Court.

Severance does not apply to acts that have no legal standing. The amendment act was null and void due to the flawed procedure under which it was enacted.

GOSPEL ACCORDING TO JUDGMENT OF MUGAMBA, JSC VERBERTIM

On 26th July 2018, the Constitutional Court rendered its decision on the contested validity of the Constitution (Amendment) Act, No. 1 of 2018. Three respective parties appealed that decision to this Court. At the pre-hearing conference, the three appeals were, with the consent of the parties, consolidated on the reasoning that this was appropriate since the appeals arose from the same Judgment and comprised similar issues.

In their Constitutional Petitions all the appellants had challenged the constitutionality of the Constitution (Amendment) Act, No. 1 of 2018. It was their contention that the process leading to the enactment of the impugned Act was tainted with irregularities and illegalities. They sought to have the entire Act nullified.

The Constitutional Court found that a majority of the provisions of the impugned Act were indeed unconstitutional and accordingly struck them down.

The Constitutional Court however found that some of the provisions of the impugned Act were constitutional. Applying the principle of severability of Statutes, the Constitutional Court retained those provisions it found constitutional and on that basis declined to grant the main relief sought by the appellants which was to nullify the whole impugned Act. It is worthwhile to note that the Constitutional Court found that there were some procedural irregularities in the course of passing the impugned Act but that it held that the irregularities were not substantive enough to nullify the entire Act.

The parties agreed upon fourteen issues for determination by the Constitutional Court. These were:

Whether Sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from five to seven years is inconsistent with and/or in contravention of Articles 1, 8A, 61(2)(3), 77(3)(4), 79(1), 96, 105(1), 260(1), 233(b) and 289 of the Constitution.

And if so, whether applying the said Act retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 77(3)(4), 79(1), 96 and 233(2)(b) of the Constitution.

Whether Sections 6 and 10 of the Act extending the current life of local government councils from five to seven years is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2) (a) of the Constitution.

If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.

Whether the alleged violence/scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1,2,3 (2) and 8A of the Constitution.

6. Whether the entire process of conceptualizing, consulting, debating and enacting the Act was

inconsistent with and/or in contravention of the Articles of the Constitution as hereunder:

(a) Whether the introduction of the private member's Bill that led to the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.

(b) Whether the passing of Sections 2,5,6,8 and 10 of the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.

Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members of Parliament in the Parliamentary Chambers, arresting and allegedly detaining the said members, is inconsistent with and/or in contravention of Articles 24, 97, 208(2) and 211(3) of the Constitution.

Whether the consultations carried out were marred with restrictions and violence which was inconsistent with and/or in contravention of Articles 29(1)(a)(d)(e) and 29(2)(a) of the Constitution.

Whether the alleged failure to consult on Sections 2,5,6,8 and 10 is inconsistent with and/or in contravention of Articles 1 and 8A of the Constitution.

Whether the alleged failure to conduct a referendum before 5 *assenting to the Bill containing Section 2,5,6,8 and 10 of the Act was inconsistent with and in contravention of Articles 1,91(1), 259(2), 260 and 263(2) (b) of the Constitution.*

Whether the Act was against the spirit and structure of the 1995 Constitution.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90(2), 90(3)(c) and 94(1) of the Constitution; and in particular:

i) Whether the actions of parliamentary staff preventing some members of the public from accessing the parliamentary chambers during the presentation of the Constitutional amendment Bill No. 2 of 2017 was inconsistent with and/or in contravention of the provisions of Articles 1, 8A, 79, 208(2), 20 *209, 211(3), and 212 of the Constitution.*

Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief Whip, and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 25 *74, 75, 79, 82A, and 108A of the Constitution.*

Whether the alleged actions of the Speaker of Parliament in permitting the ruling party members of Parliament to sit on the opposition side of Parliament was inconsistent with

Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, 83(1)(g), 30 *83(3) and 108A of the Constitution.*

Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members who had become Members of the Committee after the public

hearings on Constitutional Amendment Bill No. 2 of 2017 had been held and completed, to sign the Report of the said Committee, was in contravention of Articles 44(c), 90(1) and 90(2) of the Constitution.

v) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee on 18th December, 2017 to submit to Parliament the said

Committee's Report in the absence of the Leader of Opposition, Opposition Chief whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A and 108A of the Constitution.

Whether the actions of the Speaker in suspending the 6 (six) members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

Whether the action of Parliament in:

(a) Waiving the requirement of a minimum of three sittings before the tabling of the report which was also not seconded;

Of closing the debate on the Constitutional Amendment Bill No. 2 of 2017 before every willing Member of Parliament had been afforded an opportunity to debate the said Bill;

Failing to close all the doors leading to the Parliamentary Chamber where Members of Parliament carried on the debate of the Bill, are in contravention of Articles 1, 8A, 44(c), 79, 94 and 263 of the Constitution.

8. Whether the passage of the Bill into an Act without Parliament first having observed 14 days of Parliament sitting between the 2nd and 3rd reading was inconsistent with and/or in contravention of Articles 262 and 263(1) of the Constitution.

9. Whether the Presidential assent to the Bill allegedly in absence of a certificate of compliance from the Speaker and a certificate of the Electoral Commission that the amendment was approved at a referendum, was inconsistent with and in contravention of Article 263(2)(a) and (b) of the Constitution.

Whether Section 5 of the Act, which re-introduces term limits and entrenches them as being subject to a referendum is inconsistent with and/or in contravention of Article 260(2)(a) of the *Constitution.*

Whether Section 9 of the Act, which seeks to harmonise the seven-year term of Parliament with the presidential term is inconsistent with and/or in contravention of Articles 105(1) and 260(2) of the Constitution.

Whether Sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/or in contravention of Articles 21(3) and 21(5) of the Constitution.

13. Whether the continuance in office of the President of Uganda by one who was elected in 2016

and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution.

14. What remedies are available to the parties?

On 26th July 2018, when the Constitutional Court partially allowed the consolidated Petitions it declared as follows:

1. By unanimous decision, that sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term–limits are unconstitutional for contravening provisions of the Constitution.

2. That accordingly, sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, be struck out of the Act.

3. By majority decision that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which removed age limits for the President and District Chairpersons, to contest for election to the respective offices, were passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

Kenneth Kakuru JCC, did not agree with the majority decision in respect of the finding that sections 1, 3, 4 and 7 had been lawfully passed. He ruled, in his dissent, that the entire Constitution (Amendment) Act 2018 was unconstitutional as it had been passed in violation of various 5 provisions.

The Constitutional Court awarded costs, in form of instruction fees, of Shs. 20,000,000/= (Twenty million only) for each Petition (and not Petitioner). The Court however noted that this award did not apply to Petition No. 3 of 2018 since the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person. The Court further awarded two–thirds disbursements to all the Petitioners; to be taxed by the Taxing Master.

Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this Court. The Appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in this Court containing 84 grounds of appeal categorized under different parts. Issues for court's determination were framed out of the consolidated appeals and for space and convenience I shall not list the said grounds of appeal.

The appellants in Constitutional Appeal No. 03 of 2018 on their part lodged a Memorandum of Appeal containing 24 grounds of appeal. Lastly, the appellant in Constitutional Appeal No. 04 of 2018 lodged a Memorandum of Appeal in this Court containing three grounds of appeal.

At the hearing, the Respondent raised two preliminary objections to the competency of

Constitutional Appeal No.2 of 2018. Let me first dispose of the preliminary objections raised by the Respondent at this point.

The first was that the grounds of appeal offended against Rule 82 of the Judicature (Supreme Court) Rules. It was contended by the respondent that the grounds are speculative, argumentative, narrative and an abuse of court process. Indeed, Rule 82 relates to the contents of a memorandum of appeal and in sub rule (1) reads as follows:

'(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make'.

In support of his objection the Respondent cited two cases, Beatrice Kobusingye vs Fiona Nyakana & Another, Civil Appeal No. 5/2004 and Hwan Sung Limited vs M&D Timber Merchants & Transporters, Civil Appeal No. 2/2018.

Essentially in the Beatrice Kobusingye case this Court stated, citing Rule 65(2) of the Rules of the Court of Appeal:

'Grounds or any of them may ordinarily be rejected if all or any of them offended that rule which reads: -

"The Memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of

a second appeal, the POINTS OF LAW, OR OF MIXED LAW ANDACT(SIC), which are alleged to have been wrongly decided ……" (underlining added).

Generally, therefore, objections to any ground of appeal in this Court of Appeal can be based on these provisions'.

In the Hwan Sung Limited case the ground read:

'The Learned Justices of Appeal erred in Law in dismissing the appeal'.

It was held by this Court that since there was no way to tell how the Court of Appeal decision was wrong, the ground, as it appeared, offended Rule 82(1) of the Rules of this Court given that no specific error on the part of the Court appealed from was indicated.

Needless to say, the objection above was opposed by Appellant Male Mabirizi in particular. He argued that Rule 82(1) of the Rules was not applicable given that Rules 78, 98(b) and 42(1) rendered this irrelevant.

For ease of reference below are the mentioned provisions:

`78. Application to strike out notice of appeal or appeal.

A person on whom a notice of appeal has been served may at a time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time'.

`98. Arguments at hearing

`At the hearing of an appeal….

(a)……

(b)a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 78 of these Rules;

`42 Form of applications to Court

(1) Subject to sub rule (3) of this rule and to any other rule allowing informal applications, all applications to the court shall be by motion, which shall state the grounds of the application'.

According to Black's Law Dictionary, 8th edition an objection is a formal statement opposing something that has occurred or is about to occur, in court and seeking the judge's immediate ruling on the point. From the above definition not every objection need be by motion. Rules 42(1) and 98 (b) of the Rules of this court certainly do not provide that all objections should be that formal. Rule 78 itself is not mandatory.

On the face of it nothing should stand in the way of the Respondent raising that preliminary objection relating to Rule 82(1). Prima facie, it is true that a large number of the Appellant's grounds of appeal offend the cited rule. Nevertheless, it should be borne in mind that this appeal is an aggregate of three separate appeals which were for reasons of expedience combined at a scheduling conference. At the conference, one hundred and more grounds of appeal, gathered from the three appealing parties were with the help and knowledge of the Respondent compressed into eight issues.

At the hearing of the appeal what featured were the issues rather than grounds of appeal which were the discarded raw material of the issues. Respectfully, it is misleading for the Respondent at this point in time to be making references to incompatible grounds of appeal. This objection fails.

The other objection as I understand it is that this court should not allow this appeal because the Petition in the Constitutional Court which was genesis to it was filed in December 2017 before the Bill was enacted. In this connection the Respondent referred to Article 137 of the Constitution. The Article relates to the Constitutional Court. There is no evidence that this concern on the part of the respondent was ever brought to the attention of the Constitutional Court, let alone being addressed by that court. It is trite law that a matter that was not subject to adjudication in the original court of

adjudication does not qualify to be addressed by this court on appeal.

Both objections lack merit. They are rejected.

Arising out of the several grounds of appeal filed by the three Appellants in their different memoranda of appeal, 8 issues were framed and agreed upon by the parties and the Court at the pre-hearing conference as being sufficient to address the Appellants' grievances with the decision of the Constitutional Court. These issues are reproduced below;

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?

3. Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?

Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?

Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution? 6. Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?

7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?

8. What remedies are available to the parties?

Legal Representation

The appellant in Constitutional Appeal No. 02 of 2018 represented himself. M/s Lukwago & Co. Advocates together with M/s Rwakafuzi & Co. Advocates appeared on behalf of the Appellants in Constitutional Appeal No. 03 of 2018 whereas Mr. Wandera Ogalo represented the appellant in Constitutional Appeal No. 04 of 2018. The Attorney General appeared in person.

Both parties filed written submissions and were allowed to give oral highlights of their cases during

the hearing of the consolidated appeals.

Principles of constitutional interpretation

The Constitutional Court and this Court have in numerous cases endorsed various principles of constitutional interpretation and there is no dispute, as such, on those principles. The Justices of the Constitutional Court, particularly in the judgments of Remmy Kasule, JCC and Kenneth Kakuru JCC, unanimously and elaborately restated those principles and I do not therefore find it necessary to repeat them.

Similarly, the relevant Constitutional history, ably reproduced in the preamble to the 1995 Constitution, was highlighted by the Constitutional Court especially in the lead judgment of Owiny-Dollo, DCJ. Kenneth Kakuru, JCC, in his dissenting judgment also extensively discussed our nation's constitutional history and its relevance for approaching questions of fostering the rule of law and a culture of constitutionalism. I agree with him and will take that history into consideration as well.

Ultimately, I agree with the following restatement of the law, by Kanyeihamba JSC as he then was, in Besigye v Museveni, Presidential Election Petition No.1 of 2006 endorsed by Remmy Kasule, JCC in his judgment; "… the overriding constitutional dogma in this country is that Constitutionalism and the 1995 Constitution of Uganda are the Alpha and Omega of everything that is orderly, legitimate, legal and decent. Anything else that pretends to be higher in this land must be shot down at once by this Court using the most powerful legal missiles at its disposal… Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda."

I now turn to a discussion of the issues framed by the parties to ease determination of the numerous grounds of appeal, 109 of them to be specific, in the consolidated appeals. In evaluating the grounds of appeal canvassed by the Appellants herein, I am also mindful of the duty of a first appellate court to re-appraise the evidence on record and subject it to a thorough scrutiny and reach my own conclusion bearing in mind that I have not had opportunity to see the witnesses testify.

Some witnesses were cross examined on their affidavit evidence in the Constitutional Court while a number of deponents were not summoned for cross examination. In respect of the latter category, the lower court did not enjoy any superior advantage over this Court in terms of reappraising the affidavit evidence on record. I will bear that in mind as well.

Issue 1: *Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine."*

Appellants' Submissions

Counsel strongly submitted that the learned Justices of the Constitutional Court misconstrued the

application of the basic structure doctrine in their finding that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure of the constitution and as such Sections 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

Counsel for the Appellants submitted that the thrust of the basic structure doctrine is that it attempts to identify the philosophy upon which a constitution is based as opposed to a textual exegesis of the same. He submitted that the Basic Structure doctrine has also been instrumental in shaping the constitutional jurisprudence of different countries across the world.

He relied on numerous authorities specifically Kesavananda Bharati Versus State of Kerala, AIR 1973 SC, Minerva Mills v. Union of India, AIR 1980 SC 1789, Interpretation No. 499 of the Council of Grand Justices of Taiwan, Anwar Hossain Chowdhury vs Bangladesh 41 DLR 1989 App Div 169, Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) and Njoya vs Attorney General and Others (2004) AHRLR 157.

Counsel faulted the learned Justices for according the basic structure doctrine a narrow and restrictive application when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of Parliament but not to the removal of upper age limit restrictions in the constitution.

Counsel argued that the aforesaid key pillars of the 1995 Constitution are reflected and embodied in the preamble to the constitution yet the Majority Justices of the Constitutional Court overlooked the significance and importance of the preamble. Counsel cited also authorities such as the British Caribbean Bank v The Attorney of Belize Claim, No. 597/2011 that applied the basic structure doctrine in emphasizing the essence of the preamble in support of the submission.

Counsel therefore invited this honourable court to take cognizance of the fact that the framers of the 1995 constitution deemed it absolutely necessary to enshrine within the text of the constitution such provision as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well as the National Objectives and Directive Principles of State Policy; these included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution.

In Counsel's view, these provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland and that by amending Article 102 (b) to remove the Presidential age limit, after scrapping term limits, Parliament not only emasculated the preamble to the constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger.

It was contended by the Appellants therefore that the basic features of the constitution were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 constitution. In their view, on that account alone, the Constitutional Court ought to have invoked the basic structure doctrine and struck down the entire Constitution (Amendment) Act, No.1 of 2018.

Respondent's Submissions

The learned Attorney General submitted that the learned Justices of the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act did not derogate from the Basic Structure of the 1995 Constitution.

Counsel argued that the proper definition of the doctrine was that found in the case of Kesavananda Bharati vs. The State of Kerala Petition

(Civil) 135 of 1970; (A.I.R 1973 SC 1461) Vol 5 Tab DD page 64, where S.M. Sikri, C. J defined the Basic Structure of the Constitution to consist of supremacy of the constitution, republican and democratic form of government, secular character of the state, separation of powers and the federal character.

It was argued that it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional (Amendment) Act, No.1 of 2018 into law and that this did not in any way contravene the basic structure of the Constitution and that it was not inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

Resolution of issue 1

It is contended by the Appellants that the qualifications for eligibility for the offices of President and District Chairpersons are part of the basic structure of the Constitution implying that they are not subject to amendment or at the very least, their amendment would require the involvement of the people through a referendum that was never held prior to the enactment of the impugned Act.

The Justices of the Constitutional Court, including the dissenting Justice, unanimously held that the qualifications for eligibility for office are not part of the basic structure of the Constitution. They all agreed that our constitution contains a basic structure or fundamental pillars but that qualifications, in particular upper age limit restrictions, for the office of President or District Chairperson were not part of them.

In his lead judgment, Owiny-Dollo, DCJ, considered the basic structure doctrine and its applicability to the Ugandan constitution as follows;

"The principal character of the 1995 Constitution, which constitute its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the

Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights, and judicial independence.

In the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions."

With due respect to the Appellants, I am unable to fault the collective conclusion of the Justices of the Constitutional Court in that regard. In my view, Owiny Dollo DCJ gives a correct restatement of the basic structure of the Ugandan Constitution.

The fundamental pillars of our constitution do not surely include the minimum qualifications for the offices of President or District Chairperson. The removal of age limit restrictions do not fundamentally alter the character of the constitution. I will briefly explain my reasons for that conclusion.

From the outset I must declare that the doctrine of basic structure in a given Constitution is a derivative of Indian judicial experience and that it defies universal description. The several authorities available lend testimony to this. Curiously, what forms basic structure in one jurisdiction is not necessarily what forms basic structure in another. Suffice to say that the basic structure in a given Constitution is embedded in that particular Constitution and that it is accompanied by the intended rigidity. That rigidity is woven in the Constitution and its assured mission is to ensure that the Constitution is not wantonly tampered with by way of amendment.

Thirteen Justices of the Supreme Court were on the bench in Kasavananda Bharati vs State of Kerala, AIR 1973 SC 1461. They had disparate views of what constituted the basic structure in the Constitution of India. Chief Justice Sarv Miltra Sikri read the majority opinion where he said the basic structure comprised of:

-The Supremacy of the Constitution

-A republican and derivative form of government

The secular character of the Constitution

-Maintenance of the separation of powers

The federal character of the Constitution

To the above majority list was added another three by Justices Shelat and Grover. The three additions were:

The mandate to build a welfare state contained in the Directive Principles of State Policy.

Maintenance of the unity and integrity of India.

The sovereignty of the country.

Justices Hegde and Mukherjea, in their opinion, mentioned:

The sovereignty of India

The democratic character of the polity

-The unity of the country

Essential features of individual freedoms

The mandate to build a welfare state

Justice Jaganmohan Reddy relied on the preamble and cited:

A sovereign democratic republic

The provision of social, economic and political justice

Liberty of thought, expression, belief, faith and worship

-Equality of status and opportunity

The array above is striking. In the Bangaladesh Supreme Court case of Anwar Hussein Chowdhury vs Bangladesh, 41 DLR, 1989, App. Div 169, Justice B.H. Chowdhury stated:

"Call it by any name `basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled byan authority created by itself –namely the Parliament…… Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution".

(The emphasis above is added).

Similarly in Bangladesh Italian Marble Works Ltd vs Bangladesh (2006) 14 BLT (Special) (HCD) I the Supreme Court had this to say:

"Parliament may amend the Constitution but it cannot abrogate it, suspend it, or change its basic feature or structure ……The enabling powers to amend cannot swallow theConstitutional fabrics. The fabrics of the Constitution cannot be dismantled …even the Parliament, which is a creation ofthe Constitution itself. While the amendment power is wide it 30 *is not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy".* (The emphasis above is added).

Also instructive is the South African Constitutional case, Executive Council of Western Cape Legislature vs the President of the Republic of South Africa and others (Case No. CCT 27/95). [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877where Justice Albie Sachs stated inter alia:

"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus the question has arisen in other countries as to whether there are certain features of the Constitutional order so

fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life-the constant renewal of its membership is fundamental to the whole derivative constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution".

Of further relevance is the dicta in S vs Acheson, 1991 (2) SA 805, a case from Namibia, where at page 813 of the report Mohamed Ag. JA referring to a Constitution of a nation said it is:

"……not simply a structure which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion".

Without exception, all the Justices who heard the Petition in the Constitutional Court related to the Constitution as the source of the basic structure or basic features. They referred to the preamble, the National Objectives and Directive Principles of State Policy and to several Articles in the Constitution to this effect. They called to memory the chequered history of Uganda prior to the promulgation of the present Constitution. Mention was made also of some pertinent records in the report of the

Constitutional Commission that aided the Constitution making process.

In his judgment Alfonse Owiny Dollo DCJ held that the `structural pillars in the 1995 Constitution include the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, separation of powers between the Executive, Parliament and the Judiciary, the bill of rights ensuring respect for and observance of the fundamental rights and judicial interference.

Justice Remmy Kasule JCC mentioned the following to comprise the basic structure in the Constitution sovereignty of the people (Article 1)

the supremacy of the Constitution (Article 2)

defence of the Constitution (Article 3)

non – derogation of particular basic rights and freedoms (Article 44)

democracy including the right to vote (Article 59)

participating and changing leadership periodically (Article 61)

non-establishment of a one party state (Article 75)

separation of powers amongst the legislature (Article 77)

separation of powers amongst the executive (Article 98)

separation of powers amongst the Judiciary (Article 126)

Independence of the Judiciary (Article 128)

Kakuru JCC held that the basic structure of the 1995 Constitution comprises of:

The sovereignty of the people of Uganda and their inalienable right to determine the form of governance of the country.

The supremacy of the Constitution as an embodiment of the soverign will of the people, through regular free and fair elections at all levels of political leadership.

Political order through adherence to a popular and durable Constitution.

Political and Constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.

5. Arising from 4 above, Rule of Law, observance of human rights, regular free and fair elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.

6. Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State

Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.

Natural Resources are held by the government in trust for the people and do not belong to government.

Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.

Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of Law as to deprive a party.

The basic structure in the 1995 Constitution, according to the decision of Elizabeth Musoke JCC, includes empowerment and encouragement of active participation of all citizens at all levels of governance as well as ensuring stability. The Learned Justice also held that Article 1(1) of the Constitution which guarantees the sovereignty of the people by providing that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution is part of the basic structure. She also held that the Bill of Rights, especially the non derogable rights, form part of the basic structure and their removal or amendment would result in actual replacement of the Constitution.

In his consideration of the basic structure in the Constitution of Uganda Cheborion Barishaki JCC had this to say:

"Firstly, our Constitution contains elaborate National Objectives and Directive Principles of State Policy that emphasize democratic government, public participation in governance, promotion of unity and stability, respect for fundamental rights and freedoms inter alia. Article 8A of the Constitution requires Uganda to be governed based on the principles of national interest and common good.

Secondly, Article 20(1) of the Constitution, touching upon fundamental rights and freedoms provides that;

`Fundamental rights and freedoms of the individual are inherent and not granted by the state`.

……

In my view in the Ugandan context the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution".

I have demonstrated that each Justice of the Constitutional Court exhaustively addressed the doctrine of basic structure in relation to the 1995 Constitution. It is the argument of the Appellants that any amendment to the basic structure would result in the Constitution itself being abrogated or replaced. The Respondent on the other hand contended that the process by which amendment can be effected is contained in the Constitution itself and that provided that the set process is adhered to, it is possible to effect a legitimate amendment. In the Constitutional Court, four of the Justices agreed with the submissions of the Respondent in this respect.

Kenneth Kakuru JCC however was adamant that there was no possible amendment of the basic structure because such amendment would result in the replacement or abrogation of the Constitution. With respect, I do not agree. The position of the majority Justices is the correct approach in my view.

The finding of the majority of the Justices of the Constitutional Court, with which I agree, is in consonance with the dicta of Mahomed DP in Premier KwaZulu – Natal vs President of the Republic of SouthAfrica, 1996 (1) SA 769 (CC) in a majority opinion. He observed:

"There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that the purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an `amendment' at all".

Subject to the above caveat on "amendments that may not qualify as amendments at all", an

amendment that follows the constitutionally prescribed procedure is unassailable.

It is assuring that we have in our Constitution Article 1 on the sovereignty of the people, Article 2 on the supremacy of the Constitution as well as Article 3 enjoining us to defend the Constitution. Needless to say there are several other provisions in the Constitution that amplify the sovereignty of the people through the Constitution. It is exactly in that spirit that we have Article 79 which states:

"Functions of Parliament

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda".

Clearly Parliament is enjoined to act in accordance with the Constitution. The Constitution is the embodiment of the social contract between the governors and the governed. In that respect no legitimate amendment process in Parliament can be effected except where Parliament has adhered to the provisions of the Constitution.

In my view, there is inbuilt in our Constitution adequate and robust provisions whose effect is to protect the Constitution. As such any concern is ill placed and assuredly no chaperons need be called for. Articles 1, 2, 3, Chapter Four and Chapter Eighteen are self evident. It is reassuring that to effect any amendment to the Constitution, there is need to go through an elaborate gate-keeping process laid down in the Constitution.

The stringency may vary though depending on the matter at stake. The cumbersome process was obviated by the need to sustain participation by the people in matters that concern their governance. It may be touted here that the rigidly ring fenced provisions of the Constitution comprise the basic structure. My view however is that basic structure as a term is amorphous. What is basic structure varying from country to country and from case to case.

I am unable to wholly endorse the contention that provisions exist in the Constitution that are so sacrosanct that even if one followed provisions of the Constitution it would not be possible to amend them legitimately. Respectfully, that would be turning human progress on its head. What one generation may consider impossible and unnecessary, the exigencies of the times might lead to a different conclusion for a subsequent generation. We have no right to hold our progeny in bondage. That is why the Constitution allows for amendment so long as the delicately laid down process contained in it is adhered to.

Consequently, in the matter at hand I find no basis to fault the majority Justices of the Constitutional Court in their verdicts concerning the basic structure doctrine. I answer this issue in the negative.

Issue 2: Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?"

Appellants' Submissions

Counsel contended that the procedure and manner of passing the entire Constitution (Amendment) Act No. 1 of 2018 was flawed and/or tainted with illegalities, procedural impropriety in violation of Articles 28, 42, 44, 79, 91, 92 and 259 of the Constitution and the Rules of Procedure Parliament.

It was argued that although Parliament is enjoined under Article 94 of the Constitution to make rules to regulate its own procedure, it must do so subject to the provisions of the Constitution. In support of this argument, counsel relied on the case of Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14 which was cited with approval in Law Society of Kenya vs Attorney General & Anor [2016] eKLR where court held that:

"*Parliament as a law making body should set standards for compliance with the constitutional provisions and with its own Rules. … the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it …"*

Counsel thus invited this Court to find the above authority persuasive and hold that failure by Parliament to comply with its own Rules of Procedure rendered the whole process a nullity. In respect to whether or not the Bill was a charge on the consolidated fund contrary to the provisions of Article 93 of the Constitution, counsel contended that although the Constitutional Court made a finding that the impugned Act violated the provisions of Article 93 of the constitution, it declined to nullify the entire Act on ground that the non-compliance with the Constitutional provision only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years.

Counsel argued that the entire Act ought to have been struck out because Article 93 of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. He added that the sum of Shs. 29,000,000 paid as facilitation to carry out consultations with the public regarding the Bill. was a charge on the consolidated fund?

On the issue of Consultation/Public Participation, Counsel submitted that the learned majority

Justices of the Constitutional Court erred in law and fact when they held that there was proper consultation of the people of Uganda on some of the clauses of the impugned Constitution (Amendment) Bill, 2017.

In support of the submissions above, counsel cited the persuasive Kenyan cases of Law Society of Kenya Vs. Attorney General, Constitutional Petition No. 3 of 2016 andRobert N. Gakuru& Others –Vs- The Governor Kiambu County & Others.

Counsel submitted that there was overwhelming and cogent evidence on record indicating that the process leading to the enactment of the impugned Constitution (Amendment) Act was not preceded by a Consultative Constitutional review exercise as was the case with the promulgation of the 1995 Constitution and the 2005 amendments. Counsel relied on the affidavit evidence of the Appellants who are Members of Parliament for this view.

Counsel further argued that members of Parliament opposed to the amendments were denied the opportunity and right to engage the people over the aforesaid Bill by the police and other security agencies. The affidavit evidence of some members of Parliament including the Appellants as well as the testimony in cross examination by AIGP Asuman Mugenyi, was relied on.

The Appellants contend that the motion to introduce the impugned Bill was smuggled onto the order paper in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure. Counsel submitted that the finding of Owiny Dollo, DCJ that the Speaker had considerable latitude in determining the content of the order paper was an erroneous conclusion at variance with the express Rules of Procedure of Parliament. He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee.

The affidavit evidence of Hon. Semujju Nganda, to the effect that on 19th September 2017 the Deputy Speaker assured the house that there was not going to be any ambush to MPs as far as handling the impugned Amendment Bill was concerned, is relied upon. The Appellants contend that Rules 27 and 29 regarding prior provision of an order paper with relevant documents to members of parliament were flagrantly violated.

It is argued that Members of Parliament were denied adequate time to debate and consider the impugned Bill as well as the Report of Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance. Counsel additionally contended that the Committee Report was not tabled in accordance with rule 201 (1).

It is argued that the suspension of some members of Parliament, the 1st, 2nd, 3rd, 4th and 5th Appellants, by the speaker during the parliamentary sitting of 18th December 2017, was in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

Further, one of the Appellants disputes the validity of the Committee Report on the impugned Bill

and faults the majority decision of the Constitutional Court for holding that the participation of the new members that were irregularly added to the Committee could not invalidate the Committee report because even if their signatures were disregarded, the majority report still had enough signatures to pass it.

It is argued by the Appellants that the Failure to close the doors to the chambers at the time of voting on the impugned bill, was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament which fact was also admitted by the Clerk to Parliament in her affidavit.

Counsel further submitted that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of Compliance and the Bill at the time of Presidential assent to the Bill.

It is argued that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. Counsel added that the requirement of a valid certificate of compliance under Article 263 (2) of the Constitution and Section 16 of the Acts of Parliament Act is couched in mandatory terms.

The Appellants raised various other irregularities that, in their view, contravened the Rules of Procedure of Parliament including the nonadmission of Appellant Male Mabirizi to the gallery during the debate, Parliament proceeding without the official opposition in the house and delay by the committee to issue its report.

In conclusion, the Appellants contend that the net effect of noncompliance of Parliament with its own rules of procedure and those laid down in the Constitution was to render the impugned Bill and the resultant Constitution (Amendment) Act No. 1 of 2018 null and void.

Respondent's Submissions

The Attorney General begun by pointing out that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill, except when introduced on behalf of the Government, that had financial implications as provided therein.

The Attorney General was emphatic that Parliament only proceeded with the Bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the Consolidated Fund. He further argued that this position was rightly confirmed by all the five Justices of the Constitutional Court who held that the original Bill presented on the floor of Parliament by Hon.Raphael Magyezi did not contravene Article 93 of the constitution.

Regarding the contested facilitation of Ug. Shs. 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination [at pages 309 Vol. 3 of the Record], the Clerk to Parliament ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the Consolidated Fund.

In conclusion on this point, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government that made provision for financial implications. In his view, the Article did not concern itself with the money used in processing the bill, allowances/facilitations that was paid out to the Members of Parliament to process the Bills.

On public consultation, the Attorney General submitted that the majority learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of conceptualization and enactment of some clauses of the impugned Act.

In light of this, the Attorney General submitted that there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. He argued further that it was dependent on Parliament to determine how best to achieve the participation objective.

The Attorney General submitted that the two cases on public consultation relied upon by the appellants were distinguishable. Additionally, he submitted that the above notwithstanding, at pages 620 – 640 Vol. 3 of the record, the Parliamentary Committee on Legal and Parliamentary Affairs had complied with the requirement for public participation.

The Attorney General refuted the appellants' contention that the Bill was smuggled onto the order paper. The Attorney General pointed out that under Article 94(4) the Speaker had powers to determine the order of business in parliament. He submitted that the inception, notice of motion and tabling of the motion was undertaken well within the Rules. In the

Attorney General's view, there was no smuggling of the Bill as alleged by the appellants and that the amendment of the Order Paper by the Speaker was authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25).

The Attorney General pointed out that the matter of suspension of the six Members of Parliament was ably canvassed in the Affidavit of the 30 Clerk to Parliament [at Paragraphs 17- 23, pages 612-613 of the record].

He submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament and that the Speaker properly did so.

The Attorney General refuted the Appellants' assertion that the invalid suspension of Rule 201 (2)

of the Rules of Procedure of Parliament and non secondment of the motion to waive Rule 201 adversely affected the whole process of enacting the impugned Act. He further disputed the appellants' assertions that the suspension of Rule 201(2) deprived Members sufficient time to debate the report of the Legal and Parliamentary Affairs Committee in that they were given only 3 minutes to debate and that hard copies were not duly tabled before the House as provided in Rule 201 (1).

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Right Hon. Speaker informed the House that on the preceding Thursday, she directed the Clerk to upload the Committee report on their ipads and that therefore the highlighted Rule did not apply.

The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonse Owiny-Dollo, [DCJ at page 176] and Cheborion, JCC [at Page 95], the Attorney General submitted that Members of Parliament had adequate notice as to the contents of the report (four days before debating the same) and that therefore the purpose of Rule 201(2) was achieved

He prayed that since, the Members of Parliament received the report of the Committee three days before the debate, this Court should uphold the finding of the Constitutional Court that no prejudice was occasioned to the members.

It was submitted that the Speaker explained the reason for the non compliance with Rule 98(4) of the Rules of Procedure of Parliament as being the large numbers of members present inside the Parliamentary chambers. The Attorney General submitted that there was no requirement that each and every Member of Parliament must debate before closure and that the Appellants' contentions in that regard were mistaken.

In respect to the allegation of signing of the Committee Report by non members, the Attorney General submitted that Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. In light of his submissions, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated upon by the Constitutional Court. He prayed that this Court upholds the same.

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act

was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General reiterated his submissions in the Constitutional Court [at pages 2154-2159 Vol K, of the record]. He added that Rule 230 of the Rules of Procedure of Parliament vests in the Speaker power to control the admission of the public to the premises of Parliament so as to ensure law and order as well as the decorum and dignity of Parliament. He argued that the non-admission of Appellant Male Mabirizi was well within the powers of the Speaker.

In answer to the contention that the proceedings conducted in the absence of the official opposition were a nullity, the Attorney General reiterated his submissions made in the lower court. He however pointed out that Rule 24 of the Rules of parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of parliament shall be one third of all Members of Parliament entitled to vote.

In his view, it followed that the business of Parliament can go on in the absence of the leader of opposition and opposition Members of Parliament as long as there is the requisite quorum in Parliament. He added that under Article 94 of the Constitution Parliament may act notwithstanding a vacancy in its membership.

The Attorney General also defended the validity of the Report of the Legal and Parliamentary Affairs Committee against the contention that it was invalid since it had delayed in the Committee beyond 45 days, contrary to Rule 128 (2) and 140 of the Rules of Procedure of Parliament. The Attorney General submitted that this allegation constituted a departure from pleadings that be disregarded.

It is submitted that had this matter been raised in time, evidence would have been led to prove that the committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the house was sent on recess on 4th October 2017. He added that during recess, no parliamentary business is transacted without leave of the Speaker. He contended that the days could not start running unless the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon Speaker on the 3rd November 2017. He added that the 45 days started running from the 3rd November 2017. In the

Attorney General's view, this meant that the days would expire on 16th December 2017. He argued

that, the Committee reported on the 14th December 2017 which date was two days before the expiry of the 45 days period.

He submitted further that in any event non compliance with the 45 days rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined by the Constitutional Court. He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. He said that in the same vein, the Bill did not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

Resolution of issue 2

The majority Justices of the Constitutional Court held that Parliament substantially complied with the Constitution and with its Rules of

Procedure save for certain Rules of Procedure which the Speaker, in particular, violated. The Justices of the Constitutional Court unanimously ruled that the following alleged infractions of the Constitution and Rules of Procedure of Parliament were without merit:

The payment of Shs.29,000,000/= as an alleged charge on the Consolidated Fund. Denying adequate time for debate in the house.

Alleged arbitrary suspension of members of Parliament

Failure to close doors at the time of voting

Illegal crossing of the floor of parliament by members of the ruling party

Proceeding in the absence of the Leader of Opposition and other opposition Members of Parliament

Delay by the Legal and Parliamentary Affairs Committee to submit the Report on the Bill initiated by Honourable Raphael Magyezi

It is worth noting that the dissenting Justice equally held that the above alleged violations of the Rules of Procedure of the Parliament of Uganda and the provisions of the Constitution were

without merit. He was in agreement with the majority on this aspect of the petition. On the other hand, Kenneth Kakuru JCC, in his dissenting judgment held that the following alleged infractions of the Rules of Procedure and the Constitution had been proved by the Appellants and thus rendered the entire Act a nullity:

The unlawful sidelining of the motion of Honourable Patrick Nsamba and prioritizing the one of Honourable Raphael Magyezi. The failure to formally lay on the table, prior to debating, the Committee Report.

The amendment of the order paper to include the motion by Honourable Raphael Magyezi without three hours' notice to members.

The voting by non-members of the Legal and Parliamentary Affairs Committee on the majority Report.

The failure to carry out proper consultations on the Bill.

Elizabeth Musoke, JCC agreed with Kenneth Kakuru JCC that the Speaker acted unlawfully in sidelining the motion moved by the Honourable Patrick Nsamba and prioritizing the motion by the Honourable Raphael Magyezi. Her Lordship however did not agree with Kakuru JCC on the effect of this illegality. She went on to hold nevertheless that the motion by Honourable Patrick Nsamba did not have an accompanying draft Bill and would have been incompetent on that ground.

The Appellants invite this Court to find that the alleged infractions of the Rules of Procedure and provisions of the Constitution rendered the entire Act a nullity. Let me first address the alleged violations which the entire Constitutional Court ruled were non-existent or inconsequential before addressing the infractions found to have been proved by the dissenting Justice of the Constitutional Court and which the dissenting Justice ruled were fatal to the validity of the entire Act.

It is trite law that Parliament must comply with its own Rules of Procedure enacted under Article 94 of the Constitution and that failure to follow those Rules amounts to a violation of the said constitutional provision. See Prof Oloka Onyango & Others vs Attorney General, (Supra)

I have re-appraised the affidavit evidence on record proffered both by the Appellants and the Respondent. In particular, the largely undisputed affidavit evidence of Honourable Ibrahim Ssemujju Nganda in regard to the manner in which the motion by the Honourable Raphael Magyezi was introduced onto the order paper of Parliament after an unexpected amendment of the Order Paper.

He testified also, in his affidavit, about the manner in which the Committee on Legal and Parliamentary Affairs went about its responsibility of scrutinizing the Bill proposed by the Honourable Raphael Magyezi. In particular, I take note of the largely undisputed testimony that the Speaker of Parliament initially approved of the need by the Committee to consult as widely as

possible throughout the country on the said Bill but evidently the extent of the consultations is a subject of dispute.

I have also considered the affidavit evidence adduced by the Respondent especially the affidavit of Jane Kibirige, Clerk to Parliament, rebutting the averments by the Appellant Members of Parliament. After a careful appraisal of the evidence on record, I do not, with the greatest respect, agree with the unanimous findings of the Justices of the Constitutional Court that the complaint concerning denial of adequate time for debate on the Bill, contrary to the Rules of Procedure, was without basis. The evidence on record and the exhibited proceedings in the Hansard demonstrate that there was unusual haste and a complete lack of transparency in the manner in which the Honourable Speaker handled the impugned Bill.

Similarly, the Honourable Speaker's ruling suspending Members of Parliament on 18th December 2017 lacked transparency. While the suspension of some Members of Parliament for disrupting order in the house on 26th September 2017 was lawfully and fairly handed down, the record does not show any cause for the suspension ordered on 18th December 2017. During the proceedings of 26th September 2017, a number of Members of Parliament disrupted proceedings when they sang the National Anthem repeatedly to block further business till the house was adjourned. Their suspension was in my view deserved and lawful.

By contrast, the record, particularly the Hansard, clearly demonstrates that the Appellants did not engage in any form of misconduct or indiscipline warranting suspension from the proceedings of 18th December 2017. What appears on the record is that those members firmly and politely strove to draw the Hon. Speaker's attention to what they considered to be violations of Rules of Procedure. Then the suspension followed. However, the members did not invoke Rule 86(2) of the Rules of the House. As such the act of the Speaker remained unchallenged. In the circumstances the Speaker cannot be faulted.

As for the other alleged violations of the Constitution and the Rules of Procedure, I am in agreement with the unanimous decision of the Constitutional Court that those allegations were without merit. For avoidance of doubt, those are the following;

The payment of Ug. Shs. 29,000,000/= as an alleged charge on the Consolidated Fund.

Failure to close doors at the time of voting

Illegal crossing of the floor of parliament by members of the ruling party

Proceeding in the absence of the Leader of Opposition and other opposition Members of Parliament

Delay by the Legal and Parliamentary Affairs Committee to submit the Report on the Bill initiated by Honourable Raphael Magyezi

In respect to the payment of Ug. Shs. 29,000,000/=, I am unable to agree with the interpretation

advanced by the Appellants that this amounted to an unconstitutional charge on the Consolidated Fund arising out of a private Member's Bill. Article 93, in my view, prohibits the presentation of a private Member's Bill that contains financial provisions that have a prospective effect on the Consolidated Fund.

I agree with the decision by the Justices of the Constitutional Court that preparation of every Bill, including a private Member's Bill, requires facilitation and use of Parliamentary and other resources. Such do not translate to a charge on the Consolidated Fund. Were this the case, no private member's bill would be possible since it is the duty of Parliament to assist and facilitate every mover of such a bill. Certainly there is some expenditure involved but not what the appellants allege.

Concerning the contested proceedings conducted without closed doors, the crossing of the floor of Parliament, the proceedings conducted in the absence of the Leader of the Opposition, and some other opposition MP's as well, I find these were minor infractions that the Speaker of Parliament, in exercise of her discretionary powers, lawfully disregarded. The evidence on record, especially the affidavit of the Clerk to Parliament, does explain away the said infractions and the recourse to the Speaker's discretionary powers. I do observe however that those occurrences were unusual.

I do not agree with the Appellant Male Mabirizi that the Committee Report was tabled outside the 45 days limit. I accept the explanation given by the Attorney General to the effect that no such delay occurred given that the appellants computation of the days wrongly included the time spent on parliamentary recess.

I will now consider the alleged violations of Rules of Procedure which the dissenting Justice found to have merit and held that they invalidated the entire Constitution (Amendment) Bill 2017. These were the following;

i. The unlawful sidelining of the motion of Honourable Patrick Nsamba and prioritizing the one of Honourable Raphael Magyezi.

ii. The failure to formally lay on the table, prior to debating, the Committee Report

iii. The amendment of the order paper to include the motion by Honourable Raphael Magyezi without three hours notice to members

The voting by non-members of the Legal and Parliamentary Affairs Committee on the majority Report

The failure to carry out proper consultations on the Bill.

I have carefully reviewed the Constitution, Rules of Procedure and the authorities provided in regard to the five violations alleged above. Concerning the voting by non-members of the Legal and Parliamentary Affairs Committee on the majority Report, I am unable to agree with the

dissenting Justice that this violation was fatal. The evidence on record indicates that only two non-members were pointed out to have signed the majority report. The exclusion of their signatures from the Report would still leave a majority of members as signatories to the said report. I agree nevertheless that it was an irregularity.

In law, their participation in the proceedings was not fatal either as the Constitution provides for such eventuality. Article 94(3) of the Constitution is relevant. It is only the act of signing their names against the majority report that is problematic. I would have reached a different conclusion if the split in numbers between the majority and minority reports was adversely affected by those two members of Parliament.

In regard to the alleged violation of the Rules of Procedure namely; the sidelining of the Honourable Patrick Nsamba motion, the irregular amendment of the order paper to include the Honourable Raphael Magyezi's motion and the failure to formally table the Committee Report on the floor of Parliament, I am of the view that the motion of Hon. Patrick Nsamba could not precede that of Hon. Magyezi because the former had no draft Bill whereas the latter had. That is not to say that the introduction of the motion was not inordinate and suspect.

I appreciate the concerns of the dissenting Justice, that the cited acts and omissions grossly violated the Rules of Procedure especially considering that this was done in the context of effecting a Constitutional amendment. There was no apparent justification on the part of the Honorable Speaker to prioritize the Honourable Raphael Magyezi's motion which was hastily introduced onto the Order Paper. I look at this in light of the haste that attended the transaction so soon following the Deputy Speaker's assurance earlier on that due notice would be given.

Nevertheless, I acknowledge that the Speaker exercised her discretion.

The Justices of the Constitutional Court ably set out the law regarding the mandatory nature of public participation and consultation in the constitution making process and legislative processes generally. There is no doubt that the process of effecting constitutional amendments requires and mandates involvement of the people in accordance with Article 1 of the Constitution.

The Honourable Speaker of Parliament, to her credit, was alive to the need for involvement of the people in accordance with Article 1 and she duly discharged her role in bringing the same to the attention of the August House.

Regrettably, several subsequent events detailed in the cogent affidavit evidence of the Appellants lead me to conclude that the attempt to involve the people in this process was less than would be expected. First, the relevant Committee of Parliament charged with collecting views from Ugandans across the country was unable, for unknown reasons, to carry out that exercise; contrary to the Speaker's earlier indications. Secondly, there is evidence on record that some members who

were opposed to the proposed Constitutional amendments, were unlawfully blocked from openly collecting views from the public. This was most unfortunate. While I agree with the majority decision of the Constitutional Court that there were in evidence only a handful of interruptions of some members of parliament, the fact that it occurred at all is unfortunate. It is equally exasperating to note that no system is in place to gauge the extent of consultation and participation such as the one in contest. The extent of the consultation would have been better assessed had a system been in place to measure consultation and participation. In the circumstances I cannot fault the majority Justices.

Assistant Inspector General of Police, Asuman Mugenyi, in his affidavit confirmed that he issued a directive that was uniformly enforced by all police stations in the country. Where MPs attempted to breach it police was on hand to disperse the gatherings. This directive, which was unanimously found to be unlawful, arbitrary and obnoxious, prohibited MPs opposed to the proposed Constitutional amendments from holding joint rallies or conducting public consultation beyond their constituencies.

The affidavit evidence on record indicates, without challenge, that a number of MPs who attempted to hold joint rallies or conduct public dialogues had their gatherings dispersed by the police as the Leader of Opposition testified. There is no affidavit evidence on record to support the finding by the majority Justices that the disruption of joint rallies and public consultations by those opposed to the impugned amendment were isolated events.

Consequently, I am in agreement with the dissenting Justice that the attempts at public participation were restricted. However, for want of a proper measuring tool I find no basis to pronounce myself on the extent of public participation country wide.

I must now determine whether the entire Bill or parts of it are invalid in light of my findings above. I will also address the significance of the Speaker's Certificate of Compliance that accompanied the Bill sent for Presidential assent.

The learned Justices of the Constitutional Court, by a 4 to 1 majority, found that all the clauses which were introduced into the original Bill were invalid. However, they ruled that all procedural requirements for the original Bill had been met and that those original clauses were good law. The Justices invoked the doctrine of severability of Statutes in holding that the impugned clauses were invalid. They saved the original clauses of the Honourable Raphael Magyezi's Bill, those existent before the introduction of amendments by the Honourables Micheal Tusiime and Nandala Mafabi. The majority Justices held that the original clauses were validly passed.

I have addressed my mind to the process of enactment. It should not be doubted by anyone that both the provisions that were severed and those that were saved from severance were enacted as

one entity.

On 3rd October 2017 the Constitution (Amendment) (No. 2) Bill, 2017 was tabled as a Private Members Bill by Honourable Raphael Magyezi, MP, Igara County West. He sought to amend Articles 61, 102(6) and 183 (2) (b) of the Constitution. The Bill was also meant to amend Article 104(2) and (3) as well as Article 104(6) of the Constitution.

In the course of the debate on the floor of Parliament, additional amendments were proposed and accommodated, notably those made by Honourable Michael Tusiime regarding extension of the term of the current Parliament and those made by Honourable Nandala Mafabi seeking the return of the Presidential term limits. Without dwelling on the merits of the questioned process, I can declare that the original Bill together with its amendments were voted on and passed, lock, stock and barrel.

The Hansard of Wednesday 20th December 2017 at page 5263 refers to the Report from the Committee of the whole House and captures the Honourable Raphael Magyezi stating as follows:

'Madam Speaker, I beg to report that the Committee of the Whole House has considered the Bill entitled, "The Constitution (Amendment) (No. 2) Bill, 2017" and passed the entire Bill with amendments and also introduced and passed new clauses - amending Articles 77, 181, 29, 291, 105 and 260. I beg to report.'

The report was adopted that day and the Speaker invited Honourable Raphael Magyezi to move for the third reading. Roll call followed. Those for the Bill were 315. Those against were 62. Two members were absent.

Thereafter the Speaker declared that the Bill had been passed.

Article 263 (2) (a) regards the certificate of compliance issuing from the Speaker to the President if an Assent is to be obtained. It states:

'(2) A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by

the President only if -

(a)it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with inrelation to it;

The emphasis above is added.

In the Certificate of Compliance, the Speaker recorded:

'I certify that the Constitution (Amendment) (No. 2) Bill, 2017 seeking to amend the following Articles -

Article 61 of the Constitution;

Article 102 of the Constitution;

(c) Article 104 of the Constitution; and

(d) Article 183 of the Constitution was supported by 317 Members of Parliament at the second reading on the 20th day of December, 2017 and supported by 315 Members of Parliament on the third reading on the 20th day of December, 2017, in Parliament, being in each case not less than two thirds of all Members of Parliament, the total membership of Parliament at the time, being 434; and that the provisions of Articles 259, 262 and chapter Eighteen of the Constitution have been complied with in relation to the Bill.'

In the event, the Bill that the Honourable Speaker proceeded to proffer to the President for assent was different from the one Honourable Raphael Magyezi had initially proposed. However, it was similar to the one that the House had gone on to pass on 20th December 2017.

Given the circumstances, the Bill the President assented to bore little resemblance to the one the certificate of compliance, issued by the Honourable Speaker, certified as having been passed in Parliament. The certificate of compliance indicated that only four Articles in the Constitution had been affected by the amendment. The Constitution (Amendment) Act No. 1 of 2018 assented to by the President showed ten Articles were affected by the amendment.

It is not contested that the President signed what was actually passed by the House. What is in contest is the veracity of the certificate of compliance. Yet the legislation was passed as one whole and it was the Speaker herself, upon passing of the law, who declared that the legislation had been passed as a complement. The Hansard of 20th December 2017 bears testimony to this. The Bill as originally intended metaphorically lost its claim to innocence when other provisions were added to it. There was, therefore, in my view no certificate accompanying the Bill to be assented to as is mandatory under Article 263(2)(a) of the Constitution.

A certificate is meant to certify the contents of the Bill to be assented to. Since the document tendered by the Speaker as the certificate did not tell the truth when certifying the legislation to be assented to, I hold there was no certificate. The assent in my view was made in vain. This is a fundamental procedural irregularity which cannot be cured by severance as the Justices of the Constitutional Court attempted to do. To do so would tantamount to the judiciary entering the legislative arena which should not be countenanced.

This irregularity has company. It should be seen in the light of other irregularities that attended the impugned enactment which are highlighted elsewhere in this judgment. Contrary to Article 93 of the Constitution, Parliament proceeded to legislate on the impugned enactment including provisions that required a certificate of no financial implication. No effort was made to secure it following the additions and in the endeavor the legislature went on to debate and pass the amendment bill without the necessary certificate. The resulting legislation is therefore illegal. Needless to say the additions

that were later accommodated with the original provisions rendered the entire Bill subject to Article 263 (1) of the Constitution. The mandatory separation of at least 14 days ordained by the Constitution between the second and third reading of the Bill was not observed. It was deliberately ignored. All the above omissions point to the failure of the legislature to follow the procedure laid down by the Constitution for its amendment. For these reasons, the majority Justices of the Constitutional Court erred in law when they applied the doctrine of severance to hold that some clauses of the Constitution (Amendment) Act 2017 had been lawfully passed. I shall be addressing severance in issue 8 herein.

For now I must answer this issue in the affirmative.

ISSUE 3: *Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffles inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?"*

Appellants' Submissions

Counsel for the Appellants as well as appellant Male Mabirizi submitted that the learned trial Justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Counsel argued that they rightfully established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act.

The Appellants contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting was complied with by all police personnel. The Police in blocking the said consultations invoked the directive of the Director of Operations, AIGP Asuman Mugenyi, which directive was unanimously declared by the Constitutional Court to be unlawful, arbitrary, obnoxious, unfortunate and unconstitutional.

Counsel averred that the bill was passed amidst violence within and outside Parliament. Counsel alleged that there was violence throughout the Country during public consultations. Counsel added that the entire process was vitiated and rendered the ensuing Bill unconstitutional. It was argued that as a result of the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House, the Speaker was prompted to write a letter to the President of Uganda inquiring into the existence of armed personnel in the precincts of Parliament.

Counsel stated that the unlawful invasion and/or heavy deployment at Parliament by combined

forces of the Uganda People's Defence Forces, the Uganda Police Force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the Constitution using violent means, that it undermined Parliamentary independence and that as such it was inconsistent with and contravened the Constitution.

Counsel submitted that the learned Justices of the Constitutional Court acknowledged that security forces committed acts of violence in and out of Parliament but held that those acts were not sufficient to vitiate the enactment. Counsel argued that application of the qualitative test by the learned Justices of the Constitutional Court was erroneous. Counsel faults the majority Justices for wrongfully introducing the qualitative test used in electoral law in a dispute dealing with non-compliance with constitutional provisions in the legislative process.

Counsel criticized the Constitutional Court finding that the violence was not so prevalent to vitiate the enactment process. Counsel submitted that the violence had a chilling effect on other members of the public that wished to participate as well as some members of Parliament that would have wished to oppose the amendment. Counsel said it was imperative for the learned Justices of the Constitutional Court to find that the amendment was begotten from violence inflicted on persons opposed to the amendment, and therefore this was contrary to Art 3 (2) of the Constitution.

In conclusion, the Appellants submitted that the invasion of Parliament by the combined armed forces of the Uganda People's defence forces, the Uganda police and other militia was unwarranted and uncalled for as rightly found by the learned Justices of the Constitutional Court. Counsel stated that the violence was unjustified in the circumstances and that this later on had an adverse effect of curtailing several persons and Ugandans at large from participating in the process leading to the enactment of the impugned Constitution (Amendment) Act.

Counsel invited court to answer this issue in the affirmative and find that the learned trial justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the impugned Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Respondent's Submissions

The Attorney General submitted that Learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act 2018 did not amount to a breach of the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional and prayed that this Honourable Court does uphold the decision of the Court on this matter.

He pointed out that it is factually incorrect for the Appellants to state that the learned Justices of the Constitutional Court found that the UPDF, Uganda Police Force and other militia wrongfully

intervened in the entire process leading to the enactment of the Constitution (Amendment) Act. It was the unanimous decision of the Court that the intervention of the Uganda Police Force was lawful and there was never any reference to militias as alleged by the Appellants.

The Attorney General contended that the evidence on record clearly illustrated that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented chaos, disorder and misconduct from the Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. However, he argues that some MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-atArms.

The Respondent submitted that the Rt. Hon. Speaker is legally mandated to ensure that order and decorum is maintained in the House and she clearly had the powers as derived from the 1995 Constitution to suspend the MPs who perpetuated violence in the Parliamentary chambers.

The respondent prayed that this Honourable Court upholds the decision of the Learned Justices of the Constitutional Court that in the circumstances as presented by the evidence, the Rt. Hon. Speaker acted within her powers and in accordance with the Constitution to evict the named Members of Parliament.

It was the Respondent's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with the security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the security forces.

The Attorney General submitted that it was apparent from the findings of the Constitutional Court that their Lordships considered the evidence on the record and came to the appropriate conclusions on this issue of the alleged violence against the members of the public.

The Attorney General faulted the Appellants for alleging that the Constitutional Court did not address this issue. He submitted that when the evidence was evaluated it was found that an overwhelming number of Members of Parliament carried out their meetings of consultations with the people in an uninterrupted manner and that they were then able to come and vote on the Constitutional Amendment Bill No. 2 of 2017.

The Attorney General stated that the appellants, as was the case in the Constitutional Court, did not adduce any evidence to show that there was a group of Ugandans whose right to participate in the process leading to the enactment of the Constitutional Amendment Act No. 1 of 2018 was curtailed by the security forces.

He invited this Honourable Court to confirm the finding of the Constitutional Court that the consultative process was not marred with violence by the security forces against the people and that

there is no need to invalidate the same.

The respondent argued that the Appellant had raised a new argument on appeal that force was used to amend the Constitution and as a result the Respondents are in breach of Article 3(2) of the Constitution.

The Attorney General argued that the appellants never raised this issue at the Constitutional Court and that therefore they are precluded from raising this argument at the Supreme Court. Rule 82 (1) Judicature (Supreme Court Rules) Directions S.I. 13-11.

He submitted that this particular argument cannot be raised by the Appellant as it was never raised at the Constitutional Court level and there is no decision on the same to be appealed against.

He pleaded that, in the event that this Honourable Court accepts to consider the ground of appeal in the manner that has been raised by the Appellant, the evidence as has been led by the Respondent clearly illustrates that the amendment was done with the full participation of the Members of Parliament and this contention should be dismissed.

The Attorney General prayed that this Honourable Court finds that the Appellants severally misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of Constitutional Amendment Act No. 1 of 2018.

The Respondent in conclusion prayed that this Honourable Court finds that the Constitutional Court correctly found that the violence inside and outside Parliament was not sufficient to warrant a finding of inconsistency with the Constitution.

Resolution of Issue 3

In my resolution of the Appellants' complaints regarding the disruption, by police, of joint consultative rallies and meetings organised by the Members of Parliament opposed to the constitutional amendments, I already determined that the unlawful and unconstitutional actions of the police force rendered the attempts at public participation and consultation futile. For that reason alone, I would answer this issue in the affirmative.

However, for the sake of completeness, I will briefly address the affidavit evidence on record and the arguments in respect of the events that transpired inside the Parliamentary chambers on 27th September 2017.

In respect of the violence in Parliament, the Respondent contends that the Appellants and other rowdy Members of Parliament were to blame particularly for the events of 27th September 2017. While it is true that some Members of Parliament did not behave honorably throughout the proceedings concerning the impugned amendment, I am unable to agree with the Respondent that the events of 27th September 2017 when unknown security agents invaded Parliamentary chambers

and assaulted a number of MPs are justified.

First, the evidence on record indicates that the members of the UPDF were unlawfully involved since there was no state of emergency declared to warrant their involvement. Members of the national army are only required to intervene in curbing civilian unrest in cases of emergency under the Constitution.

Consequently, their unwarranted involvement in dragging MPs from Parliamentary chambers and assaulting them was unconstitutional. That operation was in breach of Article 97 of the Constitution regarding the immunities and privileges of Members of Parliament.

Secondly, the Right Honourable Speaker of Parliament, in her letter to the Head of State, protested the invasion of Parliament by the unknown security agents attached to the army who assaulted MPs and dragged them from Parliamentary chambers. Clearly the head of the House was not privy to the operation.

It is pertinent to note that the Speaker pointed out to the President, in agreement with evidence of the Appellants, that some MPs who had not even been suspended were also targeted by the said security agents and assaulted before being dragged out of the parliamentary chambers. The affidavit evidence of Gerald Karuhanga, Ibrahim Ssemujju Nganda and the Winifred Kiiza is corroborated by the Speaker's protest to the Head of State in this regard.

An extract of the Speaker's letter to the Head of State, which was relied on and annexed to the affidavits of Honourables Gerald Karuhanga and Winifred Kiiza, is worth reproducing to put the whole episode in its proper perspective;

"As you may be aware there were some disruptions of Parliament proceeding by some rowdy members of Parliament on the 21st20 September, 26th and 27th September 2017.

I took action to suspend 25 members of Parliament from the service of the House for three (3) sittings.

However, after I had requested the Sergeant At Arms to remove the Members from the precincts unknown people entered the Chamber beat up the Members, including those not suspended and a fight ensued for over one hour.

I have had opportunity to view camera footages of what transpired and noticed people in black suits and white shirts who are not part of the Parliamentary Police or the staff of the Sergeant at Arms beating Members. Additionally, footage shows people walking in single file from the Office of the President to the Parliament Precincts.

I am therefore seeking an explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted the Members of Parliament.

I am also seeking an explanation why the members were arrested and transported and confined at

Police stations.

I would also like to know who the commander of the Operation was since the Parliamentary Commission/Speaker did not request for any support"

The said letter, addressed to the Head of State, was copied to the Prime Minister, the Minister of Internal Affairs, the Inspector General of Police and the Commander of the Special Forces Command.

Clearly, the events of 27th September 2017 and the Speaker's formal protest cum inquiry to the Head of State corroborate the Appellants' claims, especially the affidavit averments of Honourables Gerald Karuhanga and Ibrahim Ssemujju, that they were assaulted, harassed and targeted by security agents on account of their opposition to the impugned Constitutional amendments. Such deplorable acts carried out by some elements of the country's security forces were most unfortunate and should never be allowed to happen again.

I do not agree with the Justices of the Constitutional Court who sought to lay blame for the violence inside parliament solely on the rowdy Members of Parliament. As the Speaker of Parliament confirmed in her letter, she viewed the video footage of the saga and observed that some Members of Parliament whom she had not suspended for being rowdy were equally targeted, assaulted and taken to various police stations. The learned Justices ought to have given due consideration to the above concerns raised by the Speaker which were never satisfactorily answered by the Respondent. In my view, the Justices misdirected themselves on this issue and reached an erroneous conclusion.

Consequently, I hold that there was violence orchestrated by state security agents inside and outside Parliament targeted at some Members of Parliament who were forcefully dragged out of parliamentary chambers despite the fact that they had not been suspended by the Honourable Speaker for any misconduct.

I cannot underestimate the chilling effect of this violence on the rest of the August House. Certainly, no meaningful legislative role could be played by parliament in this atmosphere of intimidation, harassment and outright violence visited on some individual legislators.

I therefore answer this issue in the affirmative.

ISSUE 4: *Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?"*

Appellants' Submissions

The Appellants contend that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of procedure of Parliament and the Constitution as well as the invasion of Parliament.

The Appellants contend that whereas the applicability of the substantiality test is expressly provided for in electoral laws, in constitutional matters the test is totally different. The Constitution being the supreme law of the land provides for no scintilla of violation in their view.

Counsel relied on the decision of this court in *Paul K. Ssemogerere & 2 Ors versus Attorney-General, SCCA. NO. 1 OF* 2002; where it was held that the constitutional procedural requirements are mandatory.

Appellant Mabirizi submitted under Article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the 'substantiality' test.

That court has no powers to determine disputes and grant remedies outside its jurisdiction. He stated that the Constitutional Court derives its power from Article 137 of the Constitution which gives it no jurisdiction and power to determine whether the constitutional contravention affected the resultant action in a substantial manner. He contended that its work is to determine whether the actions complained of are inconsistent with or in contravention of the Constitution and when it finds in favour, to declare so, give redress or refer the matter to investigation.

In his view, since this role under Article 137 of the Constitution, is limited to only determine whether there was contravention of the constitution, not the degree of contravention, there is no way the Constitutional Court could go ahead to investigate, moreover without any pleading to that effect, whether the contravention of the Constitution affected the enacted law in a substantial manner.

Respondent's Submissions

The Attorney General submitted that the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion. He further relied on the finding of Odoki, C. J in Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001.The Attorney General submitted that the substantiality test is used as a tool of evaluation of evidence. He contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. He said that as such, whether it is in the Constitutional Court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of Nanjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A 670 where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. The Learned Attorney General therefore supported the majority decision of the Constitutional Court for having had recourse to the substantiality test.

Resolution of Issue 4

In my resolution of the second issue, I found that the violation of provisions of the Constitution and the Rules of Procedure of Parliament went to the root of the validity of the Constitution (Amendment) Act No. 1 of 2018. For that reason, consideration of this issue is moot. However, I will briefly address this issue for the sake of clarity.

It is argued for the appellants that in arriving at its decision, the substantiality test was erroneously applied by the majority Justices of the Constitutional Court. The Appellants argue further that the substantiality test is not known to our Constitutional law but that it is a creation of electoral laws which apply it in appropriate issues. In this respect, section 59(6) (a) of the Presidential Elections Act, 2005 and section 61(1) (a) of the Parliamentary Elections Act, 2005 were mentioned.

The Respondent on the other hand agreed with the majority decision of the Constitutional Court in this connection arguing that the substantiality test had been used as a tool of evaluation of evidence and that ultimately the verdict was that there had been general compliance with the constitutional requirements and procedure for the enactment of the Act in issue.

The Respondent proceeded to refer to the fights and scuffles in the environs of Parliament as well as the alleged non-compliance with the procedure necessary to be followed during legislation. It was the contention of the Respondent that all these were first considered but that later court found that the amount and extent of the evidence adduced was not sufficient to merit nullification of the entire process.

It is true our electoral law allows for the substantiality test as noted by the Appellants. Section 59(6) (a) of the Presidential Elections Act, Act 16 of 2005 reads:

"(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court

(a) noncompliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non compliance affected the result of the election in asubstantial manner;"

The emphasis above is added.

Needless to say both the provision in the Presidential Elections Act and that in the Parliamentary Elections Act relate to decisions to be made in the wake of election petitions. The matter in contention however is different in origin. Article 137 (1) and (3) of the Constitution is relevant in this respect.

It reads:

"137 Questions as to the interpretation of the Constitution

(1) Any question as to the interpretation of this constitution shall be determined by the Court of

Appeal sitting at the Constitutional Court…

A person who alleges that -

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b)any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.….".

The emphasis above is added.

According to Black's Law Dictionary, 8th edition, a declaration is a formal statement, proclamation, or announcement. It defeats the purpose of a petition when a petitioner seeks for a declaration that for reasons stated there was a miscarriage in the procedure which rendered the result nullified only to receive the reply: "although there were some unwelcome incidents not compatible with what is expected to happen in the process, the process was well carried out since the alleged incidents are of little moment". That borders on obfuscation.

Lest we forget Court here is mandated to declare. In my view, court goes beyond the call of duty when it enters the field of justification. In their judgments, the majority Justices of the Constitutional Court ruled that the incidents attending the enactment process did cause concern but that what transpired, though illegal, was not so significant that they could cause the annulling of the impugned enactment. A declaration under Article 137 of the Constitution ought to be unequivocal. I am not at one with the way the majority Justices of the Constitutional Court resolved this question.

The majority Justices of the Constitutional Court erroneously in my view applied the substantiality test prevalent in the electoral law to determine the consequences of non-compliance with the law in legislative processes.

With due respect to the majority Justices, it is trite law the failure to scrupulously comply with provisions of the Constitution or Rules of Procedure during the enactment of legislation is fatal. See Oloka Onyango & Others vs Attorney General, (Supra)

The substantiality test is not relevant in adjudicating questions regarding validity of a constitutional amendment and there is not a single Common Law or civil jurisdiction that applies it as a test for validity of legislation. I have not been able to come across one and the Respondent did not cite any.

I would therefore answer the issue in the affirmative.

ISSUE 5: *Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?"*

Appellants' Submissions

Counsel for the appellant faulted the majority Justices of the

Constitutional Court for not addressing the contention that the clauses on removal of age limits in the impugned Act violated Articles 1, 8A and 38 on orderly succession and peaceful transfer of power as a principle of democracy. Counsel submitted that peaceful transfer of power and orderly succession of Government is a principle of democracy which ought to be used in interpretation of the Constitution. He cited the case of Ssekikubo and others vs. Attorney General for application of democratic principles. According to counsel, the Court below did not consider this argument and therefore made no decision on it.

He submitted that when Parliament chose to invoke consultations on Section 3 it brought itself under Articles 1 8A and 38 of the Constitution. It submitted that Parliament recognized the issue as being one of a fundamental controversy that could threaten cohesion of the country. It decided the people must be the arbiter. According to counsel, the process must therefore produce a result of what the people want.

Counsel referred to the affidavit of Professor Ssempebwa which refers to the Constitutional Review Commission specifically mandated to examine sovereignty of the people, democracy and good governance and how to ensure that the country is governed in accordance with the will of the people. He argued that as found in the evidence of Professor Ssempebwa paragraph5, 8(f), and (q); Professor Latigo paragraphs 13, 14, 15, 16, 21 23, 24, 25 and 26 and Francis Gimara's affidavit paragraphs 6, 7, 8, 9, 10, 11, 16, 17 and 19 there was abuse of human rights violence, harassments, humiliation, assault, detention all of which negate a conducive atmosphere to genuinely seek the views of the people.

He submitted that those reasons advanced in respect of term limits equally apply in respect of a non-limit on age. Counsel argued that the evidence of Professor Ssempebwa is also to the effect that the conflict in Uganda is instigated by unchecked executive power and unlimited incumbency to the position of president. Counsel referred to the Odoki Commission report on the questions of orderly succession and clinging to power through disregard of the Constitutional provisions.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict with the principles of democracy on orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1 8A and 38 of the Constitution.

According to counsel, the Court would have nullified the Act if it had considered all these facts. Appellant Male Mabirizi submitted that removal of the age limit under Article 102 was a 'constitutional replacement' which has no place in a constitutional democracy. He argued that the

essential element of the constitution which is at stake is the qualifications/capacity of the President/Fountain of Honour which is underpinned under 63 provisions of the Constitution.

Appellant Mabirizi contends that although the element of qualifications of the President are capable of amendment, it should be in a compliant and careful way not to destroy the entire constitutional system & base.

Respondent's Submissions

Counsel for the Respondent submitted that the Justices of the Constitutional Court correctly directed themselves to the law by holding that amendment of Articles 102(b) and 183(2)(b) did not in any way infect Article 1 of the Constitution.

Counsel submitted that the Justices of the Constitutional Court were unanimous and rightly held that the amendment power of parliament extends to Articles 102 and 183. He added that the Justices of the Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b).

He contended that, contrary to the appellants' argument that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the sovereignty of the people is not infected at all. In the

Attorney General's view, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to the office of the President. According to counsel, the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from. He relied on the majority judgments to support this view.

In conclusion, the Attorney General concurred with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. Counsel contended that the learned Justices of the Constitutional Court rightly directed themselves to the law in holding that amendment of Article 102 (b) did not amount to Constitutional replacement of Article 1.

Resolution of Issue

In my consideration of the question of whether age limit clauses form part of our Constitution's basic structure, I already ruled that age restrictions are not fundamental pillars on which the 1995 Constitution stands and that removal of the upper age limit restrictions per se does not fundamentally alter the nature of the said Constitution.

There is no doubt that most of the Preamble to the 1995 Constitution is useful, well thought out and has a historical background to it. However, in arguing for the alleged uniqueness and fundamental importance of age limit restrictions in the Constitution, the Appellants' argument goes too far off

the point in my view.

As the learned Justice Remmy Kasule JCC ruled, at page 78 of his judgment, maximum age limit restrictions were not even originally proposed by the Odoki Constitutional Commission Report that informed the draft constitution which was debated by the Constituent Assembly and gave birth to the present Constitution. The Appellants' contentions regarding the uniqueness of upper age limit restrictions in the Constitution are misplaced.

Before the enactment of the Constitution (Amendment) Act No. 1 of 2018 there were limits to the ages of persons eligible to be nominated for the offices of President or District Chairperson (Local Council V Chairperson). Regarding the office of President Article 102 of the Constitution relevantly reads:

`102 Qualification of the President

A President is not qualified for election as President unless that person i*s…….*

2*(b) not less than thirty five years and not more than seventy five years of age;*

As concerns the office of District Chairperson the relevant provision is in 25 Article 183 (2) (b) which provides:

`183 District Chairperson

(1)……

(2) A person is not qualified to be elected district chairperson unless he or she is….

(a)……

(b) at least thirty years and not more than seventy five years of age;……'

The Justices of the Constitutional Court properly found that the Constitution bears provisions of diverse moment, a fact underlined by the varying ways in which different provisions may be amended. Chapter Eighteen bears testimony to this. The process for its amendment is given nowhere else apart from the Constitution itself, the supreme law of the land. It is not a question of wishes or sentiments to be addressed. Rather our guide is what is ordained in the Constitution. In Chapter Eighteen Article 259 provides:

`259 Amendment of the Constitution

(1) Subject to the provisions of the Constitution,

Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this chapter.

(2) This Constitution shall not be amended except by an Act of Parliament -

(a) the sole purpose of which is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter'.

Article 260 relates to amendments requiring a referendum. Evidently neither Article 102 nor Article

183 calls for a referendum in its process of amendment.

Amendments requiring approval by District Councils are specified in Article 261. Again neither Article 102 nor Article 183 feature there.

There is provision for those not specifically provided for either under Article 260 or 261 or even those specially entrenched under Article 44.

For the residue a simpler method is prescribed under Article 262 and that is where amendment for either Article 102 or Article183 fall. It simply provides:

"262 Amendment by Parliament

A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in Articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all members of Parliament".

Given the provisions of Article 262, specific amendment of Article 102 and Article 183 is not a process demanding exacting procedure before finally being enacted by Parliament. Provided the lawful procedure laid down in the Constitution is followed. I find that the clauses on age limit restrictions can be amended without infecting any other provision of the Constitution.

In the circumstances I see no basis to fault the finding of the majority Justices of the Constitutional Court.

I therefore answer this issue in the negative.

Issue 6: *Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?"*

Appellants' Submissions

Appellant Mabirizi, who solely raised this ground of appeal, submitted that, had the learned Justices harmonised Article 83(1)(b) with 102(b) of the Constitution, they would have found that the President elected in 2016 ceases to hold office on attaining 75 years of age.

He adopted his submissions in the lower court on this issue and called upon court to make an interpretation that a president ceases to be qualified to hold office the moment he/she ceases to possess the qualifications which were the basis of his/her eligibility to stand for office.

In his view, the provisions of Article 80 of the Constitution which provide for instances when a Member of Parliament loses his/her seat also apply to a sitting president by analogy and when the Constitution is interpreted harmoniously. He therefore prayed that this Court issue a declaration that the incumbent President is ineligible to hold office upon attaining the age of 75 years.

Respondent's Submissions

The Learned Attorney General emphasized that the Constitutional Court considered the provisions

of Article 102 and unanimously found that the provisions therein purely relate to the qualifications prior to nomination for election and not during the person's term in office. He supported that interpretation and argued that it was the right one.

Resolution of Issue 6

The Appellant's novel interpretation of Article 102 is clearly without merit. I agree with the unanimous decision of the Constitutional Court that the eligibility criteria for nomination at the time of elections is different from disqualifying factors for a sitting Member of Parliament, Local Government leader or even President.

The decision of the Court of Appeal in Ouma Adea vs Oundo Sowedi & Deogratias Hasubi, Election Petition Appeal No.51 of 2016 which was cited by the Constitutional Court, is relevant in appreciating this distinction. In the said decision, their Lordships of the Court of Appeal unanimously held that the Appellant was disqualified from nomination as district chairperson on account of his criminal conviction under the Anti-Corruption Act.

The Appellant's counsel argued that the Appellant was actively challenging the said conviction in the appellate system and that the same was therefore not conclusive and could not be relied on to bar him from presenting himself for nomination as a candidate for district chairperson, Busia. He cited, by way of analogy, Section 95 of the Parliamentary Elections Act which protects a sitting Member of Parliament from losing his/her seat on account of a criminal conviction provided he/she has not exhausted his/her appellate rights.

The Court of Appeal Justices disagreed and held that a sitting Member of Parliament could not be treated in the same manner he or she would be treated at the point of nomination. Nominees who have criminal convictions that operate as a bar to their candidature cannot be validly nominated even if they have not exhausted their appellate rights. However, a sitting elected official who has not exhausted appellate rights is allowed to remain in office in spite of a criminal conviction that would bar him or her from nomination.

While I agree with Appellant Mabirizi that the decision is certainly not the best analogy on this point, I am unable to fault the interpretation reached by the Constitutional Court. If the framers of the Constitution had intended that the upper age limit of 75 years would be a disqualifying factor for a sitting President, they would have expressly stated so. Most importantly, they would have lowered the upper age limit at the point of nomination to 70 years.

In fixing the upper age limit at 75 years, the framers of the Constitution were certainly aware that candidates aged 70 to 74 years would surely offer themselves for nomination. It would be an absurdity if this category of candidates had to vacate office upon reaching the age of 75 years following successful election to the presidency. The finding by Justice Remmy Kasule, JCC, that

upper age limit restrictions were historically not even part of the draft report leading to the 1995 Constitution further reinforces this position.

If the Appellant's novel interpretation were what was intended, it would have made more sense for the said provision to bar individuals who would attain the age of 75 years while in office from being validly nominated in the first place.

Since the Constitution did not expressly prohibit this category of candidates, it would be a usurpation of the legislative role for this Court to hold otherwise under the guise of constitutional interpretation. The interpretation supported by the Appellant would require an express provision of the Constitution. Presently, there is none.

In the circumstances, to hazard the suggestion that a President in office would be bound to step down upon celebration of 75 years of life would be moot not only because it is not provided for under the Constitution but also because age in the case of the office of the President features only on the occasion of nomination and nowhere else. There is no doubt that once qualified for nomination and elected the individual would go ahead and serve the full term.

The unanimous finding of the Justices of the Constitutional Court is the proper statement of the law. It should not be disturbed.

I therefore answer this issue in the negative.

Issue 7: *Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities. 7b. If so, what is the effect of the decision of the Court?"*

Appellants' Submissions

It was submitted by the Appellant, Appellant Male Mabirizi, that the right to a fair hearing was compromised in a number of ways by the

Constitutional Court. He stated that the learned Justices of the Constitutional Court misdirected themselves when they injudiciously exercised their discretion by declining to invoke their powers under the law to summon key government officials and individuals who played a key role in the process leading to the enactment of the impugned Act to appear and testify on the same in accordance with Rule 12(3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005; The provision states:

"The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision."

Counsel relied on the observations of Justice Mulenga (RIP) in Ssemwogerere& Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002 who while considering the nature and

scope of inquiry and investigations which ought to be made by the Constitutional Court, noted that;

"In my view, facts pertaining to constitutional questions ought to be proved with certainty rather than being left to the fate of "hide and seek" between litigants, which the rules on the onus of proof evoke. I would go as far as to say that if the parties failed to do so, it was open to the court,……to call direct evidence from the appropriate officer of Parliament without appearing 'to unduly descend into the arena'. The desirability to decide constitutional issues on ascertained facts cannot be over emphasized.

Appellant Mabirizi contended that Court ought to have exercised its discretion to summon the Speaker, the Deputy Speaker, the Minister of Finance, Honourable Raphael Magyezi, the Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee as well as the President.

He went on to argue that the Justices of the Constitutional Court erred when they restricted the Appellants and their counsel on what to be asked in cross examination of the witnesses limiting them to the scope of the averments in the affidavits for the respective witnesses. It was

Appellant Male Mabirizi's submission that this was in contravention of the basic principles of evidence law incorporated under Section 137 (2) of the Evidence Act which is to the effect that cross examination of a witness need not be confined to the facts to which the witness testified about

Appellant Male Mabirizi further complains that the mode adopted for submissions during the hearing of the petition was also materially defective for the following reasons;

The Justices of the Constitutional Court erroneously directed the Appellants' counsel to make submissions before the cross examination of relevant witnesses.

The Justices of the Constitutional Court erroneously denied the Appellants' counsel a right to a rejoinder after the representatives of the Attorney General had made their submissions in reply.

In his view, all these procedural irregularities occasioned a miscarriage of justice.

b) If so, what is the effect on the decision of the Court?

He submitted that the above irregularities limited the constitutional court's scope of investigation thereby failing on its noble duty vested under Article 137 (1) of the Constitution. He said that thereby it came thereby coming to a wrong decision.

He went on to state that the Court failed to determine the petition expeditiously thereby invalidating the decision. He relied on Chief Ifezue V. Mbadugha-Nigeria for the view that a Judgment delivered out of time by three months was null and void. In addition, he complained about being denied an opportunity to sit at the bar as he addressed the Court since he was unrepresented by Counsel. Lastly, he argued that he was frequently interrupted by the Court in the course of his submissions thereby occasioning him a miscarriage of justice.

Respondent's Submissions

The Respondent submitted that the 2nd Appellant did not satisfy or otherwise meet the threshold required for an Appellate Court, herein the Supreme Court hearing the instant Constitutional Appeal, to interfere with the discretion of the Constitutional Court.

In regard to refusal to summon certain individuals for cross examination, the Attorney General relied on Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo& 4 Others Vs. The Attorney General & 4 Others, and Mbogo& Others vs. Shah [1968] E.A.

The Attorney General contended that there were no irregularities at the hearing which occasioned a miscarriage of justice. In his view, the Justices of the Constitutional Court properly exercised their discretion throughout the hearing.

Resolution of Issue 7

The Appellants fault the Constitutional Court for allegedly denying them a fair hearing in so far as they were not allowed sufficient opportunity to cross examine the deponents of certain affidavits. They also complain about the procedure adopted by the Court in requiring submissions on certain issues before cross examination of deponents. Lastly, the Appellants complain that they were denied their right to make a rejoinder to the Respondent's submissions.

Certainly, the right to a fair hearing is fundamental and is non-derogable in all circumstances. However, courts of law are also enjoined by Article 126 (2) to administer substantive justice without undue regard to technicalities. It was with this principle in mind that this Court rejected the Appellant's contentions in Bakaluba Peter Mukasa vs Betty Nambooze, S.C. EPA NO. 4 OF 2009 that he had been denied a fair hearing at an election petition challenging his election on grounds that the Respondent was allowed to rely on allegations that had not been properly pleaded. This Court overruled the Appellant's contentions on grounds that he had substantially been granted a fair hearing despite the irregular pleading of some of the allegations against his election as Member of Parliament.

The Appellants' complaints present a similar scenario in my view. The Appellants do not demonstrate that they suffered any miscarriage of justice as a result of the said omissions by the Constitutional Court. They simply complain that the Justices of the Constitutional Court were wrong. While it is true that the Appellants should have been allowed a rejoinder to the submissions of the Respondent, the appellants did not show how the denial of this opportunity prejudiced their case.

Secondly, it was not shown by the appellants how requiring the Appellants to submit on issues that were purely of law, such as that on the applicability of the basic structure doctrine and the extensions of the tenure of parliament and local governments, prejudiced their ability to prosecute

the petitions.

In regard to the appellant's complaint on refusal to summon certain individuals for cross examination; in Constitutional Appeal No. 01 of 2015, Theodore Ssekikubo & 4 Others vs Attorney General & 4 Others this Court observed:

`This leaves the discretion to allow cross-examination purely in the hands of Court. In constitutional petitions, this power is expressly conferred upon the Constitutional Court by Rule 12 oftheConstitutional Court (Petitions and References) Rules, 2005, Statutory Instrument No. 91of 2005which provides that: -

"(2) With leave of the Court, any person swearing an affidavit whichis before Court, may be cross-examined or recalled as a witnesses if the Court is of the opinion that the evidence of the witnesses is likely to assist the Court to arrive at a just decision" (underlining is added for emphasis).

From the wording of Rule 12(2) above, the Court's power is purely a discretionary one. That being the case, it is well settled that this Court will not, as as appellate Court, interfere with the exercise of discretion by a lower Court including the Constitutional Court, unless it is shown that the

Court took into account an irrelevant matter which it ought not to have taken into account or failed to take into account a relevant matter which it ought to have taken into account or that the Court has plainly gone wrong in its consideration of the issues raised before it. (See. Mbogo and Others vs Shah [1968] E.A.93.)'

In the Ssekikubo case this Court went on to hold that the decision of the Justices of the Constitutional Court not to call a witness for crossexamination was a discretion the Court exercised after it had afforded both sides opportunity to address Court on the issue. No side was denied a right to fair hearing. The Constitutional Court adopted the proper course in restricting the cross examination of deponents to matters within their affidavits. I do not see how that prejudiced the Appellants. This court will not interfere with a lawful exercise of discretion by the trial Court. The complaints made by the Appellants in respect of denial of a fair hearing are in respect of exercise of discretion by the Constitutional Court in a bid to expedite the hearing of the petitions.

Ironically, one of the Appellants Mabirizi complains about the late delivery of the Constitutional Court's decision without considering that a protracted and lengthy hearing that seeks to explore and test all manner of complaints and authorities is partly a cause of the delay in decision making. For instance, in this appeal, appellant Mabirizi put together 82 grounds of appeal even though a perusal of his memorandum of appeal shows that his substantive complaints against the decision of the Constitutional Court are hardly in excess of. There is no doubt that this sort of onerous pleading and prosecuting cases itself makes it difficult for a Court to reach a timely and accurate decision.

In the same vain, concerning the complaint that authorities they presented by the appellants in

support of their petitions in the Constitutional Court were not considered is answered by my findings that though many authorities were brought in Court, it isn't in the character of this Court to cite all authorities tendered to it. Some may be relevant and others not so relevant. They may also be too numerous to serve any useful purpose. Suffice it to say, all the Justices of the Constitutional Court founded their decisions on relevant authorities.

I am therefore unable to fault the Constitutional Court for the measures that were invoked to expedite the hearing of the consolidated petitions. No miscarriage of justice was occasioned to any of the Appellants and I cannot interfere with the said exercise of discretion.

Consequently, I answer this issue in the negative.

Issue 8

"What remedies are available to the parties?"

Appellants' Submission

The appellants prayed that the appeal be allowed in the terms and prayers specified in the Memorandum of Appeal and specifically that the Constitution (Amendment) Act, No. 1 of 2018 be annulled in its entirety and that the Respondent pays costs of this Appeal and in the Court below. In the alternative but without prejudice to the foregoing, they prayed that if court answers issue 7 in the affirmative a retrial should be ordered.

Appellant Male Mabirizi also prayed for general damages and full costs of the case in this court and the court below with an interest of 25% per annum from the date of judgment till payment in full.

Respondent's Submissions

The Respondent supported the findings of the Constitutional Court and prayed that this Court upholds the same.

Resolution of issue 8

The majority Justices of the Constitutional Court applied the doctrine of severance and held that the entire Constitution (Amendment) Act 2018

was not affected by the numerous illegalities proved to have been committed in its passing. I have already held that I disagree with that conclusion.

It is gainful to address the doctrine of severance which was relied upon by the majority Justices of the Constitutional Court. Their decision was ultimately based on that doctrine. It is incumbent on a court faced with an option to severance to define carefully the extent of the inconsistency between the Act in question and the Constitutional requirements.

In Attorney General for Alberta vs Attorney General for Canada, [1994] AC 503, 518 the Board considered the severability of statutory provisions viewed for constitutionality, stating:

'The real question is whether what remains is so inexplicably bound up with the part declared

invalid that what remains
cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all……. .'
That above is the Canadian experience.

In the United States of America there is the case of Missouri Roundtable, 3965.S.W. 3d 348 which I find relevant for purposes of the matter in hand. The case is cited in the Missouri Law Review Vol 79. Iss. 3[2014], Art 10. The Missouri Law review at page 840 thereof notes:
`Since one of the grounds for the inapplicability of Section
1.140 is non-sensical when applied to procedural constitutional violations, the procedural violations taint the entire affected act, and it makes more sense to restrict it to substantive constitutional violations. Legislative intent is regularly used in ascertaining the substantive constitutionality of a statute, and it is possible for such violations to be restricted to only a portion of a bill. As such, statutory severance under section 1. 104 is not applicable to procedural violations - in particular the single-subject rule – and it is applicable only to substantive constitutional violations. This reasoning supports the conclusion in MissouriRoundtable that substantive and procedural constitutional violations have separate analyses in the context of severance.'

Earlier on at page 835 of the Review the following passage appears:
'Judge Fischer, however, filed a concurrence in the case, stating that he believed that the judicially created doctrine of severance should be abolished. Specifically, he argued two grounds that supported his contention: first, that the doctrinal severance provides "no incentive [for legislators] to follow the clear and express procedural mandates of the Missouri Constitution [,]" and second, that it potentially violates state separation of powers. Elaborating on the effort of judicial severance on the separation of powers, Judge Fischer stated that it may subvert the legislative process by allowing legislation that might not have received enough votes to become law to survive. Procedural constitutional violations, severance, and the discussion prompted by them came into sharp focus in Missouri Roundtable.'
Returning to these Constitutional Appeals, several procedural irregularities were referred to. Some of these were disposed of by the Constitutional Court. Some others are before this Court for determination. The majority Justices of the Constitutional Court in their wisdom ordered for the severance of some of the sections in the Constitution (Amendment) Act, No. 1 of 2018. Other

sections were saved on the ground that they were the provisions originally intended to be legislated on and that on their own they did not infringe on the 5 Constitutional provisions in the course of their process of enactment.

Reference has been made to the case of Salvatori Abuki vs AttorneyGeneral, Constitutional Case No. 2 of 1997 in justification of the doctrine of severance. For the record the decision in that case was later appealed.

On appeal in Attorney General vs Salvatori Abuki, Constitutional Appeal No. 1 of 1998 the Supreme Court declared:

`That section 7 of the Witchcraft Act is void for inconsistency with Articles 24 and 44(a) of the Constitution, in that it authorizes the making of an exclusion order prohibiting a person from entering in his or her home, this treatment or punishment which is torturous, cruel, inhuman and degrading'.

The significance of the Salvatori Abukicase is that it struck down or severed section 7 of the Witchcraft Act from the rest of the Act. That kind of severance should be distinguished from the one in issue where the process of enactment was attended by glaring illegalities.

For the reasons given above I find that the enactment in its entirety cannot be saved by way of severance. It must be annulled not partially but as a whole.

In view of my findings on the second, third and fourth issues, the consolidated appeals partly succeed.

A declaration is issued that the Constitution (Amendment) Act 2018 is unconstitutional having been enacted in violation of the Constitution. I would declare that the entire Constitution (Amendment) Act 2018 was illegally enacted and is null and void.

The Appellants appealed against the award of costs in the Constitutional Court arguing that the amount awarded was inordinately low. The award of costs in the Constitutional Court is contained in the judgment of Owiny Dollo DCJ. It relevantly reads:

'……

4. Court awards professional fee of U. shs 20m/= (Twenty million only) for each Petitioner (not Petitioner). This however does not apply to Petition No. 3 of 2018 where the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person .'

5. Court awards two-thirds disbursements to all Petitioners, to be taxed by the Taxing Master.'

These appeals involve questions of great public interest. They were initiated as public interest petitions. I have already set down the views of the Justices of the Constitutional Court regarding costs that were awarded. Regarding public interest litigation this court has expressed the view that courts while taking into consideration the provisions of Section 27 of the Civil Procedure Act should not automatically enforce orders on costs in public interest litigation because of pertinent factors.

In Muwanga Kivumbi vs Attorney General, Constitutional Appeal No. 06 of 2011 Tibatemwa Ekirikubinza JSC who wrote the lead judgment stated inter alia:

`A proper reading of the above cases reveals that the Court re-affirmed the already established legal principles inherent in section 27 (2) of the Civil Procedure Act.

……

..

The principles which can be deduced from the section are that:

The award of costs is left to the discretion of the court.

Costs normally follow the event-the general rule is that a successful party will be awarded costs .

(iii)Just as it is in other areas of the law where the court is empowered to make decisions, the courts discretion must be exercised judicially.

However, while accepting that the principles inherent in section 27 apply to public interest litigation cases, the above authorities emphasized that costs in public interest litigation cases should only be awarded in rare cases, that the court must balance the need to compensate the successful litigant on the one hand with the value (s) underlying public interest litigation such as growth of constitutional jurisprudence which would be stifled if potential litigants know that there is a possibility of being saddled with costs in the event of the case being dismissed

In other words, in public interest litigation, a court should exercise its discretion to award costs infrequently. Furthermore, where costs are awarded in public interest litigation cases, the award should be minimal.'

Kisaakye JSC agreed with the above dicta and went on to give further 5 justification:

'In awarding and assessing costs in constitutional litigation, courts should not lose sight of the danger that would arise if the constitutional order in this country were to break down.

In my view, society owes a litigant, who averts such a breakdown in the constitutional order through a constitutional petition pointing out areas of contravention of the Constitution, a duty to reimburse him or her for the direct costs he or she incurred in the process of filing and prosecuting the petition and/or appeal. Such a litigant should not bear the economic burden of maintaining the constitutional order for the rest of Ugandans.'

The South African experience is Trustees For The Time Being of the

Biowatch Trust vs Registrar, Genetic Resources & Others [2009]20 ZACC 14 where Sachs J stated:

This is not to deny that vulnerable sectors of society are particularly dependent on the support they can get from public interest groups. A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this court's Jurisprudence. Intervention by public interest groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally …… There has also been

pioneering litigation brought by groups concerned with gender equality, the rights of the child……..and in relation to freedom of expression. Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in public interest.

This is expressly adverted to by the National Environmental Management Authority (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.

……

……

56. I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door-at the end of the day, it was the state thathad control over its conduct.'

The opinion expressed by Sachs J in the South African case are at one with the views of this court and I find them persuasive.

In this matter I find the appellants successful both in this court and in the Constitutional Court.However, the prayer for general damages by appellant Male Mabirizi is misplaced and has no basis in a constitutional petition challenging the validity of the passing of the impugned Act. Equally, his claim to be a professional is out of context as he represented himself. Only an enrolled advocate with audience before this Court could claim for instruction fees. I should add that, even an enrolled advocate representing himself would not be eligible for professional fees.

In conclusion, I would make the following orders:

The consolidated appeals partially succeed.

The Constitution (Amendment) Act 2018 is hereby struck down in its entirety for having been passed in violation of the Constitution and Rules of Procedure of Parliament.

The awards in the Constitutional Court are upheld.

Parties to meet their costs in this Court.

Dated at Kampala this ..... day of ..... 2019.

.....

J U S T I C E P A U L K . M U G A M B A

JUSTICE OF THE SUPREME COURT

EXEGESIS OF THE GOSPEL ACCORDING TO MUGAMBA, JSC

BACKGROUND

In 2017, Hon. Raphael Magyezi, a Member of the 10th Parliament of the Republic of Uganda, brought a Private Member's Bill (Constitutional Amendment Bill No. 2 of 2017). On the 27th December, 2017, Parliament passed the Bill eliminating Presidential Age Limit and extending Parliamentary Term. The Ugandan Parliament passed an amendment to the Constitution which, among other measures, aims to eliminate the requirement that candidates vying for the presidency be under 75 years of age.

The court again by a 4-1 majority upheld the larger Bill applying severally the doctrine of severance to save the repeal of the age limit even though all the justices unanimously found unconstitutional means that were used to stifle the MPs' access to their constituents through the police.

Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this Court. The Appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in the Supreme Court containing 84 grounds of appeal categorized under different parts. Issues for court's determination were framed out of the consolidated appeals.

PAUL MUGAMBA JSC

Justice Paul Mugamba was one of the 3 Justices that dissented in the constitutional appeal No. 2 of 2018. He dissented citing procedural impropriety in passing the bill, violence visited upon members of Parliament as well as the misguided use of the substantiality test in a constitutional petition.

FAILURE TO FOLLOW RULES OF PROCEDURE

It is trite law that Parliament must comply with its own Rules of Procedure enacted under Article 94 of the Constitution and that failure to follow those Rules amounts to a violation of the said constitutional provision as per the case of Prof Oloka Onyango & Others vs Attorney General[1110].

Certificate of Compliance

Article 263 (2) (a) regards the certificate of compliance issuing from the 25Speaker to the President if an Assent is to be obtained. It states:

'(2) A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if –

(a)it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been

[1110][2014] UGCC 14

complied with in relation to it;

A certificate of compliance is meant to certify the contents of the Bill to be assented to. Since the document tendered by the Speaker as the certificate did not tell the truth when certifying the legislation to be assented to, I hold there was no certificate.

The Bill that the Honourable Speaker proceeded to proffer to the President for assent was different from the one Honourable Raphael Magyezi had initially proposed. However, it was similar to the one that the House had gone on to pass on 20th December 2017. Given the circumstances, the Bill the President assented to bore little resemblance to the one the certificate of compliance, issued by the Honourable Speaker, certified as having been passed in Parliament.

The certificate of compliance indicated that only four Articles in the Constitution had been affected by the amendment. The Constitution (Amendment) Act No. 1 of 2018 assented to by the President showed ten Articles were affected by the amendment. It was not contested that the President signed what was actually passed by the House. What was in contest is the veracity of the certificate of compliance.

The assent to the bill was made in vain. This is a fundamental procedural irregularity which cannot be cured by severance as the Justices of the Constitutional Court attempted to do. To do so would tantamount to the judiciary entering the legislative arena which should not be countenanced. This irregularity has company. It should be seen in the light of other irregularities that attended the impugned enactment which are highlighted elsewhere in this judgment.

Contrary to Article 93 of the Constitution, Parliament proceeded to legislate on the impugned enactment including provisions that required a certificate of no financial implication. No certificate accompanying the Bill to be assented to as is mandatory under Article 263(2)(a) of the Constitution.

VIOLENCE IN THE PARLIAMENTARY CHAMBERS

Justice Mugamba found that the members of the UPDF were unlawfully involved since there was no state of emergency declared to warrant their involvement. Members of the national army are only required to intervene in curbing civilian unrest in cases of emergency 20under the Constitution. Consequently, their unwarranted involvement in dragging MPs from Parliamentary chambers and assaulting them was unconstitutional. The operation was in breach of Article 97 of the Constitution regarding the immunities and privileges of Members of Parliament.

The Parliamentary invasion by the army takes us back to our militarized and dictatorial past. The very past the Constitution not to repeat as stated in the Preamble. In 1967, Apollo Milton Obote, the prime minister, has spent several months fending off an attempt by a coalition consisting of some

of his Cabinet ministers, President Edward Luwangula Muteesa II (who is the Kabaka of Buganda), MP Daudi Ocheng, and Brig Shaban Opolot, the army commander, that wants to remove him from power. The story is well known and well documented. Suffice to say that the plotters have tried both constitutional and military options to overthrow Obote. Thwarted attempts to arrest him on at least two occasions have tipped the contest toward inevitable confrontation.

The military coup is set for Tuesday, February 22, 1966. Obote gets wind of it. On the fateful morning, the police arrest five of his ministers during a Cabinet meeting. The men – Grace Ibingira, Emmanuel Lumu, Balaki Kirya, George Magezi and Matiya Ngobi - are part of the plotters of the coup. Two days later, Obote suspends the 1962 Constitution. Claiming to be acting in the interest of "national stability and public security and tranquility," he assumes all powers of the Government of Uganda and embarks on rule by decree.

To legalise his coup d'état, Obote needed a new Constitution. He ordered Godfrey Lukongwa Binaisa, the Attorney General, to do the needful. Binaisa, together with Nkambo Mugerwa, the Solicitor General, and Kofi Crabbe, a Ghanaian draftsman, sets to work. They write it in one night. The draft of the new Constitution is to be tabled before Parliament the next day, April 15, 1966. However, the MPs are not given copies of the draft document. To avoid any hiccups, a military invasion of Parliament is ordered.

The 1966 invasion set the stage for military control of the Legislature and, five years later, a military coup that would destroy everything. The 2017 invasion has snuffed out the faint flicker of hope that Uganda might find its way out of the dark hole into which it was thrown by the events of 1966. Fifty years of history and experience have not changed the ruler's attitude.

Justice Mugamba took the view that the violence orchestrated had a chilling effect of this violence on the rest of the August House. Certainly, no meaningful legislative role could be played by parliament in this atmosphere of intimidation, harassment and outright violence visited on some individual legislators.

S U B S T A N T I A L I T Y T E S T

Just like Justice Tibatemwa, Justice Mugamba found that the substantiality test is not relevant in adjudicating questions regarding validity of a constitutional amendment and there is not a single Common Law or civil jurisdiction that applies it as a test for validity of legislation.

The substantiality test has been deployed by the Supreme Court in declining to annul election petitions. However, this has been in instances of violating the Presidential Elections Act and not the Constitution. The usage of the substantiality test in election petitions stems from the wording of Section 59 of the Presidential Elections Petition which provides for annulment of an elections for

non-compliance with the provisions of this Act if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner.

However, the wording of **Article 137** of the 1995 Constitution of Uganda does not in any way provide for the substantiality test in determining whether an Act of Parliament contravenes a provision of the Constitution. The use of substantiality test by the Constitutional court to find that the violence meted on the Parliamentarians and citizens was not substantial enough to vitiate the amendment of the constitution was therefore baseless and unfounded in law.

GOSPEL ACCORDING TO JUSTICE DR. ESTHER KISAKYE EXEGESIS OF THE GOSPEL ACCORDING TO JUSTICE DR. ESTHER KISAKYE

BACKGROUND

On 16th January, 2021, the Electoral Commission declared the results of the election returning Yoweri Museveni Tibuhaburwa Kaguta of the National Resistance Movement party, hereinafter the 1st respondent as the validly elected President of the Republic of Uganda having polled 5,852,037 votes representing 58.64% of the total votes cast. Aggrieved with the outcome of the Election, the applicant contested the results of the election in this court, this being the court of first instance in challenging presidential elections. The grounds advanced included; that President Museveni was not validly elected as the elections were not conducted in accordance with the principles laid down in the provisions of the Constitution, the Presidential Elections Act, the Electoral Commission Act and other relevant laws, and that the non-compliance affected the results of the election in a substantial manner.

On 9th February, 2021, the court dismissed an application by the applicant/petitioner to amend the petition. The reasons were given on the 18th March after the petitioner Kyagulanyi sought to withdraw the petition accusing the court of being biased, partisan and remote-controlled by Mr. Museveni.

JUSTICE KISAAKYE'S RULING

Justice Kisaakye agreed with the majority ruling of the judges that Mr. Kyagulanyi couldn't amend his presidential petition, reasoning that there is no law that supports such and that he couldn't pay costs.

Justice Kisaakye specifically disparaged as "unconstitutional" provisions of the Presidential Elections Act that somehow make it apparent that a petitioner pays costs the moment he or she withdraws a presidential petitioner before it's logically determined.

Justice Kisaakye's departure from others was mainly on the issue of additional affidavits that Mr. Kyagulanyi's legal team couldn't file in court as they failed to meet the deadline set by the court in their presence. In the detailed majority ruling, which was read by Justice Mugamba, the eight judges insisted that allowing Mr. Kyagulanyi to file more 200 affidavits out of time would have meant that the respondents would have needed more days to respond and this would have eaten up much of the constitutionally laid out 45 days in which they are supposed to deliver a judgment.

Justice Kisaakye believed Mr. Kyagulanyi's narrative that he couldn't collect evidence in time because he was under incarceration from election day until the High Court intervened and declared his detention illegal on the prompting of Mr. Kyagulanyi's lawyers.

The judge squarely put the blame on President Museveni. "The first respondent [Museveni] is the commander-in-chief [of the armed force] and also the president-elect. He appoints the Chief of Defence Forces and you can't say he wasn't in the know of the petitioner's incarceration. It's possible that he is the one who sanctioned it," Justice Kisaakye ruled.

"The framers of the Constitution didn't envisage that an incumbent [Museveni] would restrict movements of his opponents," she stated. Justice Kisaakye's latest disagreement with the majority at the Supreme Court has further enhanced her label of being "a dissenting judge" because she has dissented in most critical judgments.

Reading of the "Kisakye 'Judgement

The Supreme Court was thrown into pandemonium on 18th March, 2021 after Justice Esther Kisakye's file was confiscated before she read her ruling on Robert Kyagulanyi Ssentamu's withdrawn petition challenging Mr. Yoweri Museveni's election victory. Justice Kisaakye, the longest-serving member of the Bench, was left all alone in a tent that was enveloped in darkness, with power and consequently the public address system, switched off. In the tent, the judge was lamenting before the cameras. She alleged that her file containing her ruling had been confiscated on the orders of Justice Owiny-Dollo.

"My reasoning in the ruling we have made in the presidential petition, which was withdrawn recently, I instructed my staff to put my ruling here for delivery." [1111]The Chief Justice and other members of the Coram have opted not to be part of this afternoon's proceedings and I respect their decision." She added: "However, what's of surprise to me is that my file has been confiscated on the orders of the Chief Justice. I'm going to proceed in the court building to recover my file and I will come back and read my ruling today as scheduled." The court had spent the entire morning giving detailed reasoning why they had rejected two of Mr. Kyagulanyi's applications, in which he sought to amend his petition, and also one in which he wanted his more than 200 additional

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affidavits allowed out of time.

Before midday on Thursday, the eight justices were through with reading their joint ruling, and the stage was set for Justice Kisaakye to read her "dissenting" ruling, but Chief Justice Owiny-Dollo said they had to take a break and he promised they would be back to complete the job by 1:30pm. Instead, Judiciary sources, who asked not to be named, said when the judges retreated to their chambers, it became apparent that they didn't want to go and be part of Justice Kisaakye's session in the afternoon. The culture at the Supreme Court and the Court of Appeal, which doubles as the Supreme Court, is that since they work in coram, judges share their rulings or judgements before the day of reading them for everyone to know how the other had decided but judges at the Supreme Court accused Justice Kisaakye of keeping them in the dark about her decisions and reasoning. They said she preferred to ambush them in court as she reads her rulings.

While the Chief Justice was okay with returning to court for Justice Kisaakye to do her bit, sources say other justices made it clear they weren't returning and asked him to adjourn the matter until Justice Kisaakye disclosed her ruling to them. Justice Owiny-Dollo was left with no choice, according to our sources, and he accordingly summoned the Attorney General, Mr. William Byaruhanga; Mr. Museveni's legal team led by Mr. Ebert Byenkya and Mr. Kiryowa Kiwanuka; and the Electoral Commission's legal team led by Mr. Joseph Matsiko and Mr. Elison Karuhanga, and informed them about their decision not to return to court as they had promised until Justice Kisaakye first released her ruling to them.

When the meeting was done, the three sets of lawyers left for their cars as soon as it became apparent that Justice Kisaakye had insisted on reading her ruling whether the other judges attended or not. For a moment, there was a sense of confusion as journalists couldn't understand why Justice Kisaakye was seated alone in a tent, with power switched off yet the lawyers were leaving one after another. Only Mr. Kyagulanyi's lawyers stayed put.

When Justice Kisaakye waited for minutes for her file and it became apparent that it wasn't coming, she walked back to the court building and for some minutes, security officers at the court promises were telling a journalist to go away. The expectation was that Justice Kisaakye wasn't going to have her way, but a few minutes later, she returned with what she termed as "a carbon copy" of her ruling. She first sought to clarify the standoff at the highest court in the country.

"While it is good practice for members of the court to circulate their draft ruling to colleagues, there is no law in Uganda that I'm aware of that requires me to do so," Justice Kisaakye said before she read out the details of her ruling, which took hours. "As you heard from the rulings, the 45 days required to finalise this matter constrained me to do so."

Before judges who are on a panel come to court, the practice in Uganda's Supreme Court is that

they meet, say, in the Chief Justice's chambers, or the boardroom, and they agree on how to proceed. "The meeting," a retired Supreme Court judge, who asked not to be named, explained, "helps the Chief Justice to organise well by knowing the stand of each member and how they are doing."

This meeting, according to some justices interviewed for this story, becomes critical on the day the judges are set to deliver either a judgment or ruling as it helps them to know clearly who is in the majority and those in the minority. Judges accused judges Kisaakye of consistently missing such meetings and they insisted that the Chief Justice should call her to order- even if it came with bad press.

"A judge having a dissenting judgment or ruling isn't new," one of the Justices on the panel, who preferred anonymity, said. "In fact, everybody knew that Justice Kisaakye had dissented in one of the issues in the Kyagulanyi case … but we find it disrespectful that she doesn't attend meetings and she also doesn't circulate her draft judgments or rulings. That's not how things work."

OFFICE POLITICS?

Justice Kisaakye was together with Justice Owiny-Dollo and others, interviewed for the Chief Justice job last year. The job finally went to Justice Owiny-Dollo. When Chief Justice Bart Katureebe retired in June last year, Justice Kisaakye was the most senior judge at the Supreme Court and some thought her seniority would propel her to the highest office in the Judiciary. There was a precedent: Justice Katureebe was the most senior judge at the Supreme Court when Chief Justice Benjamin Odoki retired in 2013 and he replaced him later in 2015.

Judiciary staff say before Justice Kisaakye competed for the Chief Justice job, she had years earlier tried without success to become the Deputy Chief Justice.

When the retired Justice Katureebe was Chief Justice, there were again some issues involving Justice Kisaakye but different Judiciary sources say Justice Katureebe acted differently to the way Justice Owiny-Dollo has.

A year ago, Justice Kisaakye sued former Supreme Court Judge George Kanyeihamba and a one Michael Kalule Buwembo for alleged defamation, invasion of privacy, unlawful conduct over allegations against her that were contained in a letter Prof Kanyeihamba wrote to former Chief Justice Katureebe and the letter was published in a book by Mr. Buwembo.

THE KYAGULANYI ALIAS BOBI WINE PRESIDENTIAL ELECTION PETITION CASE.

Justice Esther Kisakye of the Supreme Court disagreed[1112] with eight Justices in their decision on two applications arising from the presidential election petition filed by former presidential candidate Robert Kyagulanyi Ssentamu.

Kyagulanyi petitioned the Supreme Court to challenge President Museveni's victory in the presidential elections. At the start of the petition hearing, Kyagulanyi first filed an application seeking to be given more time to amend his petition and introduce new grounds. He filed another seeking to file additional affidavits and another seeking to withdraw the whole petition.

Kyagulanyi argued that there were unusual circumstances including the fact that his lawyers were operating mobile law firms due to insecurity and fears that state operatives may steal the evidence. He also argued that state operatives seized their political party offices which made it difficult for him to file relevant affidavits and evidence in support of his petition on time.

On Thursday, the two applications were dismissed by the eight Justices led by Chief Justice Alfonse Owiny-Dollo on grounds that a presidential election petition cannot be amended due to its strict timelines within which it should be determined.

However, in her dissenting judgement read to Kyagulanyi's lawyers, Justice Kisakye said that the reasons advanced by Kyagulanyi were more than unusual circumstances and therefore his applications should have all been allowed. She noted that it was not right for the Attorney General to argue the way he did on the strict timelines because the issue of amending petitions has happened before in the presidential election petition of Amama Mbabazi and therefore it cannot be unlawful. She added that although the extension to file additional evidence was going to have an impact on the roadmap of court, the respondents who were the majority opted to ignore the fact that those provisions were enacted and the constitution amended.

But to Kisakye, whereas the law says that the matter should be determined within 45 days from the date of filing, this requirement didn't impose on the Supreme Court the duty to ignore the unconstitutional and unlawful acts as declared by the High Court to the detriment of Kyagulanyi.

"The restrictions on the movements of the applicant as pleaded in his affidavit and as confirmed by High Court more than constituted the special circumstances which were envisaged under rule 17 of the Presidential Election Rules," she said. Kisakye added the rest of the Justices should have allowed the applicant to file additional evidence which was ready on the morning of February 15, 2021, when the deadline was on February 14th 2021.

Court heard that the fact that the evidence was ready by February 14 and the country is under

[1112]Kampala, Uganda | THE INDEPENDENT

curfew, coupled with the siege of NUP offices, the shutdown of the internet for five days and Kyagulanyi's house arrest, it was impossible that the time was sufficient for him to do all that was required.

She added that there is a principle that the mistake made by the lawyers should not be blamed on his client like the majority of the Justices did yet Kyagulanyi had already lost ten of the fifteen days.

"The applicant's counsel was not able to deliver all the evidence in the time prescribed for a variety of reasons some of which were submitted on by counsel Sseggona. By the majority attributing the mistakes of counsel to the client, the court was reversing its decisions without giving reasons," said Kisakye.

On the issue of Kyagulanyi's witnesses being arrested by the state, Justice Kisakye dismissed the arguments by the respondents saying that he should have brought evidence of the list on who was arrested and taken where and by who.

She noted that the argument lacked merit because Kyagulanyi knew who exactly was his witnesses and where they were and that the respondents were talking about matters that they didn't know about.

"The first respondent is the incumbent president, He has been in power for 35 years with an established party structure which is in place and which has not suffered any disruptions or closures as were suffered by the applicant's party at the expense of the state organs," said Kisakye.

According to her, the Electoral Commission and Attorney General also have nationwide offices throughout the country and it didn't make any sense when they said that Kyagulanyi's witnesses should have been in Kampala for them to file their responses to additional evidence he wanted to file.

Since the application for the withdrawal was consented to, Kisakye said she was not going to say much about it. She noted that what Kyagulanyi went through was unconstitutional and in the interest of justice and fairness, Museveni, Electoral Commission and Attorney General shouldn't have asked for costs.

K I S A A K Y E ' S O T H E R R U L I N G S

Last year, sitting as a single judge of the Supreme Court, she triggered a debate in Uganda's criminal justice system, when she ruled that it's unconstitutional to allow a convicted person out on bail pending appeal. "The reasoning that a convicted person should be allowed to first exhaust all his rights of appeal before he can start serving his sentence in our legal system is flawed," she argued.

In 2013, Justice Kisaakye was on the Coram of seven justices who heard an application filed by

four National Resistance Movement (NRM) party MPs who had been provisionally locked out by a ruling delivered by the Constitutional Court.

The MPs were Theodore Ssekikubo (Lwemiyaga), Wilfred Niwagaba (Ndorwa East), Muhammad Nsereko (Kampala Central) and Barnabas Tinkasiimire (Buyaga West).

Justices Christine Kitumba and Galdino Okello ruled that the MPs should go back to Parliament. Justice Kisaakye had different ideas. “In my view, Article 132 of the Constitution only vests this court appellate jurisdiction to hear from decisions of the Constitutional Court.

It does not vest in this court supervisory powers to police the Constitutional Court in every incidental or interlocutory decision the Constitutional Court makes in the course of hearing a constitutional petition,” Justice Kisaakye said. She additionally disagreed with fellow judges, arguing that the MPs had no right of appeal to the Supreme Court, on interim decisions made so far by the Constitutional Court.

“I entirely agree with the first part of the majority’s ruling that there is no right of appeal granted under Article132 (3) of the Constitution from interlocutory decisions made by the Constitutional Court. With all due respect … I respectfully disagree with the majority that the two rulings made by the Constitutional Court on the admissibility of the affidavits evidence of President Museveni and the Coram of the Court of Appeal sitting as Constitutional Court are appealable as of right because there weren’t final decisions,” Justice Kisaakye said.

GOSPEL ACCORDING TO JUSTICE TSEKOOKO, JSC. VERBATIM

The conclusions I reached in this petition were based on the evidence available and on the belief that the framers of the current constitution must have envisioned that the country will be governed under a constitutional democracy where there is free and fair democratic elections and in the belief that each branch of the state would do its duty properly and with due diligence.

Last year Col. (RTD) Dr. Kizza Besigye, the Petitioner, contested in the presidential election with four other candidates. The others were DR. ABED BWANIKA, MAMA OBOTE MIRIA KALULE, SSEBAANA JOHN KIZITO AND YOWERI KAGUTA MUSEVENI. The last named who was the incumbent President of Uganda is the second respondent in this petition. The election was conducted under a multiparty system of politics. Apart from Dr. A.Bwanika, the other candidates were sponsored by their respective political parties, namely: The Uganda People's Congress (UPC) sponsored Mama Obote Miria Kalule, the Democratic Party (DP) sponsored Ssebana John Kizito and National Resistance Movement (NRM) sponsored Yoweri Kaguta Museveni. The petitioner was sponsored by his party, the Forum for Democratic Change (FDC). The petitioner was in fact nominated in absentia while he was in custody at Luzira on a charge of treason. The contest was for the office of the President of this country. The Electoral Commission, the first respondent, which organised the election, declared on 25th February 2006, the second respondent the winner. He polled 4,078,911 votes, representing 59.28% of the valid votes cast. The petitioner, who polled 2,570,603 votes, representing 37.36% of the votes cast, considered himself aggrieved by the result of the presidential election. On 7th March, 2006, he petitioned this Court and set out complaints upon which he based his dissatisfaction. He asked the Court:

To declare that Yoweri Kaguta Museveni was not validly elected as President.

In the petition, the petitioner raised complaints against each of the two respondents and their agents and/or servants, for acts and or omissions which he contends contravened and or were contrary to the provisions of the Constitution, of the Electoral Commission Act, 1997, (ECA) and of the Presidential Elections Act, 2005 [PEA].

He also contended, in paragraph six of the petition, that S.59 (6) (a) of the PEA is contrary to the provisions of clause (1) of Article 104 of the Constitution and applied for the issue to be referred to the Constitutional Court for interpretation under paragraph (b) of clause (5) of Article 137 of the Constitution.

In paragraphs 7, 8 9 and 10, the petitioner stated his grievances against the 1st respondent in the following words:

"7 In the FURTHER ALTERNATIVES but without prejudice with the foregoing paragraph the

Election of the 2nd Respondent was invalid on the ground that the election was not conducted in accordance with the principles laid down in the Provisions of the Presidential Elections Act and thatsuch non- compliance affects (sic) the result in a substantial manner.

8

Your petitioner avers that the entire Electoral process on the 23rd day of February, 2006 Presidential Elections, beginning with the campaign period up to the polling day was characterised with intimidation, lace (sic) of freedom and transparency, unfairness and violence and commission of numerous electoral offences and illegal practices contrary to the provisions of the Presidential Elections Act, Electoral Commission Act and the Constitution.

(a)

Contrary to S.19 (3) and S.50 of the Electoral Commission Act, the 1stRespondent disenfranchised voters by deleting their names from the voters roll/register.

(b) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda.

(c) Contrary to S.57 of the President Elections Act the 1st Respondent failed to cancel results of polling stations where gross malpractices and irregularities took place in particular the districts of Kiruhura, Manafa and Pallisa.

(d) Failing to declare the results of the Election in accordance with S.56 and S.57 (4) of the Presidential Elections Act and Electoral Commission Act.

(e) Contrary to S.12 (e) and (f) of the Electoral Commission Act, failing to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

(f) Contrary to section 9 of the Presidential Elections Act the 2nd Respondent was neither sponsored as a candidate by a registered political organisation or party or as an independent candidate.

(g) Misleading voters by printing and using ballot papers which indicated that the 2nd Respondent's party was the NRM, which is not a registered party participating in the elections.

(h) Misleading the voters by allowing the use of a symbol of the "Bus" which was used by the Movement's Political System during the referenda.

9 Your petitioner avers that the 2nd Respondent benefited from the above non-compliance with the provisions of the Presidential Elections Act and Electoral Commission Act.

10 IN THE ALTERNATIVE and without prejudice failing to declare the result of the Election in accordance with Article 103 (4)"

In its answer to the petition, the first respondent asserted that the petitioner has no real grievance within the meaning of Article 104 (1) of the Constitution and denied most of the allegations contained in the petition and asserted that it validly declared the second respondent elected as president. It averred that if there was any non-compliance such non-compliance did not affect the result of the election in a substantial manner and that the election was held under conditions of freedom and fairness. To the accompanying affidavit of the Chairman of the Commission, Engineer Dr. Badru M.Kiggundu were annexed copies of observers reports of the European Union (R2) and of the Commonwealth (R3) to support the commission's stand that the elections were properly conducted.

The Petitioner's case against the 2nd Respondent is that he personally, or by his agents with his knowledge and consent or approval, committed illegal practices and offences in contravention of S.24(5) (b) to 24(5) (9) of the PEA and Section 23 (3) (b) of the ECA. These include publication of false, insulting, derogatory, derisive statements about the Petitioner alone, his party or the petitioner and the other Presidential Candidates, offering money and gifts to voters;
In respect of the 2nd respondent, the petitioner alleged in paragraphs 11 and 12 as follows:

"11. Your Petitioner avers that the 2nd Respondent personally committed the following illegal practices and or offences, while campaigning:
(a)
Used words or made statements that were malicious contrary to S.24 (5) (b) of the Presidential Elections Act.
(b) Made statements containing sectarian words or innuendos against your petitioner and or his party and other candidates contrary to S.24 (5) (c) of the Presidential Elections Act.
(c) Made abusive insulting and or derogatory statements against the petitioner, F.D.C and other candidates contrary to S.24 (5) (d) of the Presidential Elections Act.
(d) Made exaggerations of the Petitioner's period of service in the government and the reason why he was removed from the several portfolios your petitioner held in government and he also variously ridiculed the petitioner contrary to S.24 (5) (e) of the Presidential Elections Act.
(e) Used derisive or mudslinging words against the petitioner.
(f) Used defamatory and or insulting words contrary to section 23(3) (b) of the Presidential Elections Act.
(g) The 2nd Respondent Statements which were false either knowingly at a rally or recklessly namely:

(i) That the F.D.C frustrated efforts to build another dam.
(ii) That I was working in alliance with Kony, PRA and other terrorists.
(iii) That I was an opportunist and a deserter.

12. The Petitioner further contends that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval;

(a)
Bribery of voters just before and during the elections contrary to S.64 of the Presidential Elections Act.
(b) Attempting and interfering with the free exercise of the franchise of voters contrary to S.26(c) of the Presidential Elections Act.
(c) By agent procuring the votes of individuals by giving out tarplins, saucepans, water containers' salt, sugar and other beverages and making promises of giving such beverages.
Annexed to the petition was the mandatory affidavit required by Rule 4 (7) of the Presidential Elections (Election Petitions) Rules, 2001 sworn by the Petitioner. Subsequently the petitioner lodged two supplementary affidavits together with nearly 200 other affidavits from his witnesses in support of his petition.

In his answer to the petition, the 2nd respondent denied that the petitioner had any real or genuine grievous within the meaning of Article 104(1) of the Constitution or S 59 (1) of the PEA. He asserted that on 25th February, 2005, he was validly elected as President and no recount was called for and that he was elected in accordance with the principles laid down in the PEA and denied most of the allegations made against him, contending that the entire presidential electoral process was conducted under conditions of freedom and fairness. He admitted making certain statements during his campaign and reproduced the alleged statements in his affidavit accompanying his answer to the petition which he deponed he actually made.

In answer to paragraph six of the petition, both respondents contended that there was no question to be referred to the Constitutional Court and asserted that this Court has exclusive jurisdiction to inquire into and determine all questions arising in a presidential election petition.

There are two matters I ought to mention at this stage. The first relates to election monitors or observers. Before the elections, the first respondent accredited a number of local and foreign institutions or groups of individuals as election monitors or observers. The prominent foreign groups are the Commonwealth election observers group and the European Union team. They

monitored the electioneering process before the election day. They observed the voting and in some cases the announcement of the election results. They issued preliminary reports R3 and R2 respectively on 24/2/2006. Among the local monitors/observers are (1) Democracy Observes Group (Demogroup), Human Rights-network (Hurinet), Foundation for Human Rights Initiatives (FHRI). These in various ways monitored the preparations for elections, the electioneering, the voting and the announcement of results. Each of these groups produced its own report on the election process and the declaration of results. I shall be referring to these reports in the course of these reasons. Naturally each candidate or his or her party monitored the elections in their own way.

The second matter to be noted is that the Commission formed a National Electoral Liaison Consultative Forum (NELCF) which was chaired by one of the Commissioners, Mr. Steven D. Ongaria. Apart from him, some officials of the commission were included. These were the Head of the Commission's Legal Department, its Public Relations officer, a Senior Elections Officer and an Electoral Liaison officer. Each of the political parties was, or was expected, to be represented by two persons on the NELCF. Replicas of NELCF were supposed to be formed at District level. The purpose of NELCF was, according to Commissioner Ongaria, to exchange ideas and resolve challenges related to the Presidential election. NELCF held its first meeting on 20/12/2005. That was some time after electioneering had started.
The Petitioner's counsel were led by Mr. Dan Ogalo Wandera and his deputy was Mr. John Matovu. Other members of the team included M. Mbabazi and Y. Nsibambi.

The first respondent was represented by a team led by Mr. Lucian Tibaruha, the Solicitor General. The other members included Mr. Joseph Matsiko, Ag. Director of Civil Litigation and Mr. Peter Kabatsi. Dr. Joseph Byamugisha led a ten team of Counsel to represent the second respondent.

The following issues were framed for decision by this Court.
1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act in the Conduct of the 2006 Presidential Elections.
2. Whether the said Election was not conducted in accordance with the principles laid down in the Constitution, Presidential Elections Act and the Electoral Commission Act.
3. Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.
4. Whether any illegal practices or electoral offences alleged in the petition were committed by the 2nd Respondent personally or by his agents with his knowledge and consent or approval.
5. Whether the petitioner is entitled to the reliefs sought.

Before I discuss these issues, I should say something about the question of whether an annulment of a presidential election can only be made under the provisions of subsection (6) of S.59 of the PEA. This arises from the interpretation to be placed on Subsection (2) of Section 1 of the PEA. It states that "The Commission Act shall be construed as one with this Act." It seems clear to me that the ECA has to be considered along with matters stated in subsection 6 of S.59 of the PEA in deciding on annulment.

PRELIMINARY MATTERS

1. REFERENCE TO THE CONSTITUTIONAL COURT

In paragraph 6 of his petition, the petitioner contended that the provisions of Section 59(6) (a) of the Presidential Elections Act, 2005 are contrary to or inconsistent with the provisions of Clause (1) of Article 104 of the Constitution.

At the beginning of the hearing of the petition, Mr. John Matovu, one of the petitioner's counsel, moved court to refer the matter to the Constitutional Court for interpretation under Article 137 (5) (b) of the Constitution. Mr. Kabatsi, second counsel for the first respondent and Dr. Byamugisha, lead counsel for the second respondent, opposed the application. We rejected the application and promised to incorporate our reasons in our judgment. In our decision which we delivered on 6th April, 2006, we set out reasons why we rejected the application. For emphasis, I wish to add that Article 137 sets our two main scenarios under which the Constitutional Court may be moved.
The first scenario is provided by Clause (3) of the Article and the second scenario is provided for under Clause (5) of the same Article.

The two clauses read as follows.
137 (3) Any person who alleges that -
(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
(b) any act or omission by any person or authority,
is inconsistent with or in contravention of any provisions of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.
137 (5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a Field Court Martial, the Court-
(a) may if it is of the opinion that the question involves a substantial question of law; and
(b) shall if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this Article.
Under Clause (3) any aggrieved party can petition the Constitutional Court on matters stipulated by

the clause, whereas under clause (5) there is a condition precedent which is the existence of court proceedings.

Clearly under clause (3) the right of the petitioner (or any other person) to challenge S.59 (6) (a) of the PEA by petitioning the Constitutional Court was in existence before filing this Presidential Election Petition. He was, or should have been, aware of the alleged inconsistency before the Presidential Election was held on 23/2/2006 and before this petition was filed. The question as to the interpretation never arose in the proceedings of this petition.

In my considered opinion, Clause (5) can be invoked only in instances where, during the progress of a case in any civilian court, either the Court on its own, or a party, discovers any question requiring an interpretation of the Constitution. I think that the scope of the right is narrower under clause (5) than under clause (3). This is because under Clause (5) a specific question which arises in a proceeding must be identified and framed before it is referred to the Constitutional Court. It goes there as a reference. In this case, clause (3) was not applicable because the alleged right to petition existed long before the petition was filed and arose, not during the hearing of, but independently of, the petition. In my opinion to adopt the course for which the petitioner asked can easily lead to abuse of court process and ultimately even to undue delays in disposal of cases filed in court.

I do not think that the framers of our Constitution intended that a petitioner had two alternative ways by which to institute a petition based on allegations of inconsistency or contravention as suggested in this petition.

This objection is in substance similar to objections raised by respondents in the Zambian's Presidential Election Petition SC.2/EP/01/02/03 of 2002 (Anderson Kambela Masoka, Lt.Gen.S.Tembo and G.W.Myanda Vs. Levy Patrick Mwanawasa, theElectoral Commission and Attorney-General) which was cited to us by Dr. Byamugisha. The respondents challenged the jurisdiction of the Supreme Court of Zambia to hear and determine the three consolidated Presidential Election Petitions partly on the grounds that because the petition had not been heard and determined within the limitation period of 180 days stipulated by law, the Supreme Court had no jurisdiction to hear it after the lapse of 180 days since it was filed.

Under Article 41(2) of the Zambian Constitution,

> "(2) Any question that may arise as to whether:
>
> (a)……
>
> (b) any person has been validly elected as president under Article 34……..
>
> shall be referred and determined by the full bench of the Supreme Court."

The Supreme Court held that this provision clothed it with mandate to determine whether any person had been validly elected as President even after the expiry of the limitation period. The point was really that it was only the Supreme Court of Zambia which must dispose of the Presidential Election Petition. This is similar to the position in Uganda.

2. OBJECTIONS TO ADMISSIBILITY OF CERTAIN AFFIDAVITS

The petitioner tendered evidence by way of affidavits from over nearly 200 deponents, himself inclusive, in support of his allegations. Likewise, the two respondents tendered evidence by way of affidavits including affidavits from officials of the first respondent and the affidavits of the second respondent personally. They total to nearly 300 affidavits.

Counsel for the two respondents objected to the admissibility of very many of the affidavits tendered by, or on behalf of the petitioner, after the petitioner's counsel had presented the case of the petitioner.

Mr. Didus Nkurunziza, one of counsel assisting Dr. Byamugisha, made submissions on behalf of counsel for the two respondents, in support of the objections. For purposes of these objections, Mr. Nkurunziza classified the objectionable affidavits into four categories and advanced several arguments in support of the objections to each category of affidavits. Normally the objections should have been raised before the general submissions of counsel for the petitioner were made. This was not possible because of the time constraints imposed by Clauses (2) and (3) of Article 104 of the Constitution and by S.59 (2) and (3) of the PEA. So we allowed counsel for the respondents to belatedly raise the objections to the various affidavits. Of course this method has inherent risks.

The four categories are:

- Affidavits which contravene the law;
- Affidavits which do not disclose a cause of action or evidence of a complaint.

The belated raising of objections to affidavits in the first three categories though made for convenience owing to the short time frame within which the petition had to be decided, present difficulties of sorts. These affidavits are part of the evidence to which the respondents have replied by corresponding affidavits. Those replies in effect clarified some points which were bases of objections. As it will appear later in these reasons, an example is the affidavit of Salaamu Musumba to which the second respondent replied.

2.1 AFFIDAVITS CONTRAVENING THE LAW

Mr. Nkurunziza submitted that by virtue of S.67 (1) of the Advocates Act, it is mandatory that any instrument that has been drawn or prepared relating to any legal proceedings must bear the name

and address of the person who draws it. He singled out eleven affidavits. Seven of them purport to have been prepared by: M/s Mwene-Kahima & Mwebesa, Advocates, of Mbarara and four other affidavits which do not bear any endorsement on them. Learned counsel urged us to ignore all the eleven affidavits on the basis that they are forgeries because

Mr. Mwene-Kahima, the Managing Partner of the firm, swore an affidavit claiming that his firm did not draw nor prepare those eleven affidavits nor any other affidavit. On behalf of the petitioner, Mr.Dan Ogalo Wandera prefaced his reply to this point of the first category of affidavits that Mr. Nkurunziza's submission raises a legal issue as well as serious ethical issues. On the legal issue, learned counsel concurred that it is mandatory that instruments must be endorsed as stated by Mr. Nkurunziza but submitted that all the contested affidavits have been endorsed by the firm of Mwene-Kahima and Mwebesa, Advocates. Therefore the legal requirements were met. So the court should rely on those affidavits.

On the ethical issue, Mr. Ogalo Wandera contended that the affidavits were drawn in the Kabale Branch of Mwene-Kahima & Mwebesa, Advocates, where a Mr. Murumba works and from where that advocate prepared the affidavits. Mr. Ogalo intimated that Mr. Murumba was in Court and was prepared to give evidence in court to support this fact.

Subsection (1) of S.67 of the Advocates Act reads this way:

"Every person who draws or prepares any instrument to which S.66 applies shall endorse or cause to be endorsed on it his or her name and address; and any such person omitting to do or falsely endorsing or causing to be endorsed any of such requirements commits an offence".

Does the provision say, such instrument must not be relied upon in court? The answer is no.

I have perused the contested affidavits sworn by Turyasingura Joseph, Kainamira Bernard, Byaruhanga Johnson, Turyamureba Mande, Katwakura Edward, Twinomukago Vanice and of Ensinikweri Godfrey, and noted that although the address of the firm (Mwene-Kahima, Mwebesa and Co. Advocates) is given as P.O Box 343, Mbarara, these affidavits show that they were in fact sworn before a Magistrate in Kabale, apparently where the seven deponents originate. This appears to support Mr. Ogalo Wandera's submission that the affidavits were prepared in Kabale. I accept Mr. Ogalo Wandera's statement that these affidavits were drawn in Kabale and were endorsed by the firm. The fact that a Mr. Murumba, the lawyer who prepared them, was available in court to swear to their authenticity supports their genuiness. I have also perused the other four affidavits deponed by Aryeija Simon, Byaruhanga Charles, Mayombo Dick and Asiimwe Ivan Kasigaire which again bear the seal of Kabale Magistrates Court as the Commissioner administering the

Oath. These four do not bear the endorsement of the firm or person drawing them.

In my view the omission to endorse these four affidavits with the name of the person or firm which prepared them is not fatal. They are not rendered inadmissible merely because of absence of endorsement. The above provision does not prohibit use of such affidavits in court. I do not think that it is proper to reject these four affidavits merely because of non-endorsement. Forgery generally means making a false document in order that it may be used as genuine. I am not persuaded by Mwene-Kahima's affidavit that these affidavits are forgeries. He is vague about when his two assistants left his firm. In any case the breach of the law complained of is just a technicality. It is not fatal. Does the fact that these affidavits were drawn by a firm of lawyers not now representing the petitioner render them inadmissible? No objection was raised based on that ground. Whatever the case that is immaterial. They have been placed on record by the petitioner.
I would not reject these eleven affidavits. In my opinion, each affidavit should be evaluated along with the other affidavits presented by both sides so as to determine its evidential value.

2.2 AFFIDAVITS THAT DO NOT DISCLOSE OR PROVE A CAUSE OF ACTION OR ANY EVIDENCE OF COMPLAINT

Mr. Nkurunziza contended that many affidavits sworn in support of the petition do not prove a cause of action or are not evidence of any complaint. Such affidavit like that of deponent Alegi Gilbert of Nebbi District complain about disenfranchisement. Each deponent swore that they registered as voters, mentioning stations where they were registered. They deponed that when they visited the polling stations on the day of voting, their names were not in the voters register. Counsel attempted to fault the deponents on the basis that each of them should have verified during the period of 21 days display of the register whether or not they were on the register. Learned counsel, therefore, asserted persistently, that these deponents have no right to fault the first respondent for the absence of their names from the register.

Mr. Nkurunziza relied on the two supplementary affidavits sworn by
Mr. Nsimbi Charles, both of which were sworn on 22nd March 2006.
Mr. Nsimbi is described as the Head of Voter Registration at the Electrol Commission (1st Respondent) where his duties include registering voters, maintaining the voters register and issuing voters cards. In his affidavits both the original sworn on 21/03/2006 and the said two supplementaries, he states that he examined his records including the national register of voters and found that:

Many of deponents who complained that their names were not on the register were actually on the register.
(May I point out here that during the meeting of the National Electoral Liaison Consultative Forum (NELCF) on 12th January, 2006, political parties representatives complained that the Commission display officials keep the registers in their houses and that tribunals were not active. This is reflected in the minutes annexed to the affidavit of Commissioner Ongaria).
Deponents who complained that their names were not on the register had not been registered at all or were registered at stations different from where they claim they should have been registered.

Mr. Nsimbi had on the previous day (21/03/2006) sworn another rather lengthy affidavit. In it he pointed out that the voters register was updated from 29th September to 30th October, 2005. This was followed by display of the register from 22nd December 2005 to 11th January, 2006, which was eventually extended to 17th January 2006. The objective of the display "was to enable persons who had registered to check and confirm the corrections of their particulars". He then lists about four different forms each of which would be completed for a particular purpose.

What puzzles me in the display exercise, though, is first the period of display, i.e., 22ndDecember 2005 to mid – January 2006. This is a period when Ugandans are normally busy on Christmas and New Year activities. This is a notorious fact. I have known many people, both low and high, who abandon offices at this time to prepare for, and participate in Christmas and New Year holidays and festivities. It would be a miracle to expect ordinary Ugandans to religiously inspect registers during such period or indeed to expect display officials to be in one place all the time displaying the registers. This is particularly so, in as much as there does not appear to have been reasonable and adequate education of the public about the registration and the display exercises. Many Ugandans watched and heard the "education exercise" on TV and radios occasionally. Again occasionally one could see advertisement in a news paper. How accessible are these facilities to ordinary voters who must be the majority?

Mr. Ogalo Wandera responded to the objection to the said affidavits generally during his rejoinder to the general submissions of counsel for both respondents.
The gist of his contention in support of the deponents who complained of disenfranchisement is that evidence in the affidavits shows massive disenfranchisement of voters in such districts as Busia, Iganga, Kampala, Mbale, Nebbi, Sironko and Pallisa. He relied on the affidavits of the deponents. These include Atukwage Rogers (Mbarara), Obedigu Richard (Nebbi) Nafula Christine and Namakula Sarah (Idudi), Kagoya Fatuma and Kabode Abdu (Iganga). The question of the

disenfranchisement is relevant to the first and second issues framed for decision by this Court. In any event, the two supplementary affidavits of Nsimbi largely do support the claims of the deponents. He was obviously based in Kampala. He only gives explanations why names were removed or were missing from the register. I do not, with respect, accept Mr. Nkurunziza's contention that citizens who have, for instance, applied for registration and in some cases obtained certificate of registration, should be faultered for not inspecting the register during the display, which display, as mentioned earlier, took place during the period of festivities. It is common knowledge that the display of registers was not all that smooth. Party representatives on NELCF complained that in some areas, display was not done daily or at particular places. In Nsimbi's supplementary affidavit (in Vol.8 in Para 5) he referred to the affidavits of Major (Rtd) Rubaramira Ruranga and that of L. Kizito.

There is no evidence anywhere showing that any of the voters who were removed from the register were afforded opportunity to show cause why they should not be removed. I note that the Commonwealth observers team observed and disapprovingly reported this aspect. Mr. Nkurunziza's faultering of the disenfranchised deponents reminds me of criticism of voters in Morgan Vs. Simpson (1974) 3 ALL ER.722, an English Election petition case where the result depended on the omission of voters to mark the ballot papers.

The case shows that a voter would go into one of a compartment and with the pencil provided in the compartment, place a cross (x) on the right-hand side of the ballot paper, opposite the name of the candidate for whom he votes. The voter will then fold up the ballot paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, before leaving the polling station.

Denning, M. R. who presided over the appeal in the English Court of Appeal stated this:-

Now those directions are more observed in the breach than in the letter. Rarely does a voter look to see that the ballot paper is stamped with the official mark. At least I never do. Rarely does a voter go back to the presiding officer and show him the official mark on the back. At least I never do. Often enough the polling station is not suited for it. It is so furnished that the natural thing is for the voter to go straight from the compartment to the ballot box and put his paper in it without showing it to the presiding officer. So I should think that the 44 mistakes were due largely to the fault of the officers in the polling stations and very little to the fault of the voters. If their votes are not to count, they are disfranchised without any realblame attaching to them."

Similarly, I think that Ugandan voters who complained were disenfranchised without any real

blame attaching to them.

During the hearing of the petition we noted from some Forms described as particulars of persons deleted from the Registers, which were annextures to Mr. Nsimbi's affidavit that the removals were all done on 16/01/2006 which was 37 days before polling day, and four days before the end of display which apparently ended on 21/1/2006. There is no evidence of how the discoveries of disqualified persons was made.

Mr. Nkurunziza relied on the provisions of Ss.23, 24 and 25 of the E C A to support his opinion that voters were properly removed from the register. Subsections (4) (5) and (6) of S.25 of the ECA are informative.

These subsections states:

"(4) An objection under Subs (3) shall be addressed to the returning officer through the Chairperson of the parish council of the person raising the objection.

(5) The returning officer shall appoint a tribunal comprising five members to determine objections received by him or her under subjection (4).

(6) The tribunal shall comprise-

(a) at least three members of the village executive committee, at least one of whom shall be a woman; and

(b) at least one each of the following –

(i) elders

(ii) chiefs.

I did not see any evidence of the objections except sheets indicating removals.

It is evident from the foregoing subsections that a parish council chairperson would be a major player in determining initially how objections would be made. "Parish council" is not defined. I can only infer that that parish council is basically the one set up under the Movement Act (Cap.261) perhaps read together with Local Government Act. Under S.22 (3), of the Movement Act, such council consists of all the chairpersons of the village movement committees. In my opinion the Local Government Act - Cap 243 - is not helpful.

The chairperson of the parish council who is also the chairperson of the parish movement committee is elected by the parish council. Parish movement committees are responsible to movement sub-county committee. And this manner of responsibility reaches the top of the National Executive Committee of the movement which is chaired by the leader of NRM who under the law current then is also the President of the Country and their party's Chairman. So removal of voters from the register initiated, as in this case, at parish level by an official of the movement raises grave suspicions. I say at this level because the forms attached to Mr. Nsimbi's affidavits alluded to

earlier, show that the persons who recommended the removals were RC Officials and the RC's stamps on each card clearly shows this. These same recommenders are the same persons who sat on the committee (almost uniformly consisting of four members instead of five) which recommended to the returning officers the removal of any person. Clearly, according to Mr. Nsimbi, the removals were done as recommended by the Parish Tribunals. None of the persons whose removals were done appears to have ever been made aware of the removals. Since subs (8) of S.25 of ECA provide for review of decisions of tribunals, my opinion is that such reviews could normally be made at the instance of a person affected by the removal. Such a person cannot challenge his/ her removal of which he/she is unaware. So they were condemned unheard contrary to rules of natural justice.
Without going further into this matter, I think that the whole exercise was tainted with unfairness from beginning to end. In my considered opinion, therefore, the removal of the deponents was against the principle of the right to vote which is anchored in the Constitution [Article 1 (4)] and Article 59 (ii)]; S.19 of the ECA and S.2 (1) and 30 (4) of the PEA. The affidavits in my view disclosed a cause of action.

2.3 AFFIDAVITS WHICH CONTAIN STATEMENTS THAT HAVE NO BASIS OR ANY PROBATIVE OR EVIDENTIAL VALUE.

Mr. Nkurunziza contended that these are affidavits which contain generalised allegations such as wide spread intimidation and wide spread bribery yet deponents did not have instances of personal knowledge of such wide spread activity. Learned counsel singled out para 10 of Ruzindana's affidavit and para 16 of Kamateneti Ingrid Turinawa affidavit. Counsel contended that these two witnesses did not indicate how they personally knew the matters alleged. Unfortunately, Mr. Nkuruzinza did not allude to the many related affidavits from Ntungamo District from where Ruzindana hails or from Rukungiri District where Kamateneti was based at the time material to this petition.

It is true that paragraphs of the affidavits of Ruzindana and Kamateneti are on the whole drawn in general terms. However, Ruzindana explained in the affidavit, for instance, how he was an MP of Ruhama Constituency where he contested for re-election under FDC (para 2) and was conversant with facts relating to elections in the Ntangamo District because he was a candidate in one of the constituency there and the petitioner was his presidential candidate. He indicates in para 3 that he was a member of FDC National Campaign Committee for the petitioner in charge of Research and was Deputy Secretary General. In that paragraph 10 complained of by Mr. Nkurunziza, Mr. Ruzindana shows that the information about countrywide spread of payment of Shs 50,000/= to all LC 1 chairpersons is based on his survey which he carried out among all his District coordinators

that there was countrywide distribution of the money. Indeed Annexture R2 AI (infra) supports Ruzindana as regards money distribution.

In the case of Kamateneti, she states in para 1 of her affidavit that "she was the National Secretary for women FDC." In Paragraphs 3 and 4 she averred as follows:

"3. That on the eve of the elections, the FDC District Election Task Force put in place a team of monitors to go around the District (of Rukungiri) to monitor on election and report to the District Task Force what was happening at various polling centres. The office also provided video camera to the team that was to cover Rukungiri Town Council, Nyarusanje and Nyakishenyi Sub counties.

4. That on the election day the 23rd February 2006. I sat in the FDC office to receive reports from our FDC monitors".

In the subsequent paragraphs, Kamateneti sets out what she received from FDC monitors and agents. In one instance she received information of pre-ticking of ballot papers in favour of the second respondent and the candidates of NRM who were contesting other positions. As a result she and the petitioner made a complaint to the District Returning Officer who caused his Assistant Returning Officer and the District Registrar to investigate the complaint. These two apparently took half-hearted remedial action eventually.

In the circumstances of this petition, it cannot be said that the affidavits have no basis or value. I think that the proper approach is to evaluate these affidavits alongside those of the respondent's affidavits in reply in order to establish the credibility of the deponents on related facts. Obvious hearsay should be ignored.

Mind you, there were lamentations during the hearing of the petition about the short time available within which parties were able to assemble evidence. While shortage of time is no good excuse for shoddy work, such complaints if genuine, must be taken into account in assessing the value of evidence available.

2.4 AFFIDAVITS SPECIFICALLY REFERRED TO BY PETITIONER'S COUNSEL.

Mr. Nkurunziza referred to the affidavit of Pte. Barigye. Learned counsel dwelt on it and referred us to the counter affidavits from the respondents' six witnesses whose purpose was to contradict Pte. Barigye and show that he was unreliable. They are all soldiers. Two of them (Brig.Mukasa and Capt. Ndyabagye) were Barigye's superiors in the army. This submission on this category of affidavit is to be considered later at the appropriate place in the course of my discussion of each of issues No.1, 2, 3 and 4. The contentions of Mr. Nkurunziza really concern evaluation of the

credibility of witnesses. For instance he contends that affidavit refers to both ballot papers and registration cards. I think that the context is important in understanding what Barigye referred to. If Barigye had given oral evidence, or if he had been cross-examined on his affidavit, his credibility would have been better assessed, I think.

Before I leave the question of objections, I want to refer to a passage in the Presidential Election Petition Judgment of the Supreme Court of Zambia to which the respondents' counsel referred in relation to the standard of proof. It is an internet copy. This is A.K.Mazoka & 2 others Vs P. Mwanawasa & 2 others (supra). Apparently, there, in Zambia, the petitioners had led evidence which in part was a departure from the pleadings (petitions) and so partly raised a new cause. Counsel for the respondents cross-examined the petitioners' witnesses at length on those new matters and apparently indeed adduced evidence in rebuttal of the new matters. Much later during submissions, the respondents' counsel objected to the admissibility of, or reliance by the Court on the said evidence. The Supreme Court alluded to some of its previous decisions on the issue and concluded that:

"In our considered opinion, the respondents having not objected to evidence immediately it was adduced, this Court is not precluded from considering that evidence. At the end of the day, the issue will depend on the weight the court will attach to the evidence which was let in on unpleaded issues. At this late stage, we cannot therefore exclude the evidence adduced and allowed without objection. This, however, does not mean that we condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case the court will always exclude matters not pleaded more so where an objection has been raised."

With respect, I think that this passage equally applies to our situation in this case. The main differences are two. First, in Zambia, witnesses gave oral evidence which was supplemented with documentary evidence. In the present petition evidence was based on affidavits of deponents for each side. In our case instead of cross-examining witnesses for the petitioner, the respondents filed counter affidavits. In effect parties left the court to assess the evidential value of the competeting affidavits. The second distinction is that in Zambia, the trial of the petition lasted a long time and so the respondents' counsel apparently had more than ample time to raise objections which they raised after objectionable evidence had been received by court. In this petition, every side was under pressure to present their case within the limited time allowed by law. However the essence of the holding by the Zambia Supreme Court is sound and persuasive on this particular point of raising objection belatedly.

In the Presidential Election Petition No.1 of 2001 between the same parties virtually similar objections were raised as those raised by learned counsel in this petition. I said then and I say so

again that trial of election petition is governed by a special Act and special rules of procedure. See Order 45 Rule 4 of CPR. These laws emphasize expeditious disposal of a presidentional election petition. Therefore placing undue reliance on technicalities can lead to unwarranted injustice.

CONSIDERATION OF THE ISSUES

The five issues were argued separately.

Counsel for the petitioner first argued issue 4, followed by issue 1, 2 and then 3. Issue 5 which is about reliefs was argued half-heartedly.

It will be noticed as I go along that evidence of many witnesses cuts across the first four issues. Certainly that is the case particularly in the cases of bribery, harassment, violence and intimidation. Evidence on these is from many parts of the country.

If I may mention instances of witnesses whose evidence cuts across the four issues: Examples are : Mr. Augustine Ruzindana, Mr. Jack Sabiiti, Ms Kamatenite, Mr.Turyasingura, Mr. Ozo, Mr. Ekanya, Mr. Katuntu of Iganga, Patrick Kitimbo, Iganga District.

I now proceed to give my reasons in support of my opinions on the issues beginning with the first issue. I would like to repeat what I said in my reasons in Presidential Election Petition No1 of 2001 on trial by affidavits. There are inherent problems in conducting the hearing of and deciding a petition of this importance on the basis of only volumes of affidavits and annextures thereto. Any experienced trial judge will agree that trying a case, or a petition, by way of oral testimony has obvious advantages. The impression which a trial judge gets from, for instance, observation of demeanours of witnesses, is totally missing from a trial based on affidavits only. Affidavit evidence is unlikely to elicit the bad out of a witness. Falsehoods are unlikely to be exposed easily. Oral testimony is particularly helpful because a court can intervene and seek clarification from a witness about what he/ she states. In this petition, like that of 2001, matters were not made any better because there were very many affidavits upon which counsel never commented because of limited time. Where any comments were made, comments were hurriedly made. Most affidavits were referred to en masse. Of course where trials are based on oral testimony, there is the fear of the consequences of witnesses not turning up in time or at all? I do not think that that would be good enough reason for not receiving oral evidence. I hope that the authorities concerned will consider these points and amend the relevant laws especially the PEA and rules made thereunder, so that future Presidential Election Petitions are tried on the basis of oral testimony or both oral and affidavit evidence with emphasis on oral testimony.

For conveniences, I will in some instances use the acronyms “PS” for polling station or stations, “PO” for presiding officer or officers and “RO” for returig officer(s).

THE 1ST ISSUE

WHETHER THERE WAS NON-COMPLIANCE WITH THE PROVISIONS OF THE CONSTITUTION, THE PRESIDENTIAL
ELECTIONS ACT AND THE ELECTORAL COMMISSION ACT IN THE CONDUCT OF THE 2006 PRESIDENTIAL ELECTION.

This issue arises from paragraphs 5 and 8 of the amended petition, especially the latter paragraph.8.

In our decision of 6th April, 2006, we found that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act (PEA) and the Electoral Commission Act (ECA) in the conduct of the 2006 Presidential Elections by the 1st respondent in the following instances:

(a) In disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote;

(b) In the counting and tallying of results.

It is fair to state that the Court's decision on this issue was a compromise position. This is illustrated by the answers which each of the members of this Court gave to both the 3rd and the 4th issues.

DISENFRANCHISEMENT

Mr. Dan Ogalo Wandera, lead counsel for the petitioner, first referred us
to paragraph 8 (a) of the petition in which the petitioner alleged breach of sections 19(3) and 50 of the ECA.

I have already reproduced it but for easy reference I quote it again:

"8 Your petitioner avers that the entire electoral process on the 23rd day of February, 2006 Presidential Election, beginning with the campaign period up to the polling day was characterised by acts of intimidation, lace (sic) of freedom and transparency, unfairness and violence and commission of numerous electoral offences and illegal practices contrary to the provisions of the Presidential Elections Act; Electoral Commission Act and the Constitution.

(a)Contrary to S.19 (3) and S.50 of the Electoral Commission Act, the 1st Respondent disenfranchised voters by deleting their names from the voters roll/register"

Mr. Ogalo argued that by reason of S.19 (3), a voter is entitled to vote in a place where he/she resides or he is registered. The provision read thus:

"19 (3) subject to this Act, a voter has a right to vote in a parish or ward where he or she is registered."

Learned counsel contended that during the 2006 presidential election names of many voters' were deleted from the register.

He relied on the affidavits of Major (Rtd) Ruranga Rubaramira as well as the affidavits of very many other deponents that were filed in support of the petition. The various deponents swore that they could not vote because their names were missing from the voters register. To the affidavits of Rubaramira were annexed a number of reports made by accredited election observers. These observers were accredited by the first Respondent to observe or monitor the electoral process and the voting. Among these were Commonwealth Observers, European Union, DEM-group, Hurinet Uganda, Foundation for Human Rights Initiatives (FHRI). Mr. Ogalo Wandera contended that the deponents proved the allegation of country wide disenfranchisement. Examples are deponents from the Districts of Bushenyi, Busia, Iganga, Kampala, Mbale, Nebbi, Pallisa and Ntungamo. Counsel contended that deponents had voters cards in some cases or registration certificates in other cases. Photocopies of these were annexed to the affidavits as exhibits. He contended that there is ample evidence proving this issue.

Mr. Joseph Matsiko, the Ag. Director of Civil Litigation, replied on behalf of the two respondents. He adopted the submissions of Mr Nkurunziza which the latter made as already indicated on the four categories of affidavits supporting the petition. Mr. Matsiko contended that the affidavit evidence tendered in Court did no prove the allegations in the petition.

Responding to Mr. Ogalo Wandera's submissions on para 8 (a), i.e., DISENFRANCHISEMENT, of many voters, Mr. Matsiko contended that the petitioner did not in his petition or in the accompanying affidavit indicate the number of voters who registered after his return from exile and who were disenfranchised. Nor did be enumerate the districts affected by this. Mr. Matsiko repeated again Mr. Nkurunziza's opinions and contended that the affidavit of Major Ruranga Rubaramira contains hearsay, is deficient, defective and unreliable. He cited in support the decision of this Court in Presidential Election Petition No.1 of 2001, [Col. (Rtd) Dr. Besigye Kizza Vs Electoral Commissions & Museveni Yoweri Kaguta] Vol.II Supreme Court Bound Volumes of the decision (Reasons of Odoki CJ, Karokora and Mulenga JJSC).

The learned Ag. Director of Civil Litigation contended that since Major Ruranga Rubaramira did not, in his affidavit, name the FDC agents from whom he received reports about disenfranchisement, such agents even if they swore affidavits cannot corroborate the Major's evidence.

Mr. Matsiko, like Mr. Nkurunziza, argued that a voter's right is shown by the presence of a voter's name on the register and for this he relied on S.19 (1) (a) of the ECA. And like Mr. Nkurunziza, Mr. Matsiko contended that voters should have inspected the register during the display period to

ascertain whether or not they were in fact on the register. He referred to several paragraphs of the affidavits of Dr. B.Kigundu, the Chairman of 1st Respondent and, that of Mr. Nsimbi, an official of the commission, in which the latter attempted to show the position of the register and why some voters were removed. Mr. Matsiko argued surprisingly that the allegations of disenfranchisement were not proved. He prayed that we answer this issue in the negative.

I begin with the first Article of our Constitution which proclaims the people as sovereign and also proclaims the principles of regular, free and fair elections. In terms of clause (4) of the Article,

"The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."

Clearly therefore, the people have a constitutional right to freely participate in choosing who is to govern them. The people's right to vote and the responsibility of the state to help citizens to participate in voting is emphasised in Article 59 of the same Constitution. That Article states:

(1) Every citizen of Uganda of eighteen years of age or above has a right to vote.
(2) It is the duty of every citizen of Uganda of eighteen years of age or above, to register as a voter for public elections and referenda.
(3) The state shall take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote.

Clearly the right to vote is constitutional and the state is commanded by the Constitution to ensure that all citizens qualified to vote register and exercise their right to vote. On the face of it, it appears to me that S.19 of the Electoral Commission Act curtailed the citizen's right by stipulating that they can only vote where they originate or reside. For it seems to me that voting where one originates or resides is really a matter of convenience. It cannot be used to disenfranchise a potential voter once he has registered or applied for registration in a particular area of Uganda.

I am not persuaded by the explanations given by Mr. Nsimbi that some voters had to have their names removed because of the recommendation of Parish Councils. Disenfranchising citizens without affording them opportunity to be heard on the matter appears to me to be contrary both to the letter and the spirit of Article.59 of the Constitution.

I do not accept contentions of both Mr. Matsiko, and Mr. Nkurunziza that the affidavits of major Rubaramira and other deponents are valueless and do not support the complaints of the petitioner nor of the voters who have sworn the affidavits. About 90 deponents were able to swear affidavits in support of the complaints about disenfranchisement from different parts of the country. Some

local election observers groups as well as the European Union observers report (R2) support the major.

Rubaramira indicated what his status was at the material time, i.e., the FDC National Electoral Commissioner. His claim that he was involved in monitoring the electoral process throughout the country was not disputed. His other claim that he made complaints to the first respondent about irregularities was not denied. Indeed the fact of removal from the register, at least of some voters, is acknowledged in their respective affidavits by both Dr. Kigundu and Mr. Nsimbi. These two officials rely on technicalities to support their stand that the removal was according to law. They appear not to appreciate that the Supreme law of the land, namely the Constitution requires the state to enable citizens to register and to vote. An official should not hurry to disenfranchise a citizen without a sound basis.

Apart from Major Ruranga Rubaramira, volume I(b) of the affidavits of the petitioners' supporters shows that at least 54 were disenfranchised. Wetaka Paul, Siroko District visited no less than 6 stations on 23/2/2006. His name was missing. Similarly Vol.2 (d) has affidavits of no less than 41 witnesses to the same effect. These witnesses are from different parts of the country.

The deponents' names were removed without being afforded opportunity to show cause why they should not be removed from the register. Secondly as observed earlier, the tribunals which initiated the removal exercise do not appear to have been independent or transparent in as much as half the members of the tribunals were members of Movement Parish Councils and who, according to the Movement Act, were members of the Movement of which the 2nd Respondent was its President. Here the question of fairness on the part of the tribunal is questionable. The Electoral Commission Act was enacted in 1997. It provided for objections to be routed through the Chairman of a parish council (which council is made up of executive committee of LCs). The Tribunal, according to S.6 of ECA, shall comprise- (a) at least three members of the village executive committee."

The forms annexed to Mr. Nsimbi's affidavit show that the tribunals that recommended removal of persons who had registered were made up of 4 members two of whom were RC officials. It is odd that these two RC officials were the same persons who recommended the removal of the voters (see annextures to Nsimbi's affidavit). Lack of transparency and fairness in the removal exercise is too obvious to be dwelt upon. I am amazed that those in charge of the policy of the PEA and the legislature which enacted the PEA 2005 never considered and remedied that obvious anomaly.

It may be true that the petitioner did not mention by name in his affidavit the voters who were removed. But his supporters have sworn affidavits, to which Mr. Nsimbi responded.

It is not unreasonable for the petitioner to claim that voters who registered after his return from

exile were mostly the ones who were deregistered. It is not unreasonable because the chairpersons of the Parish Council where deregistration occurred cannot be said to have acted with apparent impartiality in as much as they or members of their council (as official stamps show) were the same ones who recommended the removal. They simply endorsed their own recommendations!!

It puzzles me that this type of situation was allowed to go on up to 23/2/2006, the day of the Presidential Elections, despite the fact that the Presidential Elections Act was enacted in November, 2005, nearly 8 years after he ECA was enacted in 1997. The former Act provided for Presidential Elections under multiparty politics and, therefore, the employment of chairmen of Parish Councils (who are members of movement hierarchy) should have been corrected when the PEA 2005 was enacted so that a semblance of neutral tribunals were put in place.
I note from the minutes of the 6th meeting of the Nation Electoral Liaison Committee (NELCF) held on 12/01/2006 (see Commissioner Stephen Ongaria's affidavit – Annex ECG) that representatives of political parties complained at that late time that "display officials keep registers in their houses". It was also reported that "tribunals were not active on the ground hence fears of deleting genuine voters".

As stated earlier, the various reports of the monitors who were accredited by the 1st Respondent corroborate Rubaramira on the issue of disenfranchisement. These observers, such as the Demo group, had monitors at virtually every polling station. FHRI, Hurinet, (Uganda), the Commonwealth observers and European Union observers group reports all support Rubaramira in varying degrees. I have noted that the foreign observers were indeed over cautious in their reports about what took place. Rubaramira is also supported by the many deponents themselves to whom I have referred already, who were victims of disenfranchisement. Needless to say, I have to rely on the evidence before me in arriving at my conclusions.

Like Mr. Nkurunziza, Mr. Matsiko relied on reasons given by only three of the members of this Court in the 2001 Presidential Election Petition No.1 of 2001. The Court consisted of five members and each member gave reasons and relied on certain authorities to support his opinion on the status of the various affidavits where their reliability was questionable. On that occasion I held that even if some paragraphs of the affidavits might contain hearsay matters and even if a deponent did not specify the source of certain information contained in the affidavit, those were not sufficient grounds for declaring a whole affidavit defective or a nullity. In my reasons I referred to such cases as M.B. Nandala Vs Fr. Lyding (1963) EA 706, Mayers & Another Vs Akira Ranch (1969) EA 169, Zola Vs Ralli (1969) EA 691 and Rossage Vs Rossage (1960) I.W.R. 249. At page 15, I stated –

"I think that the inclusion of the words 'belief' or information." is in some cases superfluous and does not render each affidavit invalid, at any rate not the whole of each affidavit.
In my opinion it would be improper in this petition to strike out wholly affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavit can be severed from the rest of the affidavit without rendering the remaining parts meaningless."
I have not been persuaded that I was wrong in that opinion and that what I stated in 2001 does not apply to the affidavits of Rubaramira and other deponents in this petition.

It is because of these reasons that I agreed on 6th April, 2006, that the constitution, ECA and PEA provisions were violated when many voters were removed from the register and were denied their right to vote. It was an unjustified disenfranchisement.

COUNTING AND TALLYING OF RESULTS

In our decision of 06/04/2006, we held that there was non-compliance with the provisions of the Constitution, the ECA and PEA in the counting and tallying of the results. This point has an obvious bearing on multiple voting and ballot stuffing. In their report (R2) released on 24/2/2006, the European Union Observers state " Counting procedures were also generally followed in polling stations observed, although in over half of counts observed, recouncilliation did not take place at the start of the process and in close to half the cases, results were not immediately posted." Therein lay the danger. The petitioner alleged in para 8(b) to (d) of his amended petition as follows:

"8 (b) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda.
(c) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent failed to cancel results of polling stations where gross malpractices and irregularities took place in particular in the districts of Kiruhura, Manafwa and Pallisa.
(d) Failing to declare the results of the election in accordance with S.56 and S.57 (4) of the Presidential Elections Act ……. andElectoral Commission Act.

Section 32 of the Presidential Elections Act governs voting at the presidential election. According to subs (1) thereof,
" 32 (1) A person shall not vote or attempt to vote more than once at an election irrespective of the number of offices held by the person relevant to the election."
S.56 of the Presidential Election Act is concerned with the work of a returning officer. After adding

up and declaring results for each candidate, a returning officer must complete relevant return forms and thereafter transmit them to the Commission.

Mr. Ogalo Wandera relied on the second affidavit of Pte. Barigye, the affidavit of Major Rubaramira and of ninety other deponents as evidence proving the allegations that there were country wide practice of multiple voting, pre-ticking and ballot stuffing in favour of the 2nd respondent. That Barigye voted at least 5 times and had 16 Pre-ticked ballot papers which were ticked in favour of the second respondent. According to this witness many other soldiers did the same.
On Pre-ticking, multiple voting and ballot stuffing, there are affidavits of Karyarugokwe Ambrose, Komujuni Anna both of Rukungiri, Yowana Tebasobelwa, and at least forty other deponents from different districts who deponed about multiple voting, pre-ticking and ballot stuffing.

In respect of para 8 (d) of the petition, Mr. Ogalo Wandera referred us to Ss.56 and 57 and to the contents of the affidavit of Major General Mugisha Muntu and contended that the Commission is required to first receive (from returning officers) return forms, reports of the elections, tally sheets and declaration of results forms as set our in S.56 (2) of ECA to enable the Commission to ascertain, publish and declare the results in a presidential election. He submitted that in the instant petition the Commission declared the results before receiving the said documents. In that connection counsel relied on the information contained in the affidavit of Major General Mugisha Muntu. He also referred to the affidavits of Kamateneti Ingrid Turinawe and Kiroko Sam both from Rukungiri District: Kiroko was denied viewing the forms to verify their contents. Beti Olive.N.Kamya of Kampala District in her affidavit swore that there was a difference of 8,145 votes between the results noted by herself and what was announced by the electoral commission in respect of her constituency of Rubaga North for the petitioner. Ms. Edith Byanyima of Kiruhura District in her affidavit lists the irregularities she observed in Kiruhura District. I will later reproduce her affidavit in another context. These include interference in voting by security people, e.g., Captain Basheija. Other irregularities include presiding officers refusing to allow agents of the petitioner to observe voting or to verify declaration forms.
Kamatenite annexed a report by Mugume R.Kaginda, a Returning Officer. Counsel referred to Taaka Kevin (Busia District) to which were annextures of results and a report by an Assistant Returning Officer. This report details what happened. Taaka, was herself a candidate for women, Busia District M.P. She was the petitioner's coordinator and swore that in some polling stations presiding officers refused agents of the petitioner to see declaration of results forms.

In opposition, Mr. Matsiko contended that the allegations of ballot stuffing and multiple voting were not proved. He contended that Major Rubaramira's affidavits were contradicted by that of

Barigye about the number of cards produced by the latter. So the two witnesses should not be believed nor relied upon. He contended, correctly, that because of ballot stuffing in Pallisa District, results of elections in some 7 affected polling stations were cancelled. He argued again surprisingly, that there is no evidence of ballot stuffing or multiple voting.

Regarding failure to declare results in accordance with Ss.56 and 57 of PEA, as alleged in para 8 (d) of the Petition, Mr. Matsiko submitted that the petitioner did not prove the allegation. He argued that Subs (1) of S.57 does not provide any specific method of ascertaining the results and contended that the Commission has wide discretion to employ any transparent method to ascertain the results. He relied on Clause 7 of Article 103 of the Constitution for the view that the clause does not restrict the method of ascertaining. That clause reads as follows:
"The Electoral Commission shall ascertain, publish and declare in writing under its seal, the results of the presidential election within forty eight hours from close of polling."
He relied on the affidavit of Mr. Wamala, an official of the Electoral Commission, the 1st respondent, for the view that results can be received by telephone or fax and, therefore, these are among the means available for sending results to the commission. (From this last submission by Mr. Matsiko, he impliedly admitted that original documents setting out formal returns were not available to the Commission at the time the results were declared).

He referred to the affidavit of Mr. Nyakojjo Sam another official of the Commission, who deponed to the old and current methods of transparency in transmitting results. He argued that the holding of a meeting between the Commission and the representatives of participating political parties is evidence of transparency even though some of those representatives were unhappy with resultant decisions. He prayed that this ground should fail.
Mr. Matsiko ignored the affidavit of Major-General Mugisha Muntu whose responsibility at the National Counting Centre was to ensure that results were properly received, ascertained and declared according to the relevant law. The General shows in his two affidavits that the law was not followed.
Mr. Matsiko opined that because clause (7) of Article 103 does not specify a mode of ascertaining results, the 1st respondent was free to employ any mode of ascertaining the results. He thus appears to ignore the provision of clause (9) which provides that Parliament shall, by law, prescribe the procedure for the election and assumption of office by a president. Had he appreciated the import of Clause (9) he would have agreed that that law is the PEA which in S.56 governs the duties of returning officers. That section was enacted in 2005, very much later after telephones and faxes were in use. Yet that law did not refer to the use of these facilities by the Commission.

S.56 directs the returning officers to, immediately after adding the votes, declare the number of

votes obtained by each candidate, complete a return in the prescribe form and transmit to the commission:

Freedom & Fairness

In Para 8 (c) the petitioner alleged that Contrary to S.12 (e) and (f) of the ECA, the commission failed to take measures to ensure conditions of freedom and fairness during the electoral process. Intimidation and violence against agents of a candidate have a bearing on counting and tallying of results and validity of declaration of results forms.

Mr. Matsiko submitted that Kamatenite Ingrid Turinawe should not be believed on what she deponed to as having happened in Rukungiri District because her informers did not swear affidavits to support her. Similarly, and like Mr. Nkurunziza, he rubbished, as hearsay evidence, portions of the contents of the affidavits of Ruzindana and Salaam Musumba whose affidavits refer to bribery and intimidation. In the case of Ruzindana, he testified about wide spread intimidation and bribery by agents of the 2nd respondent in his constituency of Ruhama and Ntungamo District in particular and generally in the country. According to learned counsel the petitioner failed to adduce credible evidence to show that the presidential election was not free and fair.

MULTIPLE VOTING AND BALLOT STUFFING.

This has a bearing on the counting and tallying of results.

The two respondents have provided counter affidavits in reply to the affidavits supporting the allegations of the petitioner. The fact that there was multiple voting and ballot stuffing in some seven or so polling stations in Pallisa District in Eastern Uganda was incontrovertible. As a result the Assistant Returning Officer of the District nullified those results. Some of the perpetrators of ballot stuffing and multiple voting wore army uniforms as testified to by Tazanya Musitafa, who was FDC's Assistant Supervisor in charge of Buseta sub county, Pallisa District. He found Lt. Kaweru Daba and his paramilitary group terrorising and addressing people to vote for the 2nd Respondent. He is supported by among others, Tamwenya Charles. The group hounded out of the polling stations agents of other parliamentary and presidential candidates except those of the 2nd Respondent. Similarly, Bwire Swaib testified about the same Lt. Kaweru's group at another polling station where polling officials were giving out ballot papers to people not eligible to vote at the station. On polling day, Mpima Kolonerio, presiding officer, was held hostage in Pallisa by the same group as they stuffed ballot papers at Kabowa station. Of course, Mpima later, for some strange reason, swore another affidavit in support of the respondents to disown some of the statements he had stated in his earlier affidavit!! But other witnesses to what happened to him and to the polling process have given their affidavits in proof of what happened.

Dr. Katebariwe testified about what happened in Rukoni sub country of Ntungamo District in Western Uganda.

According to Dr. Katebariwe's affidavit, para 4-

"On polling day at Rukoni Sub country headquarters at around 10.00 p.m I found Bajungu, the Ag. Sub county Chief for Rukoni Sub County together with Katsigazi, the GISO, LDUs and other presiding officers opening ballot boxes and changing the declaration forms. I took a photograph of the proceedings copy is attached hereto enclosed as "A".

The photograph depicts what took place that night -
Rukoni Sub County is in Ruhama constituency of Mr. Ruzindana for which he was contesting for re-election. He was contesting with Mrs. Janet. K. Museveni, the wife of the second respondent. Witnesses refer to the heavy presence of the army especially the Presidential Brigade Guard soldiers.
Dr. Katebariwe must have been very brave. Despite being arrested and detained till 2.30 a.m, he lived to tell what he saw.
His evidence supports what Ruzindana deponed to in his own affidavit about intimidation and interference by army personnel and other security agencies in the electoral process.
Bajungu admits that he was the Sub county Chief and an election supervisor of Rukoni SubCounty. He also admits that he is in the photograph taken by Dr Katebariwe but claims simply that it was taken "while I was receiving sealed envelopes containing declaration forms from various presiding officers." Why should Dr. Katebariwe take a photograph of an official innocently engaged in simple innocent activity? GISO Katsigazi admits being at Rukoni sub county claiming-
"I only passed by Rukoni Subcounty headquarters to supervise the security situation in the area."
He did this at 10.00 p.m. Why? I have said before, and I repeat it here, that army or security personnel, other than police personnel, are not suitable for ordinary electoral duties. The functions should be discharged by police.

Dr. Katebariwe talks of extra ordinary presence of members of the Presidential Protection Unit (Presidential Guard Brigade) in Ntungamo District and in Rukoni Subcounty in Ruhama constituency. In that subcounty the Unit was under the command of Mugaga Stanley. The latter admits that he is a member of that PP Unit and that at the material time he was at Lushome in Rukoni. But he claims that he was attending to his sick parents. His parents may have been sick. However, I am not convinced by his denials.

I have no hesitation in accepting Dr. Katebariwe's honest account that officials of the 1st respondent, i.e, the presiding officers, the sub county chief, in collusion with GISO and LDUs

altered the declaration forms results in Rukoni Subcountry area and that PPU harassed the supporters of the petitioner. A similar graphic account is given by James Birungi Ozo who was FDC elections monitor in Kamwenge and Kyenjojo Districts. I will later reproduce his affidavit under issue No.3. He was badly roughed up by armed groups of LDUs, GISO who roamed about in the company of a man wearing NRM T-Shirt harassing voters at polling stations. The harassment of voters, ballot stuffing and multiple voting cut across Ntungamo District and the country as the evidence in the affidavits of witnesses from the Districts of Ntungamo, Kabale, Kisoro, Rukungiri, Bushenyi, Kihurura, Ibanda and Kamwenge (in the West), Nebbi and Arua in the North; Busia, Sironko, Mbale, and Iganga Districts (in the East) and Kampala and Mukono District (Central) illustrate.

Hon .Geofrey Ekanya, MP Tororo County, who was the Zonal coordinator for FDC in Tororo and Busia Districts, in his affidavit also depones about some of these malpractices. According to Ekanya, he and the RDC called Kasibante Dauda addressed rallies in Tororo and Butaleja Districts where the RDC intimidated supporters of the petitioner. The RDC and a woman called Felista Etyang told people who do not support NRM that the Army would be deployed to deal with them. According to Ekanya, two days before polling day, the Army was actually deployed in Tororo and Malaba Towns and in other areas in Tororo District. Military vehicles popularly called Mamba, were deployed and they cruised around Tororo and Malaba Towns and in the subcountries of Mela and Kwapa. (There are affidavits from Bungokho County, Mbale District, showing that a similar thing was at this time going on in Mbale District). This frightened the population and sent pervasive fear among voters which was no doubt emphasised by the roughing up of voters by Mr. Fox Odoi, a Legal Assistant to the 2nd Respondent.

Contrary to the assertion of the Chairman of the 1st respondent and of Messers Nsimbi and Wamala, there is ample evidence proving that the counting and tallying of results, before the declaration of the results were declared, was done contrary to the provisions of the ECA and PEA. Even if the evidence of Pte. Barigye is discarded, there is other ample evidence to support this finding.

Those were some of my reasons why I answered the first issue in the positive, namely, that there was non-compliance with the provisions of the Constitution, the PEA and the ECA in the conduct of the Presidential Elections of 2006.

ISSUE NO.2.

Whether the said election was not conducted in accordance with the principles laid down in the Constitution, Presidential Elections Act and Electoral Commission Act.

This issue arises from the petitioner's allegations set out in paragraph 8 of the amended petition which I reproduced earlier in these reasons. It will be noticed that evidence and arguments on the first and this issue are interrelated.

On 6th April, 2006, we stated that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act, and the Electoral Commission Act in the following areas:

(a) Tthe principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.

(b) The principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas.

I must again say that the decision of the court on this issue was a compromise.

Mr. Ogalo Wandera cited five principles which characterise a free and fair democratic election. These principles were summarised by Odoki, CJ, in the reasons which he gave in support of the court's decision in a similar petition between the same parties in Presidential Election Petition No.1 of 2001 in Besigye Kizza Vs Museveni Yoweri Kaguta and Electoral Commission.

At page 34 of his reasons for the judgment of the Court, the learned Chief Justice summarised these principles thus: -

These principles are indeed derived from the current Constitution and the Electoral Commission Act, 1997.

Thus clause (4) of Article 1 of the Constitution states-

" 1 (4) The people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda."

The right to vote is enshrined in Article. 59(1). The secrecy of the vote and the transparency of counting the vote and of the declaration of the results are set out in Articles 68 and 103 and are echoed in part VII, of the PEA, i.e. sections 48, 51, 54 and 57.

Mr. Ogola Wandera argued that the affidavits evidence of numerous deponents supporting the petition show that voters were deprived of the right to vote [see Rubaramira, Voters from the Districts of Kampala, Busia, Mbale, Nebbi, Ntungamo, Bushenyi, among others]. Learned counsel also argued that Ss.56 and 57 (4) of the PEA required that there is accuracy in counting votes and announcing results in a timely manner. In turn this requires that tally sheets be completed

immediately after, so as to reflect the votes cast for each candidate. There is need, for a returning officer to announce the results before transmitting details to the Commission. This is transparency. Learned counsel relied on the affidavits of Major General Mugisha Muntu in support of his argument that the presidential election results were announced before the Commission received the necessary documents stipulated in S.56 of PEA. Under that section, declaration forms compiled by presiding officers must be transmitted to the Commission for the purposes of announcing the national results. Counsel opined that Dr. Kigundu, the Chairman of the Commission, did not satisfactorily explain this in his affidavits.

I N T I M I D A T I O N

Mr. Ogalo Wandera contended that there was countrywide spread intimidation of voters. He singled out the killing of three people at Mengo by Lt. Magara of the RDC's office, Kampala, the intimidation of voters in Tororo District especially on the voting day (23/2/2006) by Fox Odoi, the Legal Assistant to the 2nd Respondent who in company of armed LDUs wielded a gun and fired it during broad daytime. This is deponed to by Hon. Ekanya in his affidavit.

Some of the threats, such as those in Bugiri were reported in writing by the petitioners' agent to the first respondent and to the CID Headquarters (See FDC letter dated 28th January, 2006) receipt of which is acknowledged by the two addressees. Apparently the 1st respondent did not reply to the letter.

The letter reads as follows: -

28th January, 2006.
The Secretary,
Electoral Commission,
Jinja Road,
KAMPALA.

The Officer-In-Charge,
Electoral Offences Squad,
Criminal Investigations Department,

KAMPALA.

Gentlemen,

RE: 1. CHARLES KITOSI LCIII, CHAIRMAN, MUTUMBA 2. SUBCOUNTY.
2. JOSEPH WANGIRA OSINYA NRM CHAIRMAN, BANDA SUBCOUNTY
3. TITO OKWARE SUBCOUNTY COUNCILOR, BUINJA SUBCOUNTY

4. *MUKISA JULIUS, BUSWALE SUBCOUNTY*
5. *OUNDO KUUCHA, MUTUMBA SUBCOUNTY*
6. *BARASA ONDYEGE, BANDA SUBCOUNTY*
7. *NGUABE MUHULO, BANDA SUBCOUNTY*

We refer to the above named persons who are candidate Museveni's agents in Bugiri District and wish to bring to your attention the following:
Each of the said agents is moving in the villages with exercise books. Each interviews a voter asking for his/her name, demand to see the voters registration card and ask who the voter is going to cast the vote for in presidential and parliamentary elections. All the particulars are then recorded in the exercise books. After this, the voter is informed that the agent has been asked by the Government to take these particulars to enable candidate Museveni and NRM make a decision about the voter.

The voter is left in no doubt that his or her decision will be subject of further action by the Government.

These actions are causing a lot of fear among voters and it is unfortunate that this countrywide exercise has not been stopped by the Electoral Commission.

Anyway, the abovementioned people are contravening section 26 of the Presidential Elections Act which prohibits interference with the free exercise of the franchise of a voter. The offence carries a sentence of three years imprisonment.
The National Resistance Movement has through its spokesman sought to justify these crimes by claiming that the party is carrying out a census. This means that these offences are being committed with the knowledge and approval of candidate Museveni within the meaning of section 59 (6) (c) of the Presidential Election Act.

We request you to immediately put a stop to these illegal practices.

Yours faithfully,
……
Secretary Legal/
Constitutional and Human Rights Affairs.

cc. Returning Officer
Bugiri District

The letter implies that the exercise was countrywide.

Indeed, this type of threats or intimidation is mentioned by Charles Byaruhanga an FDC candidate in Kabaale constituency, in Kamwenge District, in Western Uganda, where an NRM Chairman also registered FDC supporters. Byaruhanga talks about threats and briberies and involvement of RDC E. Byabarema. FDC supporters were assaulted. Byaruhanga reported some of the incidents to Obinga Onzi Gasper, the DPC, Kamwenge. This DPC admits receiving the report and took action.

On the secrecy of voting,
Mr. Ogalo Wandera relied on the contents of the second affidavit of Pte. Barigye and the counter affidavits filed by the respondents' witnesses

On the principle of equlity and fairness,
Mr. Wandera contended that his arguments about disenfranchisement apply to the violation of the principles of free and fair elections.
He contended that there was multiple voting and ballot stuffing throughout the country: see affidavits of Chabo Yasin of Yumbe District, Yowana Tebasobehwa of Sembabule District; Pte. Barigye, Judith Komuhangi and Muhwezi. J of Mbarara District, Assimwe. I .Kasigaire of Kanungu District; Mpiima K, a presiding officer in Pallisa, Bwire Swaibu of Pallisa District; Mubbala Dawsin, Kaigo Geofrey of Demogroup, Karyagowe.A, Komujuni.A. of Rukungiri District.

Mr. Matsiko for the respondents, contended that the allegations of ballot stuffing and multiple voting were not proved. He acknowledged that in Pallisa District, only seven (7) polling stations were affected and the Assistant Returning Officer (Higenyi) cancelled the results of those stations. As regards Barigye's affidavits and that of Major Rubaramira on multiple voting, Mr. Matsiko urgued court to ignore these two witnesses because they are inconsistent and contradictory to each other.

As regards the declaration of results in accordance with Ss.56 and 57 of PEA, Mr. Matsiko agreed that the Commission did not rely on the reports submitted by the Returning Officers. He argued that the petitioner had not proved the allegations in para 8 of his petition. He contended as he had done earlier that S.57 (1) of the PEA, does not provide a specific method of ascertaining results and therefore the commission has wide discretion to employ any transparent method to ascertain results. That clause (7) of Article 103 of the constitution does not restrict the method of ascertaining the results. Counsel relied again on the affidavits of Mr. Wamala in support of his contention that results could be sent to the Commission by fax or by telephone. Learned counsel submitted that in the absence of any law prohibiting use of faxes or telephones, use of these means for transmitting results by returning officers was legitimate.

On transparency, he relied on the affidavit of Rwakojo the Commission Secretary. He contended that representatives of political parties participated in some decisions relating to the electoral process.

The affidavit of Pte.Barigye, attracted replies from six military personnel including Brig. Hudson Mukasa, the Commading Officer of 2nd Division, Mbarara. The other army witnesses are Pte.E. Tumusime, Pte. Kizza Moses, Lt Balamu Byarugaba, Pte. Wandera Rogers and Captain Remeo Nyabagye. The thrust of their evidence is to show that Barigye is a liar.

The Brigadier, naturally, would not know a private soldier such Barigye. He depended on his records which showed that Pte. Barigye joined army in July, 2005 and not 2003. The Brigadier denies Barigye's claims and swore –

(a) That soldiers were not given orders to vote for any presidential candidate.

(b) That soldiers were not given more than one voters cards,

(c) That on voting day he never collected voters cards,

(d) His soldiers were never engaged in multiple voting and

(e) That none of the soldiers mentioned by Pte. Barigye were arrested and the Brigadier annexed to his affidavit some five photocopies of an alleged list of soldiers detained in lock up.

Pte. E Tumusime in his affidavit denied knowledge of Pte. Barigye and of being imprisoned as claimed by Barigye. He voted in Kanungu and not Mbarara. Pte. Kizza Moses contradicts the Brigadier on when Barigye joined the army. The Brigadier seems to imply that barigye joined in July 2005 whereas Pte. Kizza swore that he met Barigye during air defence course in October, 2004 at Nakasongola. However Kizza denied being involved in election malpractices in Mbarara. He also denied being imprisoned as stated by Barigye. Lt Byarugaba the itelligence officer, of 2nd Division, does not know Barigye and denied what Barigye attributes to him on voting day. Pte. Wandera Rogers supports Barigye to the effect that in 2003 the later was in the army undertaking basic training course and in 2004 they both went on training in Nakasongola from where Barigye went to Kadogo Community Polytechnic in Mbarara in 2005. He denies being involved in election malpractices or being imprisoned. Cpt. R.D.Ndyabagye does not know Private Barigye and denied briefing soldiers about voting as claimed by Barigye. He denied involvement in issuing voters cards and the arrest of Barigye and group as claimed by Barigye.

On the question of ballot stuffing and multiple-voting the evidence of Muhwezi J. (KakYEKKA polling centre) and Judith Komuhangi, in Mbarara District; of Asiimwe.I. Kasigaire at Nyakagyezi.I PS, (Kanungu District) of Bwire Swaib and Mubbala Dawson of Buseta subcounty, Pallisa District, and Kaigo Geofrey of Demgroup who saw people in yellow pickup and yellow T-

shirts take over a polling station, where Mr. Mpiima Kolonerio, a presiding officer at Kobolwa Polling station was held hostage by people in the same numberless yellow pickup. According to Kaigo the group went to Kampala Trading Centre twice in the morning, the group ordered voters to vote for only the 2nd respondent and Namuyangu. In the afternoon, they returned, took over the station and ticked ballot papers in favour of R2 and Namuyangu.

According to Mpiima Kolonerio, these armed people in the numberless yellow pick-up-

"Alighted from the vehicle, locked voters inside (a classroom) and returned to the room where I was, held me hostage, grabbed the ballot papers and started ticking against presidential candidate Yoweri Museveni and Parliament candidates Hon. Jennipher Namuyangu and Kamba Saleh."

These candidates were on NRM ticket. Namuyangu contested on women MP ticket while Kamba was for Kibuku county, constituency. Because of double dealing I do not place much relience on Mpiima's evidence. But there are other witnesses such as Kaigo and Tumwenya who saw what happened. Mpima Kolonerio was infact also proffered by the Respondents. He modified what he deponed earlier on 15/3/2006 in support of the petitioner. By drawing another affidavit for Mpiima, the conduct of the respondent's counsel tantamount to perverting justice. Tumwenya was the Petitioner's supervisor in Kibuku Sub County. Kairaka Chris saw a presiding officer pre- ticking ballot papers in favour of the second Respondent.

In addition to Mpiima Kolonerio, the respondents produced affidavits of ASP Oyuku Jimmy Anthony, Pallisa Police station and Wairagala Godfrey. The latter's affidavit is to rebut Bwire Swaib's statements that ineligible persons were allowed to vote and that he (Wairagala) and Kaweru voted many times. He admits visiting many polling stations in Buseta subcounty to give lunch money to agents of candidate Lt.Kamba Saleh. He travelled in the same vehicle with Kaweru and Wampanda Stephen. The DPC just denies receiving a complaint from Bwire about conduct of Wairagala's group. Kaano Samuel replied to Mubbala's affidavit denying that as a Presiding Officer at Buyalya PS, he issued more that one ballot paper to any voters. Kintu Polycarp and ASP Bamunoba Ubaldo responded to the affidavit of Tamwenya Charles. Kintu was PO at Nanoko PS (Kampala T.C) where at 1.50pm men in a yellow pick up went and grabbed a booklet of ballot papers for Presidential and Parliamentary Candidates, ticked the papers and instructed Kintu to put those papers in the ballot boxes. After 20 minutes Tamwenya appeared and demanded to know what had transpired. It then started raining till the time of counting votes. When the RO arrived at 4.40pm, Kintu told him that he considered those ticked papers as spoiled. He denied being held hostage by the people in the yellow vehicle. Cadet ASP Bamunoba denied receiving a report from Tamwenya (the petitioner's supervisor in Kibuku subcounty) about what went on at Nanoko (or

Mawako) polling station. He however responded to a telephone call report about commotion at Kobulwa PS where he found the Deputy District Registrary, the district CID Officer and the OC (police) Operations had impounded the vehicle of people causing the commotion. The Registrar had halted voting. That is the station where Mpiima Kolonerio was the PO. Indeed, Pabire Higenyi, the District Returning Officer, Pallisa District, confirmed in his affidavit that there were malpractices at Kobolwa, so he cancelled the election results of that station along with another PS. Higenyi swore his affidavit in reply to that of Anthony Adone who was the FDC Chairman in Pallisa District. The two affidavits relate to multiple malpractices. Both Adome (in para 11 of his affidavit) and Higenyi (in para 7 of his affidavit) agree that results of 2 stations were cancelled outright because of massive malpractices. They both also agree that in at least 5 other stations the number of votes received were over and above the number of registered voters. The results were therefore nullified. This evidence proves allegations of multiple voting in parts of Pallisa District.

Asiimwe Ivan Kasigaire in Kanungu District an agent of the petitioner at Nyakagyezi polling station in his affidavit talks about multiple voting by Councillor Margaret, by polling agents of the 2nd Respondent. Polling Assistants and the Constable were partisan and did the same, despite Asiimwe's protests. Biruingi Robert (PO) and his assistant Byarugaba .F swore identical affidavits (except for their names) by simply denying what Asiimwe stated. I have no reason to doubt what Asiimwe swore.

Ms Judith Komuhangi was petitioners polling agent in Lubiri K-L Polling Station, in Mbarara Municipality. In her affidavit she accused Cpt .Chris Ndyabagye, Divisional Intelligence Officer, Mbarara, for causing multitple voting and chaos at the PO. She also accused a Mrs. Bwita for causing ineligible voters to vote. As a result of protests by Komuhangi, there was a scuffle. It will be recalled that Pte.Barigye implicated this same Captain in multiple voting. In his affidavit, the Captain devoted most of his affidavit in denying Barigyes statements. He denies knowledge of Komuhangi and what she states in her affidavit and asserted that although he voted, thereafter he was involved in duties of Regional Election Security co-ordinating committee headed by RPC. I do not believe the Captain

There is Hon. Ekanya from Tororo District and Hon. Nandala Mafabi and Rev. Phabiano Muduma who swore about what took place in Sironko District. There are affidavits of Asiimwe, Mayombo of Nkikizi, in Kanungu District deponing about massive preticking and voting at night. Respondents offered affidavits of Mrs.J. Mbabazi, Hon. Amama Mbabazi and Muhwezi. L to contradicts these.

Oginga Godfrey was FDC chairperson, Kichwanba subcounty, Bushenyi deponed about what took

place there. There is James Barungi Ozo of Kamwenge District. Ozo was FDC elections monitor in Kyenjojo and Kamwenge Districts where he was terrorised by GISO and LDU armed groups who were accompanied by a man in an NRM T-Shirt.
The European Union Observers report (R2), annexed to Dr. Kiggundu's affidavit, shows that although these observers did not cover all the districts of Uganda, there was evidence of violence, threats thereof and intimidation as well as lack of level playing field.

There are many affidavits in further support of intimidation and violence. Samples are the affidavit of the Abdu Katuntu in Iganga District, and of the aforementioned Barungi Ozo. There is the affidavit of Augustine Ruzindana supported by affidavit of Dr. Katebariwe and Bisimaki in Ntungamo District. In that District we have affidavits of Karugaba Charles, Bakalema James, Kagumire, Alex Kamuhangire, Ssali Mukago, Kanyesige Kato and Kagonyera Constance. They all speak of harassment and, in some instances, assault and arrest by Hon. Mwesigwa Rukutana. He swore an affidavit in reply and infact admitted that Karugaba, Bakalema and Kamuhangire were arrested on 22/2/2006 by the ISOs and one of his own employees Kidokori allegedly because they were bribing voters or issuing FDC agents Appointment letters. The Hon. Mwesigwa Rukutana admits that on voting day, he caused these people to be transferred to and detained at Ntungamo Police Station. Kagonyera and Ssali Mukago in their affidavits talk about multiple voting, underage voting and violence by Mwesigwa Rukutana who indeed slapped A Taryatemba, the petitioner's agent, at Kanungu parish polling station, causing Kagonyera and Turyatemba to run away. Ssali Mukago was the petitioners coordinator in Bushenyi county (Constituency) Ntungamo District of which Hon. Mwesigwa Rukutana was the sitting MP and was seeking re-election. Ssali visited many polling stations where he noted malptractices such as multiple voting, underage voting and lack of secrecy and noted the chasing away of FDC agents. Though Hon. Mwesigwa Rukutana denies wrong doing, he, as stated earlier, admitted being involved in causing three deponents to be transferred to Ntungamo police station. He admitted his presence at Kagugu market polling station where he engaging in hot arguments with Bakulu Mpagi (RO), and an FDC agent Turyatemba about voting malpractices. I believe Ssali and Kagonyera in what they state and I find as a fact that the Hon.Mwesigwa Rukutana was involved in malptractices. The respondents offered the evidence of Bajungu Natuyamba, GISO Katsigazi Francis and Mugaiga of PPU to contradict Dr. Katebariwe. As shown later, Katebariwe's evidence is credible. Nathan Nandala Mafabi from Sironko District is supported by Rev. P. Muduma about intimidation and multiple voting in the same Sironko District. The affidavit of Jack Sabiti is supported by Rukandema, D.Katwakura.A in Kabale District. Mushebo, Nafula, Nabulayo, Khaitsa and others deponed about Musoola, in Bungokho, in Mbale

District. They were terrorised and intimidated by military personnel led by Mr. Joram Mayatsa, NRM Mbale District Chairman before and during election day. In his reply Mr. Mayatsa and Nashawo James Wateya, (a PO), denied the allegations. Mayatsa admitted that he was escorted by an armed police man. He makes no attempt to justify why he had to be escorted by an armed policeman, if election was being conducted under conditions of freedom or fairness. Indeed, Wateya contradicts Mayatsa by claiming that Mayatsa never went to his (Wateya's) polling station with an armed policeman.

As stated earlier, intimidation was widespread in the country. I have mentioned some of the witnesses in Mbarara District. Ms Damali Nagawa deponed about what happened in Mbarara. She was FDC Coordinator for Ruti Ward in Nyanutanga Division, Mbarara District. On 23/2/2006, she left home at 6.00 a.m for distribution of appointment letters to FDC polling agents and assign the agents to respective polling stations. She was in the company of an LC I Chairman. When she reached Ruti Trading Centre, she met with a GISO man and LDUs on a pick up. The GISO man told her that it was illegal for her to move around before 7.00 a.m. The LCI Chairman run away while Nagawa was arrested and taken to Mbarara Police Station where she was detained with about 300 other FDC supporters until 3.00 p.m when Charles Atanba, Stephen Katembeya and Edith Byanyima intervened before the group was released by the Police!!

Although Nagawa did not name the GISO man, he is Mpairwe Moses who is in charge of the Division. He responded to Nagawa's affidavit. According to him, on 23/2/2006 at about 5.00 a.m he received a phone message to the effect that Nagawa "was involved in the distribution of sugar to voters." He and his "constables" intercepted Nagawa who was in the company of an LC I official. The LCI man "took off" on his motorcycle. Mpairwe and group asked Nagawa where she was coming from and where she was going. According to him, Nagawa rudely responded telling him it was none of his business. But she stated that she was distributing appointments letters to FDC polling agents, although she did not have those letters. All returned to Nagawa's home where they found two ladies who said they were waiting for Nagawa to assign them duties. Mpairwe and his group took Nagawa and the two ladies to LCI Chairman. The latter sighted the group and disappeared. He then consulted DISO (District Internal Security Organisation) officer and took Nagawa and the two women to Police. The OC, Mbarara Police Station also replied to Nagawa's affidavit and deponed that it is true Nagawa was one of the people who were arrested and taken to police on 23/2/2006 on allegations that she was one of the people involved in bribing voters. The OC denied that there were 300 people detained. He admits that Nagawa was eventually released because there was no merit in the complaint against her!!

Clearly the evidence of Nagawa has been substantially corroborated by the response from GISO and the OC. What the Nagawa evidence establishes is that in Mbarara, some FDC supporters and agents were intimidated and harassed even as late as on voting day. The OC does not really indicate the time of release but the time given by Nagawa must be accepted. The Nagawa incident and these affidavits of many other witnesses to intimidation by ISO security officers appear to point to the fact that ISO was heavily involved in intimidation of opponents of the 2nd respondent who happened to be the incumbent president under whose office is ISO (Internal Security Organisation) run. If such an incident occurred in one place or two or even three separate places, I would treat those as isolated incidents of some enthusiastic officials. In the case of Nagawa, Mr. Mpairwe, a Gombolola ISO Officer, his District Officer who gave orders for the arrest and detention of Nagawa, meaning that ISO was heavily involved in the elections.

Thus in Bushenyi District, Twinomujuni Appollo was FDC Chairman in Bihanga Subcounty. He cordinated and deployed polling agents for FDC. On polling day, at Nyakaziba polling station, he found Gilbert Bintabara, an ISO official with other men carrying guns and these men were threatening and telling voters to vote for the 2nd respondent. He chased away FDC polling agents and dared Twinomujuni to do whatever he wanted about it. When Twinomujuni tried to prevent Rutankundira, LC3 Movement Chairman from multiple voting, Byamugisha Gerevasio, a GISO pushed Twinomujuni away. After voting Bintabara ordered FDC agents "to sign declaration forms if they wanted their lives" One Babigumura Peter a PO at Nyakaziba is among those who replied to Twinomujuni. Although he denied the presence of Twinomujuni at Nyakaziba, he admits the presence of Gilbert Bintabara (ISO), of GISO Byamugisha Getevasio and LC3 NRM Chairman C. Rutankundera. He did not see any of the three men do what Twinomujuni ascribed to them except that the GISO man Byamugisha spoke to the polling agents. On his part, GISO Byamugisha claimed he was in-charge of his sub county where he monitored security situation on the polling day and that indeed he visited Nyakiziba polling station and talked to polling agents who reported no problem. He denied that Bintabara had guns nor threatened people. He denied meeting Twinomujuni at polling station nor pushing him. He only met Twinomujuni in the evening at the subcounty where poling materials from different polling stations were being collected. Neither Byamugisha nor Babigyeni have provided any reason why Twinomujuni should implicate them. I believe Twinomujuni's version of what happened.

Again there is the affidavit of Turyasungura Joseph of Nyabirerema, Rukiga constituency of Kabale District. He was a campaign agent for the petitioner for the presidency and for Jack Sabiiti for the constituency.

On polling day at Kakatenda polling station, he saw Rubaramira Bernard, Mrs Kabarisa and Apollo Nyegamehe giving money to voters and urging them to vote for the 2nd Respondent. When he intervened, LDU Commander, Buherezo, who was accompanied by four other armed LDUs chased him away. Shortly after, Pte. Byamugisha, of the Directorate of Military Intelligence arrived driving a double cabin pick up carrying Lt. Kakooza and two other soldiers who were brandishing pistols. These army men grabbed Turyasingura, beat him up and dumped him on the pickup and drove to and kept him at Kabale police station where he was detained till evening where he was released when the voting was over.

As the army men drove away, they telephoned some one and reported to have got hold of a big fish. Turyasingura deponed that his arrest caused many FDC supporters to go into hiding. A similar story is told by Kainamura of Nyabirerema parish who was picked by armed men at Kabaare polling station dumped on a pickup and driven to and detained at Kabale police station till after the voting. I must mention that these two deponents are among the 11 deponenets to whose affidavits Mr. Nkurunziza objected on the ground that the affidavits were disowned by advocate Mwene Kahima and that they contravened S.64 of Advocates Act.

Mr. Apollo Nyagamehe was NRM District task force in charge of NRM agents in Bukinda Subcounty. He denied statements by Jack Sabiiti and Turyasingura that he together with Rubura Rubaramira, Mrs. Kabirisa bribed voters with money, sugar, salt and soap on 23/2/2006.

Franco Bindeeba was the Presiding Officer at Kabaare polling station. He stated that *"there was no incident where Kainamura was picked up by armed men, placed at gun point and or placed on a pick up and driven away. He never saw terror and chasing away of voters."*

Apollo Nyagamehe does not say whether Turyasingura was at the station stated in the affidavit neither does Franco Bindeba say so in respect of Kainamura. Mr. Kafeero Moses, OC, Kabale police station, claimed that Kainanura was arrested and charged on suspicion of bribing.

Interestingly, both Turyasingura and Kainamura produced police form 18 showing that they were detained but released on 24/2/2006 on bond where Jack Sabiiti and Rev. Fr. Gaitano were sureties for the two men. The police form (Bond) shows that the two men were charged with inciting violence and not bribing, as Kafeero claimed.

I believe the stories told by both Turyasingura and Kainamura. As I stated earlier, while giving reasons why their affidavits should be admitted, the alleged irregularity in the drawing and filing of the affidavits does not diminish their evidential value.

Turyamureeba Mande, an FDC Chairman of Nyakagabagaba parish, in Kabale District, depones about similar facts as Turyasingura. He coordinated election activities for the petitioner in the

parish. On polling day he went to Kihorezo polling station to vote at 11.00 a.m. On reaching there, a pick up full of soldiers armed with guns and pistols arrived. Among the soldiers was Bosco. The witness was identified to the armed soldiers as FDC Chairman. The soldiers cocked their guns and "one of them put a pistol on my (witness's) head and arrested" him. He was put into the pick up which was then locked. The armed soldiers then demanded to know if there were any other FDC supporters. Voters were scared and said no. The soldiers ordered everybody to vote for the 2nd respondent. The witness was then driven to Kabale police station where he was detained overnight. He never voted. He was released on police bond the following day when again Jack Sabiiti and Rev. Fr. Gaitano stood surety for him. Advocate Mwene-Kahima simply denied drawing Mandes' affidavit. I discussed this earlier. I believe the evidence of Turyaimureeba Mande which corroborates the evidence of the other three deponents about threats, violence and intimidation of voters by soldiers and other security agencies personnel.

In Kanungu District a sample of evidence on intimidation is the affidavit of Byarugaba Charles who was Chairman of Kanungu District FDC task force.

According to this man, during the campaign period NRM put forth the message that voting for the petitioner meant voting for war and that failure to vote for the second respondent means taking the country back to war and misery. Ordinarily this could be characterised as exercising freedom of expression in a campaign period. However he deponed that NRM agents staged war films in the two towns of Kanungu and Kihiihi showing film wars of former presidents Idi Amin and Obote. During the film shows, the audience was given the message that not voting the 2nd respondent meant voting for the past days of terror and chaos. He claimed in his affidavit that on the eve of election, i.e, 22/2/2006, at 9.00 p.m, the police arrested him on his way home after meeting his party parish agents and coordinators. The police removed shs 687,500/=, $8 and 80 Euros from him. That this money was intended to be paid to FDC polling agents as lunch allowances for 23/2/2006. His arrest was announced by NRM agents through out that night on Nkikiizi FM Radio allegedly owned by Hon. Amama Mbabazi and he opined that this demoralised FDC supporters. The Hon. Amama Mbabazi responded to some of Byarugaba's statements. He deponed that the radio is a limited liability company and a commercial enterprise. That the NRM campaign in Kanungu District was based on the achievements of Uganda and the Movement Government and Programmes set out in the NRM manifesto. In para 13 he stated that the Kanungu District NRM task force did not stage films anywhere in the district showing wars of Presidents Amin and Obote nor sponsor broadcasts on Kinkiizi FM Radio to the effect that a vote for candidate Besigye was a vote for war.

Although Muhwezi Laban's affidavit is headed Reply to Affidavits of Mayombo and Byarugaba,

the affidavit says nothing about the latter's affidavit. Muhwezi was the Registrar of Kanungu District. The affidavit is at page 52/54 of R's Vol.III. ASP Joab Wabwire, the OC Kanungu District Police Station also replied to Byarugaba's affidavit. He admits the arrest of Byarugaba at night and states that the police had received information that Byarugaba was driving around Rutenga Subcounty distributing money and hoes to voters. The OC states that at Rutega, he heard that Byarugaba "had distributed money and hoes to voters which we recovered and exhibited at police." Then OC and his team went to Mafuga looking for Byarugaba. They arrested him and on searching him removed from him shs 687,500/= which was exhibited. That Byarugaba was subsequently charged with the offence of bribery.

It should be noted here that the OC does not say he found Byarugaba carrying any hoe. He does not mention any individual from whom he recovered hoes or money allegedly given by Byarugaba. There is no evidence of any deponent saying he/she was bribed by Byarugaba. So the OC's evidence on bribery is valueless.

Elliot Kabangira swore as Manager and News Editor of Kinkiizi FM Radio. He echoes Hon. Mbabazi statements that Nkikiizi FM Radio is a private company. Kabangira, in para 5, denied that the radio station broadcast any announcements that Byarugaba Charles has been arrested or detained. He contradicted this in para 8 of the same affidavit by deponing that –

"Nkinkiizi FM included in its news brief on the morning of 23rd February, 2006, the news then that Byarugaba Charles had been arrested on 22nd February, 2006 and was in police custody as per the information from the police. The station has news in Runyankore Rukiga at 7.00 a.m, in Kishwahiri at 900 a.m and in English at 10.00 a.m."

According to this witness, the DPC had passed by the radio station and informed the witness that Byarugaba had been arrested and shs 687,500/= was found in his possession and was suspected to be for bribing voters. Here the arrest of Byarugaba is corroborated. The motive of the DPC reporting the arrest to a radio station manager is not easy to explain since apparently when Byarugaba was arrested, he was not found bribring any body. I have not seen any affidavit of any body claiming to have been bribed. I am inclined to believe Byarugaba that his arrest and subsequent announcement on the radio of his arrest was ill-motivated intended to cause fear and fright among supporters of the petitioner who could hear about the arrest. This is the gist of Byarugaba's affidavit.

I may point out that although Hon. Mbabazi and Mr. Kabangira say the Nkinkizi FM radio is a private limited company commercial enterprise, each was careful not to mention the shareholders of that private company nor the real proprietor(s).

As already noted Mr. Ekanya detailed what Mr. Fox Odoi, a Legal Assistant to the second respondent, did on the polling day in Tororo Town. This is how Ekanya describes the situation, in paras 10 to 13 of his affidavit:

"10. That on polling day Fox Odoi, the Legal Assistant of the second respondent terrorised voters in Tororo Municipality.

11. That I saw the said Fox Odoi armed with a gun accompanied by Local Defence Units blocking the road between Tororo and Mbale and forcing passengers out of the vehicle.

12. That I heard him order the LUDs to undress the passengers and to beat them up which LDUs did heartly using gun buts.

13. That the said Fox Odoi fired in the air and many voters run back to their homes and did not vote.

14. That he eventually dumped the passengers at the police station."

In para 23 of the affidavit accompanying his petition, the petitioner raises this incident and alleged that his supports were harassed, assaulted and intimidated by Fox Odoi. This allegation is proved by Ekanya.

There is no evidence proving or suggesting that Odoi did all these things to advance his own personal activity. In his affidavit, he states that he was on his own things. This things are not metioned. Mr. Fox Odoi, in his affidavit, down plays his activities. Some of the victims of his violence swore affidavits. One Epakasi Lawrence of Aukot village, Tororo District, swore such affidavit denying that he was assaulted by Odoi. However he admitted seeing Odoi together with "policemen" at the scene where the policemen arrested this unfortunate man and four other men. Epakasi claims he had already voted. Others were going to vote. After being detained at Tororo Police, he was taken to CID headquarters where he and the others made statements allegedly denying being assaulted by Mr. Odoi.

There are affidavits of Abenaitwe Ezera of Bushenyi to which are replies of affidavits by DPC Aguma J, Hon. Prof. T. Kabwegyere and Ntege. There is the evidence of Fred Kagumire, of Mbarara District and Edith Byanyima, in Kiruhura District.

Byanyima was assigned by the petitioner to supervise and monitor the polling day process in Kiruhura District. She deponed about what she noted, or what was reported to her by FDC agents, about intimidation, interference, in electoral process and chasing away of FDC agents from some polling stations. To her affidavit are replies by Musindi Rogers, a Presiding Officer, at Rusherere,

Matsiko.H.E, an LC3 Chairman, Captain David Bashaija an LC5 Councillor, Kagaba Allen Mukyira, Rwakashaija S, George Kabagambe, LC2 Chairman, Mugume A, G.Byabakama, Kansiime.C, Presiding Officers.

At the risk of being lengthy, I will produce what Edith Byanyima swore about her experience in Kiruhura District and summarise the evidence of respondent's witnesses who replied to her affidavit.

1. That I was appointed by the petitioner to supervise and monitor the voting process on polling day in Kiruhura District.

2. That I travelled through the district and observed many irregularities.

3. That at Sanga and Kanyereru polling station there was no secret ballot as voters were required to openly tick the ballot papers at the first table.

4. That at those two polling stations I saw captain Bashaija who is also a Councillor Local Council V leading a group of soldiers and local defence units and overseeing what happening at the polling stations.

5. That I met several people who informed me they had not voted because of Bashaija and his men.

6. That at Rushere polling station the petitioner's agent had been chased away and ballot boxes were not sealed. When I protected to the presiding officer he too informed me the boxes had come without seals.

7. That at Omukatongole polling station I found the second respondent's agents seated on the same table with the residing officer John Mwesige and when I protested to him, he informed me the agents were very important persons in the area. I also observed that the ballot boxes were not sealed.

8. That at Rushonge polling station the Presiding Officer Justine Ingeine allowed underage persons to vote as well as people not in the roll nor holders of voters cards and that when I threatened to report him to police he stopped and said he would not repeat the same mistake.

9. That I reached Nyakasharira Polling station at 2:00 p.m only to find the petitioners agents chased away and so I appointed Mapozi and Kagezi and left. That when I reached the trading centre about 100 meters from the polling station Mapozi and Kagezi came running after me and informed me they had been chased as well.

10. That I went back at the polling station and pleaded with Matsiko Hope the councillor of the area to prevail on the presiding officer to be fair. When I went back in the evening to collect the declaration of results forms Kagezi and Mapozi both informed me that though they had been

allowed to stand around, the presiding officer had refused to give the declaration forms.
11. That I reached Kirihura polling station at 3:00 pm and found that the petitioners polling agents had been chased away allegedly because they were not registered voters. That I appointed Mbabazi Allen and Matsiko Edward.
12. That I arrived at Rugongi I polling station and found the petitioners agent Zabandure Edward petrified. He pleaded to leave with me because he had questioned the ballot stuffing by Chairman LC.II Kabagambe Justus and has been threatened.
13. That I appointed Bakunde David and left with Zabandure. I later met Bakunde who informed me the presiding officer had refused to give him declaration forms.
14. That at Malina polling station the petitioner's agents refused to sign the declaration forms because of the ballot stuffing."

Musindi Rogers, a PO for Rushere PS, in his reply to Byanyima's affidavit stated that what the latter deponed in para 6 is false and that he never saw Byanyima at his PS. Although he claimed in para 7 that no agent of the petitioner came to the PS, he in effected contradicted himself when he stated in the next paragraph that "the only person I saw representing the petitioner was Kagumire Fred who came at 2.30 p.m and asked about presence of any agents of the petitioner. Musindi does now tell us the answer he gave to Kagumire about the petitioner's agents. Matsiko Hope Eric, an LC.III Chairman of Keshunga subcounty deponed that what Byanyima stated in Paras 7,8 and 10 of her affidavit is false.

What is stated to be false in para 7 is the name of the presiding officer. While Byanyima mentions Mwesige, the LC.III Chairman mentions Tumwesige. As regards para 8 of Byanyima's affidavit, the Chairman claims that there was no polling station called Rushonge and that he does not know one Justice Ingeine. Byanyima deponed that the PO at Rushonge was Justine Ingeine who allowed the underaged to vote. Although Chairman Matsiko denies that Byanyima pleaded with him to prevail over the PO of Nyakasharira III to be fair, he admits having a brief dismission with Byanyima there. He does not mention what the discussion was about. Byanyima stated that she discovered that the petitioner's agents had been chased away. She was forced to appoint new ones and so she appointed Mapozi and Kagezi. The Chairman admits that these two were agents but seems to suggest that they were not also chased away as stated by Byanyima.

Incidently the chairman's evidence seems to support Byanyima to the effect that she went around checking on PS and yet Musindi and some other PO whom Byanyima implicates in malpractices deny seeing her. Rushere PS manned by Musindi as well as Nyakasharira are in Keshunga Subcounty. It is improbable that Byanyima could visit Nyakasharira and leave out RushereI noticed

that Akandwanaho Amoni, a polling assistant at Omukantongole polling station which is also in Keshunga saw Byanyima attempting to open ballot boxes there to check on sealing. This is evidence of the movement of Byanyima.

There is something peculiar about Chairman Matsiko. Although he swore that he was an LC3 Chairman and a registered voter, he does explain what was his role in polling matters which enabled him to know such particulars as names of polling officers and particular polling stations so as to be able to challenge Byanyima on these. Matsiko's activities support the concerns expressed by the European Union Observers in their report about the continuation of the old NRM system up to the election day, despite the fact that these elections were held under multiparty political dispensation and that this led to lack of level field. The fact that Byanyima implored him to intercede points to the influence which LC officials could bring to bear an elections.

Retired army Captain Bashaija David, is another one who responded to Byanyima's affidavit in paras 4 and 5. She implicated the captain in leading a group of soldiers and LDUs at Sanga and Karyerera stations to make voters tick ballot papers openly. The captain is an LC5 Councillor in Kiruhura District where he is also Secretary for Defence. He knows Byanyima but claim he did not see her at Kibega PS where he voted at 11.00 a.m. He denied visiting the two polling stations as stated by Byanyima. I think that visiting at Kibega at 11.00 a.m is no proof that Byanyima was not there at a different time. I have found no explaination about why Byanyima should falsely accuse the captain who by virtue of his post as District defence secretary would normally supervise the LDUs.

Rwakashaija.S. was a polling constable at Kanyerera PS on 23/2/2006 and claimed that he never saw captain Bashaija there, alone or with LDUs, nor was there open voting. Allan Kagaba Rukira was a Presiding Office at Nombe III PS which is at Sanga subcounty Hqtrs. He stated that there was no PS known as Sanga. He denied that voters ticked ballot papers at presiding officers' table as claimed by Byanyima. I note that although Kagaba asserts that there was no polling station called Sanga, Captain Bashaija referred to such a station. In any case Kagaba admits that Nombe III is at Sanga subcounty Hqtrs which probably explains why Byanyima calls it Sanga as does the Captain.

The other witness is George Kabagambe. Like Matsiko (LC3) Kabagambe is an LC 2 Chairman in Rugonyi Parish, in the same Keshunga subcounty. In effect he denies that he is Kabagambe Justus whom Byanyima implicated in threatening Zabandure Edward, a petitioner's agent who had challenged Kabangambe because he (Kabagambe) was engaged in ballot stuffing. The chairman denies knowing Byanyima. He swore that although he knows Zabandure, he never saw the latter at

the PS. Kabagambe is yet a member of the old NRM retained up to election day. I note that because Zabandure, an FDC agent at Rugongi, was petrified by Kabagambe's threats, Byanyima substituted Bakunde David for Zabandure at Rugongi PS. The PO of the station, Basiime Boaz, in effect corroborates Byanyima. Although Basiime denies seing Zabandure, he accepts that Bakunde David was an agent of the petitioner at the station. Kabagambe simply denied knowledge of Byanyima. Neither Kabagambe nor Basiime deny seeing Byanyima at Rugongi Polling Station.

Mugume Arthur was the presiding officer at Karyaryera. He deponed that he does not know Byanyima and that he was a presiding officer at Karyaryeru but not Kanyaryeru referred to by Byanyima in her affidavit. This appears to be a typing error. Indeed both captain Bashaija and Rwakashaija refer to the PS as Kanyanyeru and Kanyaryeru respectively, while referring to the same polling station. The other witness for the respondents is Geofrey Byabakama who was PO at Rushere1 (A-L). He deponed that it is not true as Byanyima stated in para 6 of her affidavit that there were FDC agents at the station nor were they chased away. That only NRM and foreign monitors had agents at the station. He denied knowing Byanyima. That may explain his failure to recognize her. Akandwanaho Amon, alluded to earlier, stated that it is not true, as Byanyima says in her affidavit, that at Omukatongole, agents of 2nd respondent sat at the same table with PO. Interestingly, the actual presiding officer implicated by Byanyima does not appear to have sworn any affidavit denying being involved in the malpractices. It is chairman LC3, Matsiko, whose role in elections is not disclosed, appears to suggest that the name mentioned by Byanyima as that of PO is not correct.

Kansiime Caleb was PO at Rushare II PS where he arrived at 12.50 on polling day. This time is confusing. He denies that the petitioner had agents there as claimed by Byanyima. He denied seeing Byanyima at the station. Twongyereho Robert, presiding officer at Nyakasharura III PS, was the last of the respondents' witnesses who replied to Byanyima's affidavit. He admits that Mapoza (Asiimwe) and Kagyezi were FDC agents. He denies knowledge of Byanyima and does not know whether she visited his station or not.

Twongyereho is not honest. He denies seeing Byanyima at the station yet LC3 Chairman, Matsiko, says Byanyima was there and she held a discussion with him (the chairman) at that station. Of course the chairman does not disclose what the two discussed. I have no doubt in my mind that in the discussion Byanyima was pleading with the chairman to prevail upon the PO to be fair and to allow FDC agents to be present and do their agency work.

I have evaluated the evidence set out in affidavit of Byanyima and those of the tweleve offered by respondents. As I pointed out above, there are some contradictions and inconsistencies in the

evidence of these witnesses of the respondents. Byanyima gives the image of a courageous woman who went about her coordinating work bravely in the Kiruhura district, the home district of an incumbent presidential candidate. I find as a fact that what she described is what happened and I accept her account and reject that given by the respondent's witnesses.

Kamateneti Ingrid Turinawe deponed about intimidation, violence and arrests of FDC agents and supporters in Rukungiri District. She annexed to her affidavit a letter from FDC Chairman, Rukungiri dated 24/2/2006 which is a summary of the complaints allegedly made by FDC to Rukungiri District Returning Officer. In varying degrees the complaints included arrest of FDC agents, making FDC agents to sign declaration forms before voting, deployment of Army by RDC, bribery and, distribution of salt and soap to voters, lack of secrecy during voting, refusal by POs to hand over declaration forms to FDC agents, unsealed ballot boxes and multiple voting. Kamateneti's affidavit drew responses from the RDC, Mr. Byabakama Charles, Nkurunziza Francis, District Registrar, District Police Commander, Okoti R. Obwona, Ntaho Frank, the returning officer/CAO, Zedekiya Karokora, the then LC.5 Candidate for Chairmanship, DISO Bwogi Hadge Asuman and Ruraka Byaruhanga George an NRM Subcounty chairman, Kebisoni.

I have considered the evidence of these witnesses elsewhere but the general drift of these witnesses for the respondents is that they deny what Kamateneti state. Some of them, such as Zedekiya Karokora, admit the presence of NRM money but he says it was for facilitation of NRM electoral work. Nkurunziza was at least honest enough to admit that there were some unsealed boxes, which were eventually sealed. This was done after Kamateneti and the petitioner personally had reported the matter to the District Returning Officer where they found Nkururnziza.

About more malpractices there is the affidavit evidence of Mayombo Dick, Rukandene, Byaruhanga Charles of Kanungu District to which the Hon. Amama Mbabazi, Mrs J. Mbabazi; Mr. Elliot Kabangira, Mr. Ben Rullonga (RDC) responded.

I have read the affidavits of Major Henry Matsiko and other deponents who challenged what the petitioner's supporters deponed on what happened in Kabale District. Major Matsiko refuted what Jack Saabiiti stated about the former's role in electioneering process especially in acts of intimidations, bribery and showing of war films. But the election observers' reports such as those of Commonwealth Observers team, Action For Development, Demogroup, FHRI, and Hurinet, tend to corroborate the facts deponed to by supporters of the petitioner on allegations, inter alia, of intimidation by soldiers and other security personnel. Perusal of affidavit of Byarugaba.C, David

Dongo Katwakwora, Twinomukago, Vanice and Ensinikweri Godfrey for the petitioner and those of the Hon. Amama Mbabazi, Mrs. J.Mbabazi, Major H. Matsiko, Elliot Kabangiri for the respondents leads to a clear inescaple conclusion.

To quote the mild conclusions by Action for Development, they said-
"Generally, the elections were seen to be free but the whole process was not fairly done. There was unseen intimidation due to the presence of army since women were told that if they don't vote the incumbent, war would break. Citing many irregularities by our monitors in different polling station was an indication that the elections were not free and fair."

These pieces of evidence prove that the principles of free and fair election, transparency, etc, were trampled upon and were not complied with. Moreover the incidents cited by deponents are not isolated. If a legal Assistant to the 2nd Respondent, other soldiers, and Presidential Guard Brigade, LDUs, ISOs are involved in flouting the electoral law in very many districts across the country, the inescapable inference must be that this was an organised operation. At the material time the Secretary-General of NRM was the Minister of Defence. The second Respondent was the Command-in-Chief of the Army. In Western Ugandan, the evidence shows intimidation appears to have been the norm rather than the exception. I am unable to say that during a civilian election in Uganda of today security personnel such as ISO, PGB, LDU, on their own can cause army vehicles to rumble through some villages in such Districts as Mbale, Tororo, Ntungamo, or Bushenyi by accident. Similarly I can not understand how PGB, other soldiers, DISO and LDUs appear in sizeable numbers at polling stations where some of them threaten voters or direct voters to vote for the 2nd Respondent and members of Parliament contesting on the NRM ticket. Obviously the elections were not conducted in accordance with the principles laid down in the Constitution, the PEA and the ECA. One certainly makes the same irresistible conclusion when presiding officers from many stations across the country encourage or force pre-ticking, ballot stuffing and multiple voting: The same conclusion is made when so much money is splashed around in payment to poor voters or giving such poor voters gifts. NRM of which the 2nd Respondent is the leader has been leading the country for many years even though as a political party or organisation, it was registered in 2005. Its presence and leadership was or should have been well known to the country and to the voters. The fact of introduction of multiparty election was known by NRM or at least by its leaders more than a year in advance of the elections held on 23/02/2006. So giving money and gifts around the country during the last one week or two weeks before the election day cannot be described as intended for just facilitation of NRM functionaries to buy such things as pens, pencils, etc. This must be money targeting the poor voters. In my opinion, this went against the principles of

fair, free, democratic and transparent electioneering.

Even if the evidence of Pte. Barigye and of Major Ruranga Rubaramira is disregarded, the other evidence available does establish:-

(a) Violations of the principles of free and fair election, bribery, intimidation and violence and

(b) Multiple voting and vote stuffing. These contravened the law.

It was for the foregoing reasons that I concurred in the finding of the Court on the second issue and answered the issue in the affirmative.

Issue No.3

WHETHER IF ISSUE 1 OR 2 OR BOTH ARE ANSWERED IN THE AFFIRMATIVE SUCH NON-COMPLIANCE WITH THE SAID LAWS AND PRINCIPLES AFFECTED THE RESULTS OF THE ELECTION IN A SUBSTANTIAL MANNER

In my opinion, this issue and the next issue (No.4), pose and will continue to pose some intellectual controversy as long as provision of S.59 (6) (a) remain as they are now. That is why in the Presidential Election Petition 1 of 2001 there was a split of 3 to 2 and in the present petition there is split on the bench (4-3) in favour of the respondents. It is perhaps a test of the operation of a constitutional democracy.

I was one of the minority of three Justices who believe that answering this issue in the positive is based on available evidence. There is evidence of wide spread harassment and intimidation of (voters and supporters of the petitioner) by agents of NRM and members of security forces including intelligence agencies in such districts as Mbale, Sironko, Bushenyi, Kabale, Rukungiri, Kanungu, Pallisa, Iganga, Bugiri, (Kamuli), Kiruhura, Mbarara, Ntungamo, Tororo, Kyenjojo and Kamwenge. There is evidence of ballot stuffing, multiple voting, involving security and LC personnel. There is evidence of wide spread giving of money in very many districts as well as threats of war in some districts. Surely these must affect the results in a substantial manner. Evidence prove wide spread lack of fairness and freedom in electioneering and voting, let alone transparent counting of votes in some areas. Principles of fairness and freedom during elections were wounded.

On the 6th April, the answer of the Court read as follows:

"On issue No.3, by a majority decision of four to three, we find that it was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner."

The wording of issue No.3 is of course based on the contentions of the two sides as alleged in their

respective pleadings. Those contentions are themselves based on para (a) of subsection (6) of S.59 of the Presidential Elections Act, 2005. This provision is identical to a similar provision in the PEA of 2000 which also split the court in answering a similar issue in Presidential Election Petition No.1 of 2001. The current provision reads this way-

"59 (6) The election of a candidate as President shall only be annulled on any of the following grounds, if proved to the satisfaction of the court-

(a) non-compliance with the provisions of this Act, if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner."

Perhaps it is inappropriate to say that the Act laid down principles. Principles are read into an Act by interpretation. In other words, principles are inferred from the various provisions of the Act. Earlier in these reasons while explaining my views on issue No.2, I reproduced those principles as summarised in the 2001 Presidential Election Petition reasons for the judgment of the Court.

The question of affecting the result of an election "in a substantial manner" is the question on which we were divided. I must admit that the question is not clear cut. It is not obvious because first it appears to depart from what Article 104 says. In clause (5) of the Article, the Constitution states that-

(5) After due inquiry under clause (3) of this Article, the Supreme Court may –

(a) dismiss the petition; or

(b) declare which candidate was validly elected; or

(c) annul the election.

This clause does not prescribe that a decision of the Supreme Court shall be made on basis of substantial effect. It can be argued that because Parliament was given power to make laws about the election of a President, and annulment of the election, in enacting S.59 (6) Parliament obeyed the Constitution.

Secondly, by requiring that the non-compliance with the principles should affect the result of an election in a substantial manner, members of the court are driven, I think, into applying subjective tests which can even involve moral judgment. Perhaps S.59 (6) (a) in a way recognizes human frailty in the activities of mankind such as contesting for a political office.

The provision appears to me to imply a licence to candidates to cheat or flout the law but do it in such way that the cheating or flouting ought not to be so much as to amount to creating a substantial effect on the election result. The cheating must be such as can be tolerated by the courts!! This notion of substantial effect is found in the English law from which we drive our own

law. The notion of "substantial manner" could be a recognition of many things. It can be argued that an election exercise such as that of a President of a country involves a lot of preparations by many actors. It can be agued that preparation for election should end soon or that the exercise even though it is done once in every so many years, it is costly and, therefore, some violation of the law need not be treated as fatal. Therefore a repeat of such an election is bound to cost the country more resources. As against these possible arguments, there are considerations of virtues of a free and fair democratic election. If the principles enshrined in our laws, and especially the Constitution, are properly observed during a free and fair democratic election, losing candidates and their supporters will surely be satisfied and, therefore, allow the country to develop peacefully. But if a presidential election is won through fraud, cheating or through the flouting of the law and the constitution, dissatisfied candidates and their followers may create instability and disaffection among the population. Allowing candidates licence to cheat even as little as cannot affect results would render the election exercise a farce, a play thing or frivolous. Indeed tolerating cheating and fraud in elections can imply that holding elections itself is not desirable or necessarilly. Yet proper election should give legitimacy to winners.

On the question of standard and burden of proof, I will quote what I stated in Election Petition No.1 of 2001. At page 124 of my typed judgment, I said when referring to the 2000 PEA provision similar to present S.59 (6) (c) –

"I think it is safer to apply the words (of the statute) themselves and say that the standard of proof required to nullify an election of a president after a presidential election, must be proof to the satisfaction of the justices trying the petition, namely proof so that the trial justices are sure that on the facts before them, one party and not the other party is entitled to judgment."

Whether a petitioner has discharged the burden or not will invariably depend on the evidence adduced by the petitioner. For instance, I think that in cases of commission of an electoral offence or an illegal electoral practice where proof of such offence justifies nullification of the election of a president, the burden of proof might be lighter than the burden of proof that non-compliance with the provisions of PEA affected election results in a substantial manner. I say this because in the former case evidence in proof of a single case of bribery will suffice while in the latter case evidence must be adduced in respect of many incidents. The difference may possibly be on whether burden of proof is the same as the standard of proof.

Fortunately this Court is not the only Court faced with such a task in election matters. Other courts, both within Uganda and outside Uganda, have faced similar tasks. See the Uganda case of Ojera Vs Returning Officer (1962) EA 532(U) and Tanzania case of Bura Vs Sarwatt (1967) EA 234 (T) and to some extent Morgan & Others Vs. Simpsons (1974) 3 ALL E.R. 722 especially the judgment of

Lord Denning, MR. See also the Nigeria Court of Appeal decision in Alhaji Mohamed Dikko Yusuf and others Vs. Oluseguri Aremu Akikiota Obasanjo and 53 others, CA/A/EP/1/2003. All these decisions arise from similar law which has its origin from the English law.

Be that as it may, by answering yes to both the first and the second issues this Court acknowledged violations of some relevant sections of ECA and the PEA and the principles underlying those sections. I have already given my reasons in support of the answer to both issues 1 and 2. I cited some of the Districts across the country where violations occurred. I also mentioned some witnesses from both sides in support of the petitioner or the respondents.

So how does a judge arrive at the conclusion, as I did, that non- compliance affected the result in a substantial manner? Or how does a judge arrive at the conclusion that the non-compliance did not affect the election results in a substantial manner? I think that before answering these questions, a judge must evaluate and appraise all the evidence of both sides not only in relation to this issue but also to the first two issues in order to reach his own conclusions. Would a judge in a constitutional democracy by annulling an election be interfering with a decision made by voters who are given power to choose who is to govern them? I think that Judges have a constitutional duty to annul an election where there is clear evidence of patent violations of the principles of free and fair democratic election such as the evidence of intimidation, threats and violence or the violation of the principle of one man one vote or the violation of the principle of transparency? On 23/2/2006, the voting day, in midmorning, voters are roughed up, arrested while on the way to voting and taken to police station and detained as happened in Tororo, by an apparently important official such as Fox Odoi. Similar incidents were carried out in many districts in Western Uganda. What effect does this have on those voters who have not voted or who are on their way to voting stations but hear about these?

There is a view that because in 2001, by a decision of 3 to 2, this Court answered a similarly worded issue in the negative, therefore, all of us on this court, are bound to answer the third issue in this Presidential Election Petition in the negative. Indeed, Mr. Ogalo Wandera, for the petitioner urged us to depart from the decision of 2001. He relied on Art. 132 (4). With respect, I do not agree. First the doctrine of binding precedent is set out in Art.132 (4). That relates to our exercise of appellate jurisdiction. In this petition, we are sitting as a trial court to exercise special jurisdiction conferred on us by Article 104 [especially clause (5) thereof]. Moreover as a trial court we must decide the petition on the basis of all the evidence tendered before us in this particular petition. Each case is decided on its own facts.

What must be understood is that in this petition even though by coincidence the parties are the

same as those in 2001 and the issues are framed in identical terms, in reality we have evidence from vastly different witnesses, except the petitioner and the 2nd respondent.

I think that here our decision does not rotate around settling a law. It is about assessment of facts as set forth in affidavits. It is the evaluation of the facts and not the settlement of law which is at issue.

I can foresee a real possibility of an incumbent who won a previous presidential election petition, (or any other election) some how encouraging his or her agents to employ the same malpractices, or modified malpractices but similar to previous ones, in order to win an election. He/she will be advised that he and his agents are in order to do any similar thing, however wrong, to win election because that thing was done previously and was accepted as proper by the Supreme Court of Uganda.

Another point is that whereas in 2001 only five of us sat, this time the full court is participating.

I now proceed to examine the evidence as adduced through witnesses' affidavits and the observers reports to show how non-compliance with the principles affected the results. As I hinted, there are many affidavits containing facts which cut across all the four issues.

In my opinion the non-compliance with the principles of the PEA affected the results in a substantial manner. In particular I think that-

(a) The principles of a democratic free and fair election were clearly violated substantially in that-

- There was no level playing field between the petitioner and the second respondent. All election observers and monitors agree on this.
- It is remarkable that in areas where intimidation and violence were intense and extensive such as many parts in Western and Eastern Uganda, the petitioner got less votes. Examples are districts of Kiruhura, Mbarara, Ntungamo, Bushenyi, Kabale, Kyenjojo, Kamwenge, Kanungu and Rukingiri, and Iganga. This is reflected in results announced by Dr. Kigundu, Chairman of the Electoral Commission, 1st Respondent.

(b) The principle of equal suffrage, transparency of the vote and secrecy of the ballot were grossly undermined by-

- Multiple voting

There are very many witnesses who testify to this. So do the accredited election observers, both local and foreign.

Mr. Ogalo Wandera made forceful arguments in relation to the clause "Non- compliance affected the result of the election in a substantial manner," andurgued us to look at the nature of non-compliance. Learned counsel contended that non-compliance which negates the basic principles

enumerated earlier in these reasons must be taken to have affected the results in a substantial manner. He opined that these principles are the yardstick of an election, i.e., the principles determine whether there was or there was no election or a gravely defective election. Counsel contended that the petitioner's evidence established disenfranchisement throughout the country contending that 38% of the polling stations had instances where voters were turned away which translates into 7000 polling stations. Turning away voters at such stations has substantial effect on election results because voters did not vote. In his opinion there is no need to make head count.

INTIMIDATION, THREATS AND VIOLENCE

Learned counsel contended that there was widespread intimidation of and violence against voters. Counsel asked us to take judicial notice of the existence of many FM Radio Stations and argued that these stations give a lot of publicity to murders of supporters of an opposing presidential candidate such as that which occurred at Mengo. He also argued that the recording, as was done in the recent presidential and general elections, of names by NRM officials of voters who are supporters of the opposing candidate can and does cause fear and this would be particularly so where those in charge of recording the names make threats to non-supporters of NRM, as happened in such districts like Iganga, Kamwenge and Kyenjonjo Districts.

In the alternative learned counsel submitted that if numbers are to be taken into account in respect of affecting results in a substantial manner, then the court should consider the effect of multiple voting and ballot stuffing. Counsel urged court to determine whether, in view of multiple voting, ballot stuffing and disenfranchisement, at the end of the whole process the votes of each candidate would have affected the results in a substantial manner.

He contended that the effect of all the proved irregularities greatly reduced the majority margin. He further contended that the petitioner's evidence point to a narrowing majority and that the majority of 9% on the part of the second respondent is in doubt. In this regard, counsel relied on the report of Dr. Odwee, a statistician from Makerere University, who explained in his report and his affidavit how the results of votes for the petitioner and for 2nd respondent were affected.

Counsel concluded that the petitioner's evidence proved his case to the satisfaction of the court and prayed that the court declares that the second respondent was not validly elected.

Mr. Lucian Tibaruha, The Solicitor General argued issue No.3 on behalf of the two respondents with particular reference to subparas (a), (b) (d) and (e) of paragraph 8 of the petition. He adopted the submissions of Mr. Nkurunziza generally on the value and relevance of affidavits in support of the petition. He also adopted the submissions of Mr. Matsiko, which the latter made when responding to Mr. Ogalo Wandera's submission on the 1st and the 2nd issues.

According to the learned Solicitor-General, the phrase "to the satisfaction of the Court" used in S.59 (6) of the PEA, means that the petitioner must adduce evidence to satisfy court that the evidence proves the allegations made in the petition. He contended that the evidence adduced on behalf of the petitioner does not establish the allegations so as to result in the annulment of the election of the 2nd respondent. He relied on the reasons given by the majority (Odoki .CJ, Karokora and Mulenga, JJSC.), in Presidential Election Petition No.1 of 2001(Col. Dr. Besigye Kizza VsThe Electoral Commissionand Museveni Kaguta Yoweri)

The learned Solicitor-General contended that in this petition, the petitioner should have indicated that the difference between the petitioner's total votes and the 2nd respondent's total votes were affected. According to the Solicitor-General:

(1) Numbers must be used to measure the effect of irregularities;

(2) The number of votes obtained by the 2nd Respondent, i.e, over 1.5 million votes, must be taken into account. The petitioner must show that irregularities affected this difference.

(3) Court must consider that the result of the election is that of the whole national constituency and not in isolated districts.

(4) Court must take into account the number of polling stations where irregularities took place in relation to the national total. 189 Polling Stations which is 0.8% must be related to over 19000 polling stations. He argued that 189 polling stations do not constitute "substantial."

The learned Solicitor-General contended that the petitioner failed to prove that there are any irregularities which affected the results in a substantial manner and so he urged us to answer issue 3 in the negative.

The evidence available shows that intimidation, threats and violence were perpetuated by a sizeable number of members of the security forces especially members of Internal Security Organisation (ISO), Presidential Protection Brigade/Unit, UPDF, LDUs and by NRM functionaries.

I have already referred to the evidence of some of the witnesses who deponed in the affidavits about intimidation, threats and violence. This is reflected particularly in the evidence of such witnesses as of Hon. Ekanya of Tororo District, Mr. Augustino Ruzindana, Dr. Katebariwe in Ntungamo District, of Abenaitwe Ezera the FDC Secretary- General in Bushenyi District as well as Mr. Byarugaba of Kanungu District (the latter two heard agents of the 2nd respondent talk of war if he looses). There is evidence from Kabale District of Jack Sabiiti, Kanaimura, Turyamureeba Mande, Katwakura Edward, Twinomukego Vanice, Rukandena, and Ensimkweri Godfrey and of Damali Nagawa of Mbarara District. A typical example of intimidation and threats in the form of terror and use of security personnel is given by Turyasingura Joseph, who was a campaign agent of

the petitioner in Nyabirerema parish, in Kabale District. According to him, on 23/2/2006, he found Rubaramira Bernard, Mrs Kabarisa and Apollo Nyegamahe distributing money to voters allegedly to vote for second respondent. When he intervened, LDUs harassed him. A double Cabin Pick-Up arrived at the scene carrying Pte. Bosco Byamugisha of the Military Intelligence together with Lt. Kakooza and two other soldiers. It is pertinent to quote what Turyasingura Joseph stated in paras 5 to 11 of his affidavit-

"5. That in a short while, a double cabin pickup with private numbers being driven by Pte Bosco Byamugisha attached to Directorate of Military Intelligence together with Lt. Kakooza, and two other soldiers both in civilian clothes and brandishing pistols stopped at the polling station.
6. That the armed men asked for me and people pointed at me and immediately I was grabbed, beaten and dumped in the double cabin and driven away.
7. That Nyabirerema Parish of which I am an LC.II Chairperson is an over whelmingly supportive area for Col. (Rtd). Dr. Kizza Besigye and candidate Museveni did not have any votes in this area.
8. That through systematic bribery which I witnessed and my subsequent arrest and detention and intimidation of other supporters, candidate Museveni managed to get some votes which were otherwise Col. Dr. Besigye's votes.
9. That when these armed men arrested me, they telephoned to some people and informed them that they had arrested a big fish and the famous Kakatunda Polling Station was now finished.
10. That I was denied my right to vote like many others who supported Col. Dr. Besigye as I was incarcerated at Kabale Police for that whole day until I was released in the evening and a copy of Police form 18 upon which I was released on police bond is attached hereto and marked "Annexture PI."
11. That after my unlawful arrest, many of our supporters went into hiding for fear of eminent arrest and did not vote."

Apollo Nyangambehe an NRM member of its task force in Kabale District swore an affidavit denying what Turyasungura and Jack Sabiiti deponed about. He does not suggest any motive why he was implicated.

This is how Mayombo Dick, a petitioner's elections monitor in Kinkizi West Constituency, Kanungu District, describes what happened there in paras 3 to 11 of his affidavit. He refers to voting at night which hampered identification of voters, preticking, intimidation, open voting and interference with petitioners' agents as follows:-

3. That on the said polling day I noted that the commencement of the elections was very late as

voting began after 1:30 pm and ended at Night Under circumstances that ware not favourable for proper Identification of voters hence enabling massive fraud aided by partisan polling officials.

4. That at Samalia polling station at 6.30 p.m, Mrs. Jackline Mbabazi instructed the presiding officer that voting should take place on the open table.

5. That the presiding officer called Muteraba insisited on secret ballot whereupon one Zepher Mugisha who was in company of Mrs. Amama Mbabazi Telephoned the Registrar called Muhwezi Laban who arrived immediately and took over the station from the presiding officer and sent away the presiding officer.

6. That Hon. Amama Mbabazi also arrived with soldiers escorting him and army vehicle No.H4 DF 669 6 armed soldiers also parked at the station and the armed soldiers surrounded the place causing terror and fear among voters and agents.

7. That voting continued into the night and Agents were unable to identify the people that were being issued ballots for casting on the lumps couldn't provide sufficient light.

8. That the agents for candidate Museven including Abdu Muhire were giving money to people and taking them to the ballot box and ticking the ballots in favour of candidate Museveni.

9. That the polling officials systematically invalidated ballot papers of known FDC supporters by pre-ticking candidate Abed Bwanika so that when FDC supporters tick on candidate Kizza Besigye the vote are invalidated.

10. That the RDC called Ben Ruronga also came at the station and intimidated the agents of Dr. Kizza Besigye to allow people to vote with out disturbance of FDC agents.

11. That because it was at night and presence of soldiers at the station caused constant fear in the population and the systematic bribery where voters were being given money and led to vote by candidate Museven's agents I saw candidate Kizza Besigye loosing his votes.

Mrs. Jackline Mbabazi and the Hon. Amama Mbabazi, Mr.Muhwezi Laben (RO) Kanungu, the RDC, Ben Rullonga, Beni Mutera and some other witnesses have deponed denying only where malpractices are pointed out by Mayombo - Hon. Mbabazi and Mrs. J. Mbabazi admit the presence of soldiers as being his bodyguards as Minister of Defence. Mr. Barageine James, a retired subparish Chief, claimed he was at Samalia Polling Station. He does not disclose his role which obliged him to stay at the Polling Station throughout. He admits the soldiers presence but says they never interfered. Barageine agrees with Mayombo that voting started at 1.30 p.m and went on after 6.00 p.m when RO Muhwezi went to the station and assisted the PO. This witness largely supports Mayombo on a several aspects of Mayombo's affidavit but only denies malpractices. His unexplained role at the station casts suspicion on his version. I accept the version given by

Mayombo. While travelling with armed bodyguards is explainable, taking these armed military men to a polling station on a voting day was not explained satisfactorily by Hon. Mbabazi. On such voting occasions, one would expect plain cloth youths, supporters, to accompany a candidate rather than armed soldiers. S.42 of the Parliamentary Elections Act probibits the presence of arms close to polling station. So does S.43 of PEA. The intimidating presence of armed soldiers was undesirable and I think has effect on ordinary voters. There is no evidence suggesting any danger to the Minister so as to warrant moving with armed soldiers who hover around the polling station. This contravened the law.

In Kanungu District, many more witnesses in addition to Mayombo Dick deponed about intimidation. These include Asiimwe Ivan, Kasigarwe.

Let us look at what Mr. Abdu Katutu experienced in Iganga and Mayuge Districts in Eastern Uganda.

2. *That I am the Chairman of Forum for Democratic Change in Bugweri County where I was the FDC Parliamentary Candidate in the February 2006 general elections.*
3. *That I am the FDC National Coordinator for Iganga and Mayuge Districts.*
4. *That in the capacities above I participated and supervised the FDC campaigns in both Iganga and Mayuge districts.*
5. *That I am well versed with what happened during the campaigns in both districts and more particularly Bugweri County.*
6. *That a group of armed men wearing NRM party colours camped at Busesa mixed Primary School and traversed Bugweri County campaigning for the 2nd respondent and Mr. Kirunda Kivejinja who was the NRM Parliamentary candidate.*
7. *That the said group was led by a one Lt. Mulindwa also known as Surambaya.*
8. *That they moved from village to village threatening and intimidating people who do not support the petitioner (sic) and Mr. Kivejinja.*
9. *That they assaulted a number of FDC supporters and several cases were reported to Idudi police post vide following references. SD/17/22/01/06, SD 18/22/01/06, SD 19/22/01/06, SD 15/31/01/06, SD 17/31/01/06, SD 31/01/06, SD 13/19/02/08 etc.*
10. *That on the 21st January 2006, they attacked Idudi trading centre and took away the effigy of the FDC presidential candidate who is the petitioner after assaulting a number of people. This matter was reported to Idudi police post.*
11. *That on the 22nd January, 2006, they again attacked Idudi trading centre assaulting many people who were being reported to them as FDC supporters.*
12. *That they occupied the town for 2 hours and thereafter left for Bugiri District.*

13. *That during the Idudi Siege, they continued shooting while others in their group were defacing the posters of the petitioner and myself.*
14. *That the group was armed with AK 47 assault rifles, pistols and sticks. Copies of photographs taken by myself are attached hereto and marked collectively as Annexture "A".*
15. *That I personally rang the Minister of Internal Affairs Dr. Ruhakana Rugunda complaining of the terror by this armed group.*
16. *That the minister promised to disarm them and ensure they leave Bugweri county.*
17. *That they temporarily left but returned about 10 days to the election date.*
18. *That they continued moving around in coaster vehicles but with covered number plates.*
19. *That on the eve of elections, they arrested two of the FDC campaign manager from Bukoteka village and detained them at their camp at Busese mixed Primary School.*
20. *That their camp or tents remained at Busese mixed Primary School even on voting day whereas it was also a polling station.*
21. *That on the eve of elections, they invaded Busembyata town council and arrested many FDC polling agents.*
22. *That the arrested FDC agents were tortured and maimed.*
23. *That the arrested FDC agents herein reported to me their story after elections.*
24. *That I make this affirmation in support of the petition to confirm that there was wide spread intimidation and torture of FDC supporters in Bugweri County, Iganga District.*

S.26 PEA and and S.24 of the Parliamentary Elections Act were breached, obviously. These sections prohibit interference with electioneering activities of other persons.

Clearly Katuntu exposed the epitome of utter disregard and contravention of laws and principles on democratic elections.

As already noted, in Mbale District, a number of deponents swore affidavits in proof of the fact of intimidation, threats, violence and bribery and especially the use of military might to intimidate voters: The following sample of deponents swore affidavits in proof: Mulinda Robert, Mutonyi Juliet, Khaita Lofisa, Khaitsa Margaret, Mwayafa Deo and Mushebo Charles of Musoola TC in Bungokho County. According to these witnesses, during campaign and on voting day agents of the second respondent gave voters between shs 200/= and 1000/= urging voters to vote for him. That during January and February army vehicles moved around in their villages and this scared people. On 22/2/2006, there was frightening shooting in the villages. On polling day NRM district chairman, Mayatsa, moved with armed military police.

The respondents adduced evidence by affidavits of Mr. Kizindo Ibrahim Salum, Mbale District

Registrar/ Returning Officer to the effect that nobody reported any incidents of intimidation or bribery. Again Mr. Mayatsa Joram, Mbale District NRM Chairman, deponed that there was no intimidation by the army in Mbale as stated by Mutonyi Juliet and the others. As stated already he denied moving with soldiers but admitted moving with an armed police. He did not offer any explanation why, on polling day, he, as a politician, had to be escorted around by an armed police.

In Pallisa District, examples are Rev. Fr. Godfrey Okello, Mpima, Kafero Tanyebwa. According to Fr.Okello, he acted as a polling Assistant on 23/2/2006 at Buseta Subcounty. At 11.30 a.m a yellow pick up full of military men in Uniform came to his station and moved around the station. The men jumped out of the vehicle and beat up an agent of one parliamentary candidate. Fr. Okello was roughed up and was directed to tick ballot papers in favour of Lt. Kamba an NRM candidate. When he objected, the man of God was shoved aside and another polling Assistant was directed to tick the ballot papers. Other witnesses gave testimony to the same effect. Of course the respondent's evidence is that the results from seven polling stations in Pallisa were cancelled which is really an admission of what took place. The fact that military men brazenly roughed up a priest speaks volumes. Like his counterpart in Pallisa District, Rev. Phabiano Muduma was at Dunga Polling station, Sironko District. On the polling day, at 830 a.m, agents of the 2nd respondent and LCI chairmen, R.Gidudu and T. Kimasi, led groups of people who moved around polling stations violently chasing away both supporters and agents of other presidential candidates. Thereafter there was multiple voting.

James Birungi Ozo was an FDC Election monitor in the Districts of Kyenjojo and Kamwenge, in Western Uganda. In his long affidavit, he describes how he, agents and supporters of FDC, were harassed, threatened, roughed up in both districts by armed LDUs, GISO and NRM agents. Voters were threatened, intimidated, bribed and some agents of FDC were chased away. There were malpractices such as preticking and ballot stuffing and voting at night. He is supported by Mr. Charles Byaruhanga, an FDC candidate for Kabaale constituency in Kamwenge District. It seems the terror unleashed by NRM functionaries frightened voters. Both Byaruhanga and Barungi Ozo mentioned some names including those of NRM chairman in Kamwenge District who are said to have indulged in the electioneering and election excesses such as using security personnel like LDUs in harassing, intimidating and even assaulting FDC supporters and voters generally. Charles Byaruhanga and Ozo reported some of the incidents to the Police. The Kamwenge District Police Commander agrees that Byaruhanga made such reports and in two instances the perpetrators of assault were arrested. Byaruhanga and Ozo in their affidavits speak of NRM chairmen dishing out

money. The two speak of ballot stuffing on voting day. Ozo implicated Bumbona, a GISO of Mahyoro subcounty and Katare LDU commander in Kamwenge District, Dan Byamukama and Abbas Mutesasira, a member of NRM Kamwenge District task force. Byaruhanga implicated Tumwebaze Frank (NRM Parliamentary candidate) Biryabarema (RDC), Rugumayo Moses, Byaruhanga.G. (NRM chairman) Karamagi (GISO) among others. Those implicated swore respective affidavits in which each denied any wrong doing. The GISO man, S. Karamagi, denied any wrong doing or bribing as did Mutesasira. Frank Tumwebaze, who was implicated in moving around Kabaale constituency accompanied by the RDC plus NRM Chairman Byamukama denied moving with these two. He blamed two FDC agents for assaulting Rugumayo, an NRM agent. Similary the RDC denied campaigning for NRM or moving with either Byamukama, NRM District Chairman nor with candidate frank Tumwebaze. He claimed that Byaruhanga's affidavit contains falsehoods. Rugumayo blamed two FDC supporters for assaulting him after a video presentation which showed the NRM achievements. Kamwenge NRM district Chairman Mr. Byamukama denied decampaigning the petitioner and denied any bribing. He swore that money given out was to facilitated NRM committees or agents. I have not read of any illmotive as to why they were implicated. They indulged in the malpractices and I so find.

At common law, a parliamentary election could be avoided on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election (Hackney case (1874) 2D.2 h.77 at page 81; Wood Ward Vs Sarsons (1875), L.R. 10 C.P. 733). This is in effect what the Solicitor-General contended. Later by statute, it was enacted in England that a Court, before declaring an election invalid on these grounds, must consider that the election was not conducted substantially in accordance with the elections law and the irregularities have affected the result: Halsbury's Laws of England, 3rd Ed., P244. See especially page 261. When giving my reasons in support of the position I took in the Presidential Election Petition No.1 of 2001, I considered, among other authorities, the English Court of Appeal decision in Morgan Vs Simpson (1974) 3 ALL.E.R.722. Lord Denning, M.R., stated that the origin of the principle with which we are concerned here was introduced by an English statute of 1872. In the Morgan case, the English Court of Appeal discussed positions where number of votes matter and where they do not matter.

It is my considered opinion that neither decision of the Supreme Court of Zambia (supra) nor that of the Nigerian Court of Appeal in Obasanjo Petition (supra) are of help. In the Zambia petition the irregularities appear to have been negligible or trivial.

In the 2001 Presidential Election Petition, I expressed the opinion, which I would repeat here, that Courts and Advocates in this country who rely on the Tanzania case of Mbowe Vs Eliuffo (1967) EA. appear not to appreciate the following statement by Georges, CJ. It appears at page 243.

"We now come to allegations (a) and (b), which I shall deal with together, because they are closely related and they are the most serious allegations in the petition. Each of them would constitute an illegal practice contrary to the National Assembly (Elections) (Amendment) Act 1965. In particular as far as (a) is concerned, HAD IT BEEN PROVED TO OUR SATISFACTION IT WOULD HAVE GONE SO DEEPLY INTO THE ROOT OF THE WHOLE ELECTION THAT IT WOULD HAVE BEEN DIFFICULT, HOWEVER LARGE THE MAJORITY MIGHT HAVE BEEN, TO SAY THAT IT DID NOT AFFECT THE RESULTS OF THE ELECTION."

Here Chief Justice Georges was referring to allegations of threats by TANU youth wingers which the petitioner in that case failed to prove by evidence. That in my view is not the case in this petition. Here threats, intimidation and actual violence were meted out to the petitioner's supporters which was in some cases splashed out by the press as in the case of Lt. Magara killings at Mengo and that of assault by Lt. Col. Bugingo at FDC Headquarters in Najanankumbi as well as that of Mr. Fox odoi, the Legal Assistant to the 2nd Respondent. The first killed supporters of the petitioner. The second assaulted a very prominent member and official of the petitioner's party in full view of TV cameras. The third assaulted and fired a gun in the presence of supporters of the petitioner.

According to the affidavits of supporters of the petitioner,

Bushenyi District, is one of the districts in Western Uganda where various malpractices took place. Abenaitwe Ezra was the FDC District General Secretary. Though he made general statements in his affidavit, he deponed that he witnessed incidents of intimidation, overnight campaigns, by agents of the 2nd Respondent spreading war propaganda especially through war films that war will break out if the Petitioner was elected President. That the mobile film shows exhibited war scenes during which voters were told that war would break out if the petitioner was voted into power. That these shows were organised by Hon. T Kabwegyere, MP, Igara West, Dr. Ndahuura Richard, MP, Igara East and Hon. Karoro Okurut Mary, women MP for Bushenyi District. Abenaitwe deponed that he reported this matter to the District Police Commander, Bushenyi, and the Electoral Commission (1st Respondent) who caused the shows to stop. He deponed that one Basajjabalaba told voters that they should not vote for the petitioner because he suffers from AIDS and would collapse during the campaigns. Basaijabalaba confirmed this in para 8 of his own affidavit. Abenaitwe further deponed that supporters of the 2nd Respondent gave money to voters and asked them to vote for the 2nd

Respondent and that (presumably on polling day), "Nkuruho staged himself at entrance of one polling station" telling voters to vote the 2nd Respondent. So Abenaitwe reported this to police whereupon the District Police Commander told Nkuruho to stop.

This witness does not name dates and places when and where he witnessed the various incidents. But he is supported by affidavits in reply. One of the Respondents' witnesses who reacted to Abenaitwe's affidavit is ASP Aguma Joel, the District Police Commander, (DPC) Bushenyi District. He was very cautious in his affidavit where he deponed that he had not seen or heard of any report regarding Nkuruho's activities as stated by Abenaitwe and he denied that he told Nkuruho to stop what he was doing. The DPC admitted, though, that one night he received a telephone call from a "General Secretary of FDC" complaining that there was campaign going on at night at a Taxi Stage in Bushenyi Town. The DPC went to the Taxi Stage in Bushenyi Town where he saw many people watching a film show but he "did not find there any known candidate either in the Presidential or Parliamentary elections addressing the gathering." As what follows illustrates, the DPC does not appear to be truthful in this.

On his part, Professor T. Kabwegyere, MP, deponed that part of Bushenyi Town is in his Constituency and that what Abenaitwe referred to as a film show was in fact a musical performance which was shown before election day. He attended and during the performance, members of the audience danced. According to Hon. Kabwegyere "the musical recording, inter alia, depicted pictures of Uganda's history, the NRA struggle during 1981 – 1985 period, economic and social developments by the Government since 1986". He denied addressing the audience nor did he urge the audience to vote the 2nd Respondent.

Dr. Richard Nduhura also deponed that part of Bushenyi Town is in his constituency of Igara East. Prior to election day, he attended "a show of the musical album by Kads Band" in Bushenyi Town from about 7:30 p.m. to about 8:15 p.m. During the show he danced to the music with the audience. He greeted a number of people in the audience but did not address the audience and did not urge the audience to vote for 2nd Respondent.

Hon. Mary Karoro Okurut was at the time contesting for Bushenyi Women District Parliamentary seat and was a sitting MP for the same. She was an agent of the 2nd Respondent during the Presidential election period. She denied intimidating any body or campaigning at night nor was she aware of any of the agents of the 2nd Respondent who did so in Bushenyi District. She never spread any propaganda that war would break out if the Petitioner won the Presidential elections. In paragraphs 8 and 9 of her affidavit, this is what she stated-

"*8. The shows referred to in paragraph 10 of the said affidavit (of Abenaitwe) were staged by Mr. Willy Kamukama, the proprietor of Kads Band, which produced a musical album which was screened during the said shows.*

9. That the said album which is recorded on a DVD is commercially available and among others it depicts the following:

(i) Uganda's turbulent past history

(ii) Achievements by the NRM Government which included schools, roads, electricity, e.t.c.

(iii) Mistreatment of civilians at Road blocks by armies of previous regimes

(iv) Episodes during the bush war between 1981 to 1985"

She denied that the shows were shown late at night. She attended one of such shows between 6:30 p.m. and 8:30 p.m. She did not address the audience.

The proprietor of the Kads Band, Mr. Willy Kamukama also swore an affidavit to the effect that the band is based in Kampala and from 2004 to October 2005 it produced a musical video under the Kads Band called KISANJA ALBUM. In paragraph 7 to 11 he deponed as follows:

"*7. That message in the said album was to remind Ugandans of the past with the view that, they should avoid wars and maintain stability which the country has enjoyed since 1986.*

8. That I have read an affidavit of Abenaitwe and understood its contents.

9. That the said band staged various shows of the said band at Ishaka and Bushenyi using a mobile van.

10. That it is correct that the said album depicts WAR SITUATIONS OF THE PAST AND THE MESSAGE WAS THAT UGANDANS SHOULD AVOID WARS IN THE FUTURE.

11. That it is correct that Hon. Professor Kabwegyere, Hon. Richard Nduhura and Karoro Okurut attended some of our shows. The said shows were staged under the sponsorship of my said band and not any of the said persons".

(It is well known in Uganda that KISANJA meant the third term, the subject of this petition).

What the affidavit of Abenaitwe and the four, who replied to it, reveal is that there were video shows. Although Professor Kabwegyere and Dr. Nduhura appear to imply that there could have been one show, Hon. Karoro Okurut and the proprietor of the Band suggest that there were several shows.

According to Kamukama, production of the video was concluded during October 2005. However neither himself nor any one else indicates the dates when the several shows were staged save that the MPs say the shows were staged before election date.

Reading through the affidavits of all the six deponents, it is clear that the shows were staged during

the Presidential and Parliamentary campaigns. Although the three Honourable Members of Parliament deny that none of them addressed the audience, with respect I do not believe them. The objective of the shows was certainly to promote the campaign of the 2nd Respondent and since the shows were staged in the Constituencies of the three Members of Parliament who were contesting on the same ticket as the 2nd Respondent, the shows were really intended to promote each of these candidates. I doubt Kamukama's claim that nobody sponsored the shows since he said the Kads Band was commercial band.

I cannot believe that any of the Members of Parliament would lose the opportunity to address the audience which was readily available. The District Police Commander was obviously not candid about what he saw and whom he found in the shows.

Court did not watch any of the shows. I can only comment on what the affidavits revealed.

From the affidavit of Kamukama and that of Karoro Okurut one can draw the inevitable conclusion that the shows painted the image that if the 2nd Respondent was not elected there would be chaos if not war. Showing a film or video about the achievements of the 2nd Respondent during campaign period is legitimate. But showing NRA bush war films, has more to do with instilling or pumping into voters fear, fright and anxiety. In that regard, Abenaitwe is correct in saying that the shows were intended to frighten, intimidate voters and to show that the election of the Petitioner would lead to war. A similar situation is portrayed by Byarugaba from Kanungu District in respect of Kinkizi FM Radio. Kanungu and Bushenyi are in the same region of Uganda.

Anybody who has watched war films can draw their own conclusions. For an ordinary person I think that watching war situations in a film during campaign for presidential elections, he/ she cannot avoid being fearful of and afraid of what the future holds if any other person is elected except the 2nd Respondent. The effect on the voter is obvious. Would the provisions of the Constitution and S.23 and S.24 of Presidential Elections Act permit such an exercise in the name of freedom of expression? I think not.

Other aspects about what went on in Bushenyi are given by different witnesses. Tibatisana Ephraim was the Petitioner's agent at Kyeibare Parish Headquarters in Ruhinda County, the constituency of Hon. Kahinda Otafiire, MP. According to Tibatisana, on polling day, Hon. Kahinda Otafiire arrived at the station in the company of soldiers and ordered agents to leave immediately. After pleas, he allowed agents to sit 40 metres away from where the presiding officer was. I may point out here that in its interim statement (Annexture 3 to Dr Kiggundu's accompanying affidavit) the Commonwealth observer group noted that *"To a targe extent, the party agents were too far away to observe the checking of the register and identity documents properly"*. This supports Tibatisana.

Later Tibatisana was refused to vote by a presiding officer because he was an FDC agent. Tibatisana moved closer to the presiding officer and noticed that the presiding officer gave several ballot papers to some voters to whom he paid shs 1,000/= and asked to tick the name of the 2nd Respondent. Hon. Kahinda Otafiire in reply deponed that he visited the station at 10:00 a.m to check on the progress of voting. He denied being in company of soldiers. He talked to a police constable and the presiding officer. He never chased away the FDC and other agents as claimed.

I find no reason to doubt what Tibatisana deponed. I believe Tibasana that the Minister arrived accompanied by 3 soldiers. The effect of soldier's presence on simple voters mind is obvious. In any case, the presence of armed persons at polling stations is out-lawed by both PEA (S.43) and Parliamentary Elections Act (S.42). The armed soldiers had no business at PS.

At this juncture I return to the facts in the Morgan case which concern numbers and when and where numbers matter.

At a local government election at which a total of 23.691 votes were cast, 82 ballot papers were properly rejected by the returning officer. Forty-four of those papers were rejected because they had not been stamped by polling clerks with the official mark as required by the local election rules. The 44 unstamped ballot papers had been issued at 18 different polling stations. Despite notices displayed at the polling stations, directing voters to see that ballot papers were stamped, the voters to whom the 44 papers had been issued had not noticed that the polling clerks had failed to stamp them. The returning officer himself had not been at fault. If the 44 ballot papers, had not been rejected, but had been counted, the petitioner, a candidate at the election, would have won the election by a majority of seven over the respondent. In consequence of the rejection of the 44 papers the respondent had a majority of 11 and so was declared to be the successful candidate. The petitioner sought an order that the election should be declared invalid under S.37(1) of a UK Act, the Representation of the People Act,1949, on the ground that it had not been conducted substantially in accordance with the law as to elections; alternatively that, even if it had been so conducted, the omissions of the polling clerks had affected the result.

The English Court of Appeal considered previous English decisions and facts of the case. It allowed the appeal and held that:

Under S.37 (1) an election court was required to declare an election invalid: -

(a) if irregularities in the conduct of the election had been such that it could not be said that the election had been "so conducted as to be substantially in accordance with the law as to elections," or

(b) if the irregularities had affected the result.

Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election has been affected.
(ii) Although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid.
Learned counsel for the respondents appear to rely on the difference of 1.5 million votes which appear to separate the petitioner and the second respondent to argue that even if the petitioner had proved non-compliance with the provisions of the PEA, the non-compliance did not affect the results in a substantial manner. The English court decision in Morgan case and part of Mbowe case (supra) are against that argument. The question that must be answered is the circumstances under which the 1.5 million votes were obtained. In this petition the non- compliance with the principles of the PEA was not trivial in the sense that it consisted of officials being ignorant of the law. I have already referred to evidence about wide spread intimidations, threats, violence, assault and harassment of supporters of the petitioner. I have referred to bribery. There is evidence from the 2nd Respondent himself in paragraphs 9 and 10 of his affidavit, sworn on 21st March, 2006, in reply to that of Salaam Musumba. I will reproduce these presently.

In my opinion the difference in the number of votes cannot be the only basis for deciding whether the election results have been affected in a substantial manner. Intimidation, frightening and instilling fear of war among voters cannot be measured, for instance, when it is widespread. These acts are wholly unlawful and forbidden by our laws and do affect voting results.

The European Union observers group, at page 6 of its preliminary report (R2), issued on 24/2/2006 explained how the second respondent enjoyed substantial advantage on the use of existing movement organs; this is how the report reads:
"Despite the adoption of a multi-party system, the movement structures remained intact, active and funded by the State throughout the election period. The President and his party (the National Resistance Movement Organisation) utilised state resources, particularly through the old movement structures, in support of their campaign, including use of government cars, personnel and advertising, and received overwhelming and positive coverage on State television and radio.

The NRMO and NRM with its organs share many of their senior staff. In many districts (for example Isingiro, Kyenjojo, Bundibugyo, Kamwenge, and Kabarole in the Western Region, all Buganda districts) they operate from the same offices. This situation occurred because the movement organs which had provided the organisational structure for the no-party-system were allowed to continue operations until the holding of the elections. Thus, through this existing Movement system the President and the NRMO candidates enjoyed substantial advantages over their opponents which went further than the normal advantages of incumbebcy."

And with regard to official media coverage this is how the observers report put it on the same page 6.

"The media monitored by the EU EOM, provided a variety of information and debate about the elections in general as well as the main candidates. This was reflected in a range of news coverage focusing on the main presidential candidates, which was complemented with talk show and discussion programmes broadcast on state and commercial radio and television.

However, in certain critical areas there were evident failings, most notably in the election coverage of the public broadcaster UBC TV and to a lesser extent UBC Radio. The incumbent candidate received 79.7 per cent of overall election related coverage on UBC TV, while the leading opposition candidate had 11.5 per cent and the remaining three presidential candidates received less than 9 per cent of coverage. UBC Radio's coverage accorded more airtime to opposition candidates, but the incumbent remained the candidate granted the largest percentage of access with 55 percent of coverage on the station. The limited resources, absence of production capacity in the news department and a reliance on programming supplied by the parties and candidates. Coupled with the wide access granted to the Presidential Press Unit, this resulted in coverage of the presidential elections that was highly imbalanced in terms of access to UBC TV in favour of the incumbent. Commercial broadcasters provided a far greater range of coverage of the elections and this is represented in far wider coverage of the main opposition candidates."

FUNDUNG AND BRIBERY ALLEGATIONS

The 2nd Respondent swore the affidavit first as Chairman of both the NRM political organisation and secondly as Chairman of the Central Executive Committee of NRM. He was sponsored by NRM to contest for the office of President. It is therefore logical to infer that it was in his interest that funds disbursed were to promote his campaign and his success at the elections. The second Respondents' statements in his affidavit and particularly the contents of Annexture R2 A1 appear to support Mrs. Musumba and other witnesses who deponed about bribery. She deponed in paragraphs

3 to 19 of her affidavit this way -

2. That I was a candidate in the recently concluded Parliamentary Elections (for the same seat).

3. That I am one of the Vice Chairpersons for the Forum for Democratic Change and was involved in the Presidential campaigns and also monitored the voting process.

4. That the whole Presidential campaigns and voting process was marred by bribery of voters facilitated by the funds released by the National Resistance Movement Central Executive Committee chaired by the second respondent.

5. That each NRM Village/Branch received Ushs.100, 000 paid in two instalments of Ushs. 50,000 each with the last one being paid on 17th day of February 2006 through Commercial Bank and received two days before polling day.

6. That there are 43,365 villages in Uganda and NRM released Ushs. 4,336,500,000.

7. That to each sub county task force NRM released Ushs, 400, 000 paid in two instalments of Ushs. 200,000 per instalment with the last instalment being received at the sub counties two days before polling day.

8. That there are 670 sub counties in Uganda and accordingly NRM central Executive Committee released Ushs.388, 000, 000.

9. That to each District task force the Central Executive Committee of NRM paid U Shs 4,000,000 in two instalments of Ushs. 2,000,000 each, the last instalment arriving at the District two days before polling day.

10. That there are 69 District and the central Executive Committee of the RNM dispatched Ushs, 276,000,000.

11. That to each NRM Parliamentary Candidate the party paid Ushs, 4, 000, 000 paid in two instalments each, the last instalment of Ushs, 2,000,000 being paid two days before polling day.

12. That there are 215 Constituencies and the central Executive Committee of NRM releases a total of Ushs. 860, 000, 000.

13. That each NRM candidate vying for the Woman District Parliamentary seat received Ushs.6,000,000 paid in two instalments of Ushs.3,000,000 each the last instalment being paid two days to polling day.

14. That there are 69 districts parliamentary seats and the NRM released Ushs.414, 000, 000 on its woman candidates.

15. That each NRM candidate vying for a municipality seat the Central Executive Committee of NRM disbursed to the thirteen (13) municipalities and five divisions in Kampala in two instalments the last being received two days to polling day.

16. That each NRM candidate vying for the local Council V seat received shillings 6,000,000 from the central executive Committee paid in two instalments of shillings 3,000,000 each with the last instalment received two days to polling day. With 69 district the party released shillings 414,000,000.

17. That each NRM candidate vying for a seat on the District Council received shillings 400,000 paid in two instalments of 200,000 the last such instalment being received two day before polling day.

18. That there 1340 council seats in the country and the central executive committee released a total of 536,000,000 shillings.

19. That to each NRM candidate vying for the sub county chairperson the central executive committee paid shillings 4000,000 in two instalments of 200,000 each with the last instalment being released two days to polling day. The committee released a total of shillings 268,000,000.

20. That to each NRM candidate vying for a sub county council seat the central Executive Committee of NRM released shillings 200,000 in two equal instalments with last instalment received two day to polling day.

21. There are two seats for each parish at the sub county and with 5314 parishes the central executive committee sent out shillings 2,125,600,000.

22. That to each NRM candidate for a municipality and city council seat the central executive committee released shillings 1,000,000 in two equal instalments with the last instalments received two days to polling say.

23. That there are eighteen municipalities and five divisions of Kampala city with varying number of seats."

Although Musumba's claims especially as to the amounts of money given out were rubbished by counsel for the respondents, she is substantially supported by Zedikiya Karokora, the LC5 Chairman elect for Rukungiri District. He swore an affidavit as witness of the 2nd respondent, to contradict the affidavit of Kamatenite Ingrid Turinawe who had sworn that there was bribery in Rukungiri District. In paragraph seven of his affidavit, Karokora wholly corroborates Musumba's paragraphs 16, 17, 18, 19 among others.

The second respondent replied this way to Musumba's affidavit.

3. That I am the Chairman of the National Resistance Movement (NRM), a political organisation, and the Chairman of its Central Executive Committee and I swear this affidavit in that behalf.

4. That neither I nor the NRM Central Executive Committee authorised or released any funds to bribe voters in the Presidential Elections held on the 23rd February, 2006 or any elections of

whatever description as alleged in paragraph 4 of Musumba's affidavit.

5. That after I was nominated as a Presidential Candidate for the said Presidential Elections, I chaired an NRM Central Executive Committee meeting to plan out and put in place strategies for all NRM candidates' campaigns at national, district, constituency and local levels including the raising of resources for those campaigns.

6. That the Central Executive Committee, among other things, established a National Campaign Task Force chaired by the NRM Vice Chairman, AL Haji Moses Kigongo, to manage the overall strategies for the campaigns of all NRM candidates at national and lower levels, raise resources from our supporters and well-wishers, coordinate and generally supervise all activities relating to the campaigns.

7. That the main strategy for the campaigns was physical voter contact tasked to the NRM branch/village task forces throughout country.

8. That the primary responsibility of each branch/village task force was to persuade each voter in its area to vote for me and all NRM candidates from village to national levels, while the Parish, Sub-County, Urban, District and national Task forces would deal mainly with coordination and supervision activities.

9. That a national budget for facilitating all NRM candidates: campaigns was prepared and approved by the Central Executive Committee. The resources were handled at the Central Executive Committee level and disbursed to the level below through the districts by payment voucher documents. A copy of a typical sample of the said payment voucher is attached hereto and marked as Annexture R2A1.

10. That the figure indicated in paragraphs 6 to 23, 25 and 27 of Musumba's affidavit are not true. There was no such regular pattern of distribution. And disbursements depended on amounts received at Central Executive Committee level and the facilitation needs at the various levels.

11. That all funds raised by the NRM for the campaigns as deponed to herein were exclusively spent on facilitation of the campaigns as stated in this affidavit and no money was ever disbursed for the purposes of bribing voters as falsely alleged by Proscovia Salaam Musumba in paragraph 26 of her affidavit.

Thus although counsel for both respondents rubbished Musumba's affidavit as valueless basically because she did not disclose the source of her information, in this affidavit, especially the voucher, annexeture R2 A1, (post) the second respondent in reality confirmed the substance of Musumba's claim that NRM released a lot of money to all levels of its organs for campaigning.

The denial by the second respondent in para 10 of his affidavit that there was no such regular

pattern of distribuation is contradicted by the affidavit of Zedekiya Karokora, LC5 Chairman elect of Rukungiri District. Karokora indicates in para 7 of his affidavit, that amounts reflected in R2 A1 are the amounts given out. The giving of money to voters has been confirmed in affidavits sworn by witnesses who received money, for example, several deponents from Musoola in Bungokho South constituency, in Mbale District, David Magulu in Kaliro District and also in Soroti and Tororo Districts. These are from the East of the country. There are deponents from the Districts of Kabale, Mbarara, Bushenyi, Kamwenge, Kyenjojo, Kanungu and Rukungiri (all in the West of the Country), Nebbi District in the North and Kampala in central. The various poll observers, especially Commonwealth and DEMGroup observers, all agree on the bribing and the giving of money during campaigning. The respondents tendered affidavits of witnesses challenging those of the petitioner's witnesses. In some instances the respondents' witnesses say they had money on polling day for facilitating their party agents.

The voucher R2 A1 says it all. This annexture was prepared on 17th February, 2006, just five days before the elections on 23/2/2006. It is not known when the intended disbursers received the money. But according to para 7 of Zedekiya Karokora's affidavit one of the receipients (Ruraka George) of such money received it on 20/2/2006, just 2 days before election. Even if it is assumed that the money was received on the same day,or few days after 17/2/2006, as in the case of Ruraka, releasing a colossal sum of Shs.81,850,000/= for mere facilitation (whatever that means) in a small urban District like Jinja is mind boggling. Of course Byarugaba, an agent of the petitioner in Kanungu, was arrested on 22/2/2006 while in possession of 687,500/= intended for allowances of agents of the petitioner. But as far as I know, nobody came out to swear that he was bribed with money or hoes by Byarugaba on behalf of the petitioner or of any other person.

I find it hard to believe that a political organization, like the NRM, which for all practical purposes has been in existence and had structures operating on the ground for many years, up to polling day, would find it necessary, at the eleventh hour, to rush such big sums of money to its various organs for mere "facilitation" of its functionaries. The money must have been intended to facilitate voters rather than NRM agents. That is what the second respondent implies in paragraphs 7 and 8 – by "physical voter contact" and the "responsibility of eachbranch/village task force was to persuade each voter in its area to vote for me."

The figures of Mrs. Musumba appear to be logical deductions from the information set out in the voucher. The core information is there.

The number of Districts, counties, constituencies, sub counties, parishes or villages are matters of which every one can take judicial notice.

On matters of payment of money, take the example of David Magulu from Kaliro. On 23/2/2006

Police hired his vehicle, so he could drive them on the election supervision work. According to him, on that day, Kaliro Police arrested Bwire Bakale P, the NRM District Treasurer, Musiba.S, an NRM agent, Basoga Saleh and Naizamba Wilber. According to this witness, these people who were giving money to voters were found with shs.800,000/= on arrest. Of course they swore affidavits denying that they were bribing voters. Magulu swore his affidavit which he signed on 18/3/2006. Strangely a second David Magulu (this time spelt as Maguru) swore another affidavit on 21/3/2006, which he thumpprinted, on behalf of the respondents attempting to disown the earlier affidavit, even though in para 4 of his latest affidavit he betrays himself by admitting that the names are his. However DPC Gerald Mbasa in his own affidavit, drawn by the same respondent's advocates admits, receiving a call reporting the buying of voters at Nawampiti mentioned by the first David Magulu. He hired an unnamed vehicled to take police to the scene. Police in fact arrested the four people mentioned by the first David Magulu. According to DPC, Bwire, the Treasurer was reported to be in possession of 329,000/= and police entered this in their CRB book. On his part Bwire admits the arrest and claims he was in possession of only 260,000/= from which he paid NRM agents, each 5000/=. Both Musiba and Basoga Saleh also admitted the arrest because of allegations that, they were giving out money to voters. The description of the vehicle driven by the first Magulu as a pickup is the same pickup as that driven by the second Magulu on same day and for the same mission. It was also a pick up though registration numbers differs a little. Surely in view of this what the original David Magulu said cannot be an invention. Where did the respondents get the second Magulu? Was the first Magulu forced to modify his views? The second David Maguru must be a liar and I reject his evidence.

As mentioned already, there are witnesses who deponed to the giving of money to voters. Candidate Charles Byaruhanga of Kamwenge District talks of this in Kamwenge District. Ozo talks of this in both Kamwenge and Kyenjojo Districts.

Exh. R2 A1 speaks it all and therefore, I must quote its contents:-

National Resistant

Central Executive

Plot 10 Kyadondo Road, Box 7778 K'la. Tel: 346295,346279 Fax 256363

PAYMENT VOUCHER No.DT1117

NAME: MZEE MUWUMBA SAMUEL

CHAIRPERSON JINJA DISTRICT

Date: 17-02-2006

Particulars	Amount	
Facilitation to Village/Branch Task Force to procure pens, writing pads and refreshments during meeting to enhance the campaign effort. (395 villages in district x 50,000= per village)	19,750,000	
Facilitation to Sub County Task Force to carry out campaign effort within their jurisdiction (12sub-counties in districts x 200,000= per sub-county.	2,400,000	
Facilitation to District Task Force to carry out campaign effort within their jurisdiction	2,000,000	
Party contribution to the NRM candidate for the seat of Member of Parliament 4 (constituency mp x 2,000,000=)	8,000,000	
Party contribution to the NRM candidate for	3,00,0000	

the seat of Member of Woman member of Parliament		
Party contribution to the NRM candidate for the seat of Municipality Chairperson	2,000,000	
Party contribution to the NRM candidate for the seat of LCV Chairperson	3,000,000	
Party contribution to the NRM candidate for the sea of District Councillors (24 Councillors x 200,000)	4,800,000	
Party contribution to the NRM candidate for the seat of Sub-county Chairperson (12 Sub-counties x 200,000=).	2,400,000	
Party contribution to the NRM candidate for the seat of Sub-county County Councillors (149 sc/councillors x 100,000	14,900,000	
Party contribution to the NRM candidate for the seat of	13,000,000	

Municipality Councillors (26M/Councilors x 500,000)			
Presidential Campaign rallies			
Polling Agents (315) polling station x 8p'ple) x 5,000	12,600.000		
Special Operations	0		
TOTAL	87,850,000		
REPARED BY: BERNADETTE DATE: 17-02-2006	AUTHORISED BY …… DATE:……..	PASSED BY …… DATE:……	RECEIVED BY …… DATE: ……

All these combined plus the use of money must surely have had substantial effect on the election results.

I accept that political parties are bound to use money in electioneering and this explains why the state gave some money to presidential candidates. But excessive spending commercialises elections which violates the electoral laws as to free and fair democtratic election.

There were other matters which impacted on the presidential election in 2006. The presence in many places during campaign and on polling day of military personnel and the use of NRM structures which had been in existence for years, during campaign and polling day; the use of Government resources and personnel like RDCs, as in Kamwenge, Kabale, Tororo and Butaleja Districts, GISO, DISO, money, shooting at supporters (at Mengo), conduct of officials of the second respondent such as Fox Odoi in Tororo and the use of Military in Iganga, Kabale, Bushenyi, Mbale, Kanungu, Ntungamo Districts, the use of tear gas to disperse supporters of opposition plus inadequate civil education all combined to affect the results.

It hardly requires a great stretch of imagination for a reasonable tribunal to conclude that the level of last hour spending of money alone or combined with other complaints such as proved intimidation, violence, or threats thereof would affect the election results in a substantial manner.

Mr.Wandera relied on the opinions of Dr. J.Odwee, an expert on statistics and contended that those

opinions augment the case of the petitioner. The respondents in turn produced the opinions of Dr. Nazarius Mbona Tumwesigye to counter those of Dr.Odwee. I have gone through the reports and the affidavits of these two expert witnesses. They possibly would have been useful witnesses if clarifications of their respective reports were made orally in court. Time did not allow this to be made which is regrettable. Whatever the case I personally do not think that such clarification would have changed my opinion in this petition on this issue.

ISSUE No. 4.

INTERCESSIO SOCIAL AND LEGAL PRINCIPAL (THE ACT OF GIVING ANOTHER PERSON THE RESPONSIBILITY OF CARRYING OUT THE PEFORMANCE AGREED TO IN A CONTRACT)

WHETHER ANY ILLEGAL PRACTICES OR ANY ELECTORAL OFFENCES ALLEGED IN THE PETITION WERE COMMITTED BY THE SECOND RESPONDENT PERSONALLY, OR BY HIS AGENTS WITH HIS KNOWLEDGE AND CONSENT OR APPROVAL.

This issue arises from allegations in paragraphs 11 and 12 of the petition and the traversing of those allegations by the second respondent.

Mr. John Matovu opined, and later Mr. Wandera repeated this, that because the presidential election was held under multiparty politics under which four of the presidential candidates were sponsored by their respective parties, a candidate sponsored by a party is responsible, or liable, for the activities and actions of his party agents. Bribery or illegal practices and electoral offences committed by such party agents would be taken to have been so committed with the knowledge of and consent or approval of a candidate.

On the burden of proof in an election petition, counsel relied on the opinion of Odoki, CJ., in Presidential Election Petition No.1 of 2001 for the proposition that the standard of proof required in an election petition is proof to the satisfaction of the court. Indeed that is what the law states: See S.59 (6) of PEA. That was the general opinion of the Court in that petition. The Learned Chief Justice stated that it is a standard of proof that is very high ostensibly because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance. Further, learned counsel cited Ss.102 and 103 of the Evidence Act. (These two sections really set out the obvious, namely, that whoever wants court to believe a fact, he/she must adduce evidence to prove that fact). This is what Georges stated in Mbowe Petition (supra) at page 241D. Counsel contended that the standard is not proof beyond reasonable doubt. As regards

averments in para 11 of the petition, learned counsel contended that the PEA, 2005, created various categories of offences whose objective was to oblige presidential candidates focus on issues contained in their respective manifestoes rather than indulge in mudslinging each other. He referred in particular to the offences created by paragraphs (a), (b) to (g) of subsection (5) of S.24 of the PEA and opined that S.24 (5) (b) outlaws sectarianism, while the other paragraphs create criminal offences whose objective is to prevent candidates from promoting incitement and also to encourage discipline among candidates. He distinguished offences created by S.24 (5) (a) which, according to counsel, require proof of mens rea, from offences under S.24 (5) (b) to (e), which, according to him, are offences of strict liability.

In his view, a candidate who commits offence of strict liability cannot justify the commission by explanation, as did the 2nd respondent. These offences are alleged or pleaded by the petitioner in paragraph 11 of his petition. The 2nd respondent answered these allegations in paragraphs 8 and 13 of his answer to the petition. According to counsel the statements of the 2nd respondent contained in his answer were false and defamatory and derogatory of the petitioner and the known members of FDC.

Mr. Matovu argued that in paragraphs 12, 13, 15, 18 and 19 of the petitioner's affidavit accompanying his petition, the petitioner alleged that the 2nd respondent made statements maliciously at various rallies and that those statements breached S.24 (5) (b) of PEA. He relied on Black's Law Dictionary, (page 956), the intentional doing of a wrongful act, etc. According to learned counsel the replies by the second respondent set out in paragraphs 13, 16, 17 to 20, 23, 25 and 26 of his answer are admissions of the commission of the offences alleged in the petition and so they do not constitute defences.

Counsel dismissed the affidavits of Brigadiers Sam Kolo and Keneth Banya because each contains hearsay matters. Counsel argued that in paragraph 19 of his own affidavit, the second respondent set out a statement which is false, malicious and derogatory and contravenes S.24 (5) (d). Paragraph 22 shows that he wrote to the New Vision newspaper statements which, according to counsel, were malicious, derogatory, derisive, insulting and abusive. For the meaning of 'abusive' he again relied on Blacks Law Dictionary, page 417. And for the meaning of 'insult' he relied on Phrases Legally Defined. Counsel opined that under S.24 (5) paragraphs (b) to (g), the petitioner needs only to prove that the second respondent made statements contrary to those provisions, arguing that the 2nd Respondent admitted the commission of the electoral offences but gave explanations or motives which are no defences. Counsel contended (which is correct) further that proof of any one of these offences results in the annulment of the election.

BRIBES: Paragraph 12 of the Petition.

Mr. Matovu contended that both the 2nd Respondent and his agents gave bribes of two types, contrary to S.64 of PEA. He relied on paragraphs 2, 4, 5 of the affidavit of Umar Bashir (Kakoza) and the affidavit of Henry Lukwaya. According to counsel, the 2nd Respondent admits the giving of money in his affidavits. First, bribes were given through agents or his party functionaries: He relied on driver David Mugalu. Mugalu transported four agents of NRM who were allegedly bribing voters on 23/2/2006 in Kaliro to police station. The second types of bribes was given by vigilantes of the 2nd respondent on polling day.

Mr. Matovu relied on the affidavits of Salaamu Musumba, Kamateneti Ingrid Turinawe (Rukungiri) and Major Rubaramira (to which were annexed reports of election monitors or observers). Learned Counsel further contended that General Salim Saleh bribed voters. (Essentially, it was Major Rubaramira, who, in his affidavit deponed that he had information that General Caleb Akwandwanaho aka Salim Saleh and an army officer bribed voters and supporters of FDC). In turn the General swore that by the time of elections on 23/2/2006, he had retired from the army and never bribed voters. He admitted that he actively campaigned for the second respondent.

Mr. Matovu submitted that the offence of disenfranchisement was orchestrated by NRM functionaries. Voters were removed from registers. This contravenes S.26 (c) of PEA, (attempting and or interfering with free exercise of franchise). He argued that the petitioner's complaint to the Commission about this is sufficient proof. (The complaints are set out in a letter dated 28th January, 2006, which the petitioner wrote to the Secretary of the 1st Respondent and to the Officer – in – Charge, Electoral offences Squad, CID, Kampala. I have already reproduced the contents thereof in these reasons. That letter was annexed to the petitioner's affidavit and its authenticity has not been challenged).

Dr. Byamugisha, on behalf of the 2nd respondent, replied to Mr. Matovu's submissions on the 4th issue.

PARTICULARS OF OFFENCE

Dr. Byamugisha first contended that the accompanying affidavit of the petitioner especially para 10 does not set out the particulars of the offences of which the petitioner complained. He relied on Bullen, Leake and Jacobs, Precedents of Pleading and contended that the petitioner should have pleaded particulars of the offences. He criticised Mr. Matovu for failure to provide authority for his proposition that the alleged offences constitute strict liability. Dr. Byamugisha relied on the Australian case of He Kaw Teh Vs. R(1986) a LRC (Crim.) page 553, where the High Court of Australia held that "the presumption that Mens rea is required before a person can be held guilty of

a grave criminal offence was not displaced in relation to [(S.233 B(1) (b) of the Customs Act, 1901 of Australia].

In other words Dr. Byamugisha is of the view that the provisions cited by Mr. Matovu do not create strict liability. He contended that because allegations in the petition, if accepted, are serious in that they result in nullification of the election, mens rea has to be proved.

CAUSE OF ACTION

Dr. Byamugisha contended also that the petition does not disclose a cause of action because it did not allege that there was malice. (I think that Para 11 (a) of the petition alleged malice). Counsel argued that it neither plead that the 2nd respondent was abusive nor that he called the petitioner a false prophet. Learned counsel relied on Order 6 Rule 2 of CP Rules and Charan Lal Sahu Vs Singh & Another (1985) LRC (const.) 31, a decision of the Supreme Court of India, where that Court discussed the need for precision in pleadings in election petitions.

Dr. Byamugisha submitted that paragraphs 10 to 20 of the petitioner's affidavit breached Order 6 rules 2 of the CP Rules in as much as they do not allege that the 2nd respondent made certain statements while campaigning in which case the allegations do not give the 2nd respondent a chance to respond to those allegations in a specific manner. He further contended that there is no evidence to support the allegation that the 2nd respondent contravened S.24 (5) of the PEA, because there was no evidence by affidavits read in court to support allegations in paras 10 to 20 of petitioner's affidavit, there was no cause of action.

May I observe here that the argument by learned counsel for the respondents that we should ignore affidavits supporting the petitioner which were not read or specifically referred to in court ignores the fact that the respondents' counsel never read out most of the affidavits of respondent's witnesses. He only produced an index of those affidavits and even then, some were not indexed. Should those be ignored, too? I don't think so.

FREEDOM OF EXPRESSION

Dr. Byamugisha urged court to bear in mind that under section 23(2) of PEA, candidates enjoy unhindered freedom of expression when campaigning for the presidential office. He relied on the decision of this Court (the judgment of Mulenga, JSC) in Charles Onyango Obbo & Another Vs Attorney General ConstitutionalAppeal No.2 of 2002 (pages 16 to 17 in regard to the extent of freedom of expression). Learned Counsel contended that if both S.24 (5) and S. 23 (3) (b) of the PEA are to be preserved as law, they have to be read in conformity with the Constitution. He relied on the Bill of Rights Handbook 4th Ed. Para 3.7, headed Indirect Application of the Bill of Rights

To Legislation.

At page 70, the author states that: -
"Since the Bill of Rights binds all the original and delegated law-making actors, it will always apply directly to legislation. But, before a court may resort to direct application and invalidation, it must consider indirectly applying the Bill of Rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights. The indirect application of the Bill of Rights to legislation has become known as "reading down."

Thereafter the author discusses, at page 71, the meaning of "Reading Down" in relation to certain sections of the Constitution of South Africa which are on the Interpretation of the Bill of Rights.
Dr. Byamugisha urged us to make liberal interpretation of Ss.24 (5) and 23 (3) (b) which allow candidate's right to campaign. He relied on Halsburys' Laws of England, 3rd Ed. Vol.14 pages 226 and 227, paragraph 394, as well as Election Laws 3rd Ed., byS. K.Gosh, pages 149/150. The latter book is a commentary on the India election laws, especially regarding proof of allegations of corrupt practices. Dr. Byamugisha replied in answer to a question from court that if one section of PEA contradicts another, Court should uphold the section which is in conformity with the Constitution. He referred to paragraph 8 of the affidavit of the 2nd respondent accompanying his answer and submitted that in sub- paragraphs (a) to (h) of that affidavit, the 2nd respondent had to counter all the petitioner's accusations, falsehood and misleading statements, contending that what his client stated were correct and honest statements during a political campaign for the Presidency. He cited Hibbs (Clerk) Vs Wilkinson IF & F 873 at para 610, a case decided in 1859 and which is a case of libel. (Here learned counsel contradicts, by implication, his earlier contention that allegations in the petition did not show that his client's statements were made during campaigning. In fact the petitioner alleged that the statements were made during campaigns by the 2nd respondent and in para 11(a) of the petition the petitioner alleged malice.

Dr. Byamugisha urged that the contents of paras 10, 11, 12 & 13 of his client's affidavit, show that paragraphs 10 to 20 of the petitioner's affidavits cannot be true. According to Counsel, there is nothing false in para 12 of his clients affidavit, because politicians use colourful language which description is borrowed from the opinion of the Supreme Court of India (supra). Counsel justified what his client said explaining the need for the 2nd respondent to state what is contained in his affidavit and in that of Hon. Daudi Migereko to explain away Musumba's second affidavit, as well as affidavits of Nandala Mafabi, Ekanya and other MPs. These MPs of the last parliament were blamed for being responsible for shortage of electricity and whether or not these MPs were FDC members at that material time. Dr. Byamugisha further contended that the supplementary affidavit of the petitioner in reply to the 2nd respondent's answer cannot be used to support the petition as the

reply was filed out of time. Counsel cited Interfreight Forwarders Vs Uganda Development Bank (at pages 2068 & 216) and Norman Cameron Vs Sir Philip Fysh (1904) HC of A 314) page 55 of R) The latter case appears to support the proposition that a petitioner cannot be allowed to belatedly introduce new facts to be relied upon to invalidate an election after the time allowed by law for presenting a petition has elapsed.

B R I B E R Y

Dr. Byamugisha submitted that bribery was originally not pleaded in the petition, but it was raised after the time of pleading. He contended that his client denied the bribery allegations pleaded in para 12 of the petition. He contended that counsel for the petitioner did not canvass it neither was evidence adduced to prove the allegation of bribery. So bribery was unsubstantiated. He also contended that there are no affidavits to support allegations of the giving out of saucepans, water containers and other gifts.

Learned counsel contended further, in effect, that Salaamu Musumba's affidavit on disbursement of money is valueless because Musumba did not disclose the source of her knowledge and that in any case the second respondent answered the allegations in his own affidavit. Learned Counsel then arged that money given out was for facilitation as defined in S.64 of PEA, which is different from bribery as defined in the same section.

Counsel argued that money given out as stated in the affidavit of the second respondent was for the facilitation of NRM party functionaries/agents. He contended that there is no voter who has proved that he received money from the 2nd respondent. When counsel's attention was drawn to the affidavits of Zedekia Karokora who deponed about distribution of money by NRM task force in Rukungiri and of Umar Bashir, learned counsel contended that Bashir was only asked to cross over and campaign and that Bashir never claimed he was given money as a voter. Counsel rubbished the evidence of many witnesses (already mentioned in these reasons) who deponed that they were paid between 300/= and 500/= because, according to Dr. Byamugisha, this amount was miserable and not evidence of countrywide bribery within the scope of S.59 (6) (a) of PEA.

He made references to affidavits of Najjemba and of Henry Lukwiya and contended that shs 100,000/= paid on 24/12/2005 was not a bribe and that there was no evidence that Lukwiya was a voter.

In view of the provisions of S.64 (1) of the PEA, Dr. Byamugisha's views on this matter is with respect incorrect. Subs (1) of section 64 states as follows: -

"A person who, either before or during an election with intent either directly or indirectly to

influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery……"

He relied on Gosh'sElection Laws (Supra), pages 348 and 354 which explains how the inference of guilt can be made and on corrupt practices generally. He prayed that we should answer the 4th issue in the negative.

Mr. Ogalo Wandera wound up on behalf of the petitioner. In effect he contended that the petition disclosed a cause of action and it satisfied Rule 4(2) of the Presidential Elections (Election Petition) Rules, 2001. He argued that affidavits filed subsequent to the lodging of the petition provided requisite facts and particulars and complied with the law.

I agree with the view that proof of commission of an electoral offence or a practice results in annulment of the election, as president, of a candidate proved to have personally or through any agent committed an offence. This is evident from the reading of S.64 (1) and S.59 (6)(c). The latter reads as follows:

" 59 (6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court-

(a)……

(b) ……

(c) that an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."

In the 2001 Presidential Election Petition, I had occasion to discuss S.58 (6) (c) of the Presidential Elections Act 2000 which is almost identical to the above quoted provision. At page 132, I said……

"In the case before us, learned counsel were content to say that the standard of proof should be to the "satisfaction of the Court," meaning that it is beyond the standard of the preponderance of probabilities and yet below the criminal law requirement of proof beyond reasonable doubt. This approach is about the same, as did Lord Denning in the Bater case (supra).

Draftsmen of legislation appear to be in the habit of sticking to well trodden paths. I say this because the expression of proof to the satisfaction of the Court is used in many legislations (both penal and non-penal) and yet when Courts are called upon to try criminal cases arising under

penal enactments, those Courts require the prosecution to prove criminal charges under investigation beyond reasonable doubt. I know it is convenient and perhaps, a matter of practical draughtsmanship for legislative draftsmen to follow the old path of precedent. However I wonder why draftsmen of our election laws have avoided the inclusion of the commonly used expression of "proof beyond reasonable doubt" in the various enactments such as PEA. For this reason, I do not, with respect, subscribe to the view that the expression "proving to the satisfaction of the Court" inevitably means proof beyond reasonable doubt. I think it is safer to apply the words themselves and say that the standard of proof required to nullify an election of a President after a Presidential Election, must be proof to the satisfaction of the Justices trying the petition, namely proof so that the trial justices are sure that on the facts before them one party and not the other party is entitled to judgment."

Mr. Ogalo Wandera raised the important point about the agency relationship, in a multiparty politics election, between a presidential candidate and his or her agents who are party functionaries. Apart from making a passing reference on facilitation of party functionaries, Dr. Byamugisha did not, as far as I can recall, address us on the question of agency relationship between a candidate and his or her party's functionaries as regards responsibility or liability for acts of those agents in the conduct of electioneering under multiparty politics system elections.

Section 1 of PEA defines an agent as follows*:*
"Agent by reference to a candidate, includes a representative and polling agent of a candidate."
Under the Act a polling agent is an agent of a candidate. Obviously, a candidate would be bound by the acts of his polling agent such as the signing of declaration of results forms. The important question is how would a candidate be bound by such agent's offence(s) or illegal practice?
Under the law of agency, an agent is a person employed to act on behalf of another. An act of an agent done within the scope of this authority, binds his principal.
The definition in the Act does not say clearly whether party functionaries are or are not agents of a presidential candidate. However the affidavit of the 2nd Respondent explained aspects of this matter.
What about a representative? He/she is an agent. It is logical to infer from paragraphs 5 to 9 of the affidavit of the second respondent as to who would be an agent of a candidate. I reproduced these when I discussed the 3rd issue. Zedekiya Karokora confirms this in para 6 of his affidavit where he states that "the money I paid to Ruraka George and other sub county chairmen in Rukungiri District was received from the NRM National Task Force through the NRM task force for facilitation to the

village or branch task forces to procure pens, writing pads, refreshments during campaign organization meetings to enhance the campaign effort and to contribute to the NRM candidates for various seats.

The obvious inference that flows from the contents of the said paras 5 to 9 of the affidavit of the 2nd Respondent is that in so far as NRM was concerned, members of the branch or village task forces and NRM functionaries were agents of party candidates at all levels of elections. In particular, they were agents of the second respondent for purposes of the Presidential election. It is thus clear from his own affidavit that the 2nd respondent and the NRM Central Executive Committee authorised their agents to carry out electioneering for the 2nd respondent in the presidential election. Those agents were to contact individual voters and persuade those individual voters to vote for the 2nd respondent. So if a member of the task force succeeded in persuading any body to vote for the 2nd respondent, the act of persuading a voter to vote for the 2nd respondent would be presumed to have been done with the knowledge and consent of or approval of the 2nd respondent because he and the Central Executive Committee knew or consented and approved the fact that the branch or village task force will have to make personal contact with individual voters to woo such voters to vote for the 2nd respondent for the office of President. That is why the Central Executive Committee set aside money to be paid to the task force, or party functionaries, at all levels for the purpose of furthering the task of physical contact with voters and persuading, voters to vote for the 2nd Respondent or for an NRM candidate for any office.

The question that arises then is: where a candidate and or his party have, as in this case, authorised agents to use physical contact to persuade voters, in what manner and to what extent can the physical contact and persuasion go? In other words what are the limits of the authority thus given? Can it be reasonably inferred that the candidate consented to or approved the giving of money or gifts to voters? What is that giving? Is it bribing? Should the 2nd respondent be exonerated from the act of any agent or party functionary who bribes voters? Mr. Ogalo Wandera has argued that the 2nd respondent is liable or responsible for acts of bribery by agents or party functionaries.

Dr. Byamugisha made three pronged reply to this. First he submitted that bribery was not pleaded and secondly that there was no evidence to support any bribery. Again learned counsel contended, in reference to Umar Bashir Kakoza and Henry Lukwaya, that there was no evidence that any of them was a voter. Third he argues that even if there is evidence of bribery, such evidence is not wide spread. Learned Counsel rubbished the evidence of witnesses such as those from Musoola in Mbale District or at Buseta (Janees Kiige) in Pallisa and Busia who deponed that the 2nd respondent's agents paid them between shs 300/= and shs 1000/= as being trivial. That a whole

president could not pay shs 300/= as a bribe. Learned counsel does not seem to appreciate that to a peasant shs 300/= or 500/= at a given moment is money. Moreover that little money is not alleged to have been limited to only one location. There is evidence of this in Mbale, in Pallisa, in Nebbi, in Kabale, Palisa, and so on.

S.23 of the PEA relates to equality of treatment, freedom of expression by and access to information of a presidential candidate during campaign period. Similarly S.24 sets out what are called rights of a presidential candidate during the campaign period. On some aspects the two sections appear to contradict each other. Rights given to candidates in S.23 are whittled away by S.24.

I have no hesitation in accepting the view that Ss. 23 and 24 of PEA should be read together with the Constitution. But I would not accede to the argument that S.23 gives licence to candidates to say what they imagine or what they please without limitation.

In order to appreciate the contentions of the parties regarding offences alleged to have been committed by the 2nd Respondent, the context of both S.23 (3) (b) and S.24 (5) has to be set out. This means setting out the two sections.

S. 23 On equal treatment, freedom of expression and access to information of candidate reads this way –

"(1) During the campaign period, every public officer and public authority and public institution shall, give equal treatment to all candidates and their agents.

(2) Subject to the Constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act.

These above two sub sections together with S. 24 (1) and (2) (infra) or rights/entitlements of a candidate during campaign period.

Then subsection (3) states: -

(3) A person shall not, while campaigning, use any language-

(a) which constitutes incitement to public disorder, insurrection or violence or which threatens war; or

(b) which is defamatory or insulting or which constitutes incitement to hatred."

Relevant parts of section 24 on the rights of candidates reads this way. During campaigns –

24 (1) All presidential candidates shall be given equal treatment on the State owned media to present their programmes to the people.

(2) Subject to any other law, during the campaign period, any candidate may, either alone or in common with others, publish campaign materials in the form of books, booklets, pamphlets, leaflets, magazines, newspapers or posters intended to solicit votes from voters but shall, in any such publication specify particulars to identify the candidate or candidate concerned.

(3) A person shall not, during the campaign period print, publish or distribute, a news paper, circular or pamphlet containing an Article, report, letter or other matter commenting on any issue relating to the election unless the author's name and address, or the authors' names and addresses, as the case may be, are set out at the end of the Article, report, letter or other matter or, where part only of the Article, report, letter or matter appears in any issue of a newspaper, circular, pamphlet or matter at the end of that part.

As stated earlier, subs (5) of S.24 appears to whittle down what S.23 gives as rights to candidates.

24. (5) A candidate shall not while campaigning, do any of the following: -

(a) making statements which are false –

(i) knowing them to be false, or

(ii) in respect of which the maker is reckless whether they are true or false;

(b) making malicious statements;

(c) making statements containing sectarian words or innuendoes;

(d) making abusive, insulting or derogatory statements;

(e) making exaggerations or using caricatures of the candidate or using words of ridicule;

(f) using derisive or mudslinging words against a candidate; or

(g) using songs, poems and images with any of the effects described in the foregoing paragraphs.

My understanding of the provisions of [S.24 (5)] is that the provision prohibits a candidate from doing any of the things specified by the provisions which in effect whittle away the rights of expression given to candidates under S.23 (2).

In the Onyango Obbo case, we were concerned with a free and democratic society. Onyango and his co-appellant had been or were being prosecuted for publishing false news under S.50 of the Penal Code Act. That section read:

"50 (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.

(2) It shall be a defence to a charge under subs (1) if the accused proved that, prior to publication, he took such measures to verify the accuracy if such a statement, rumour or report as to lead unreasonable to believe that it was true".

We held that the section was inconsistent with Article 29(1) (a) of the Constitution and was consequently null and void. The Article itself is one of the Articles which guarantee Fundamental Human Right. It guarantees the right of freedom of speech and expression which includes freedom of the press.

I do not think that any reasonable person can challenge the idea that freedom of expression is necessary for a democracy and more so during electioneering. But when Parliament enacted S.23 and S.24 of the PEA it must have been aware of the necessity of freedom of expression during campaign before parliament enacted the two provisions. Any one who has watched, or participated in, elections in Uganda would appreciate the necessity of curbing excesses during election period. But how far can one go to do the curbing?

PLEADING BRIBERY

Was bribery pleaded or not? I answer yes. Let us look at the petition. In paragraph 12, the petitioner pleaded bribery by the 2nd respondent himself or by his agents. In 12 (c) he alleged that agents procured votes of individuals by giving out tarplins, saucepans, water containers, sugar, salt and other beverages.

Dr. Byamugisha argued in connection with commission of offences that no particulars were given in the affidavit accompanying the petition and therefore, that no cause of action is disclosed. It is true that the accompanying affidavit did not specifically plead particulars of bribing any named individual voters. However, in paragraph 4 of that affidavit, the petitioner pleaded generally that the elections were full of malpractices, irregularities and electoral offences. And in the 3rd and 4th paragraphs of the petitioner's summary of evidence it was alleged as follows: -

"Further the petitioner shall lead evidence to show that the 2nd respondent personally committed illegal practices and offences connected to the elections including but not limited to bribery of voters, interfering with the free franchise of the voters, made malicious, abusive, sectarian, derisive and defamatory statements against the petitioner contrary to the law.

Further more the petitioner shall lead more evidence to show that the 2nd respondent's agents with his knowledge and consent procured votes by giving out valuables and that all the above acts affected the results of the election in substantial manner."

This summary of evidence is given under authority of Order 6 of Civil Procedure Rules as amended by Civil Procedure (Amendment) Rules 1998. In that respect they form part of the pleadings. In paragraph 12 of his answer to the petition, the 2nd respondent denied the allegations contained in paragraph 12 of the petition. May I also point out, if I may, that by virtue of subrule 5 of Rule 8 of

the Presidential Elections (Election Petitions) Rules, 2001,

"Where the respondent requires further particulars of the petition, he or she shall apply for the particulars together with the answer"

Apparently, none of the two respondents, let alone the 2nd respondent, applied for any particulars. For if any had done so, according to sub rule (6) of Rule 8,

"The petitioner shall, subject to the directions of the Court, supply any particulars requested under sub rule 5 of this rule on or before the date set for trial of the petition".

The effect of this rule, as I understand it, is that more facts to support a petition are permissible after the lodging of a petition.

If this asking for particulars was not possible, the other course was for counsel for the respondents to ask, during the scheduling conference, for particulars to be provided. The respondents may reply to this by saying that they were not expected to build up the petitioner's case. However in the default of these two modes of seeking for particulars by the 2nd respondent, the petitioner filed affidavits of witnesses such Salaam Musumba, many from District of Mbale, Pallisa others from Districts of Ntungamo, Kabale, Bushenyi, Kamwenge, Kyenjojo, Rukungiri (Kamatenite Turinawe), Kanungu (Karokora) and Kampala District from Umar Bashir Kakooza, Mr. Lukwaya in support of allegations in his petition. As a result the 2nd respondent was personally able to swear affidavits on 21/3/2006 in reply denying the allegations as did many of his witnesses such as Francis Museveni Tuhimbisibwe Matia, Joram Mayatsa and James Wateya, Mbale and Washirekos.A.APC A.Bitwire. Hon. Amama Mbabazi, Muhwezi L, RDC Ben Rulonga and Apollo Nyagamehe in response to those affidavits.

In these circumstances, I do not agree that the case of Norman Cameron Vs Sir Philip Fysh (Supra), relied on by Dr. Byamugisha, supports his arguments. In the Cameron Case, an application to amend pleadings was made during the hearing of a petition to introduce a wholly new ground. That application was made belatedly. The writ appears to have been issued in accordance with the Australian Electoral Act. It had to be served on the respondent and apparently the petitioner had to file his facts (presumably a summary of evidence) in support of the petition within 40 days after the return of the writ. Facts of the petition were apparently filed in time but those facts did not contain the new ground for which the petitioner sought a belated amendment. Even then this application was made in the course of the hearing of the petition or before oral evidence was adduced. The position is clearly distinguishable from the present petition. In the present petition, evidence by way of affidavits alleging that there was bribery had been filed and so that evidence was on the record.

Dr. Byamugisha contended that no evidence was adduced to prove the bribery nor the giving of

money or other gifts. I have indicated that there is evidence some of which Dr. Byamugisha rubbished as trivial because of the amount of money given. Again Dr. Byamugisha contended that the issue of bribery was not canvassed. I think, with respect, that bribery was canvassed.

First Mr. Ogalo Wandera asked court to refer to all the affidavits tendered in support of the petitioner. Some of those affidavits certainly depone about bribery. These include affidavits of Ensinikweri Godfrey, Twinomukago Vanice, Byaruhanga Johnson, Turyasingura Joseph (of Kabale),Ozi and Byaruhanga of Kamwenge, Salaamu Musumba, Musimbi Edward and Masaba Robert (of Mbale). Discussion about Mayombo.D of Kanungu District and Umar Bashir, Lukwaya, Esther Najjemba, an NRM mobilizer relating to shs 100,000/= of Kampala. Further in his closing address, Mr. Ogalo Wandera referred to Annexture C1 to Rubaramira's affidavit which report was hardly contradicted. That was a report by DEMOgroup of the election observers. Ogalo Wandera submitted that that report shows that there was rampant bribery both prior to and during the voting day. That was canvassing.

In my opinion, the petition and subsequent affidavits which were filed in support of that petition were sufficient to found a cause of action. I think that Rule 4 (7) was satisfied in as much as the subrule does not specify what particulars a petition must contain. I do not think that in the light of the said Rule 4 (7), Order 6 R2 of CPR was breached.

Consequently, there are three points for me to consider next namely: the people who did the bribing and who were bribed and whether if I believe the evidence, the 2nd respondent can be held responsible for any bribing.

Who did the bribing?

First let me begin with the law of agency in elections. In my reasons in the President Election Petition No. 1 of 2001 between these same present parties, I held that because of the Movement Act, all the NRM functionaries were agents of the NRM Presidential Candidate. I have already said as much in these reasons. I find support of this in S.9 of PEA which states -

"*Under the Multiparty Political System, nomination of a candidate may be made by a registered Political Organisation or Political Party sponsoring a candidate …"*

Further, under S.21 (3),

"… a candidate's agent may carry on campaign meetings on behalf of the candidate and otherwise carry on any campaign which the candidate is allowed to do under this Act".

This subsection clothes an agent with authority to do what a presidential candidate can do during campaign period. Naturally this has to take into account the provisions of S.59 (6) (c) which states "that an offence was committed in connection with the election by the candidate personally or with

his knowledge and consent or approval."

There are a number of election petition cases decided from other jurisdictions which illustrate circumstances under which a candidate is bound, or is held responsible for or by the acts (or omissions) of his agents. In the ancient petitions of Stanley Bridge Election Petition (1869) 20 LT.75 and Bewdley Election Petition (1869) 19 LT. 676, corrupt practices of an agent's clerk were imputed on a candidate.

The effect of the decision in Stanley Bridge case, as a general proposition, is that whenever a candidate or his agent employs a person to bring up a voter and that person does corruptly what they intended should be done incorruptly; they must take the consequences. Can this stand the test set by S.59 (6) (c) of the PEA? I think it does.

In another ancient petition of the Borogh of Bodmin (1869) 20 LT 989, the conduct of a canvassar who was not appointed agent was treated as evidence of agency for the candidate because what he did was for the purposes of advancing the candidate's election. In this petition, the 2nd respondent has deponed that his party's task forces throughout the country were tasked to contact voters and ask voters to vote for him. That clearly is abroad authority.

In the Bewdley Election Petition, the court found that in a Borough where there was campaign for parliamentary election, nearly 20 Public houses (Bars) were habitually kept open and whoever chose to present himself was supplied with a drink. The court stated that where that was done, i.e; where bars were kept open and voters were given drinks, it would be a perfect mockery to suppose that it was done without any corrupt intention. In that case, the candidate, Sir Richard Glass, had given money to Crowther and Paradoe, his agents. These two agents employed other people to ensure the provision of the drinks which was provided to voters.

The court concluded that -

"It is quite true that Sir Richard Glass (candidate), in handing over money to Mr. Crowther, and in placing money in the hands of a person who was not returned as his agent for electioneering expenses, has infringed the Act of Parliament.

I cannot in the slightest degree doubt that where a fund is placed in the hands of an agent, and that agent expends the money in a corrupt manner, that that is evidence to show that the candidate intended that it should have been so spent.

I do not believe that at any corrupt election any candidate has been foolish enough ever actually to say, SPEND THIS MONEY IN BRIBERY."

Norwich Election Petition (1869) 19 LT 615 was a case of bribing voters. It was argued that even if

an agent was proved to have bribed voters, or committed a corrupt practice or act, that could not be visited upon a candidate. It was argued further that there was a distinction between a person who committed the act on the part of the principal as an agent and the person who did so merely on his behalf. It was argued that before a candidate is made responsible for the act of a person who had been acting in his behalf, that act must be done with the privity and knowledge and consent of the candidate for whom it was done. When rejecting these arguments, Martin B., said -

"… any person authorised to canvass was an agent, and it does not signify whether or not he has been forbidden to bribe. If the candidate had told him honestly, "Do not bribe, I will not be responsible for it," and if bribery was committed, that bribery in my judgment would affect the candidate …

In Bradford Election Petition (1869) 20 LT 729, an election court held that excessive spending of money in a constituency can be and is properly treated as strongest prima facie evidence of corrupt practices.

Dr. Byamugisha relied on The Commentaries on the Representation of The People Act of India by Gosh, 3rd Edition, 1998, for the propositions that:

a) Particulars of offences or illegal practices must be pleaded in the petition in order for the petition to disclose a cause of action; and
b) that illegal practices or electoral offences must be proved strictly.

Learned counsel did not supply us with the actual text of the provisions of the two Indian Statutes and the accompanying rules which provided background for the commentaries. I have not been able to lay my hands on any.

As a general observation I ought to point out, though, that from what I have read from pages 149 to 157 of the extract of that book provided by the learned counsel, the courts in India hold a view that consequences of upholding an election petition are very serious since a candidate who is unseated because of the success of the Petition does not only loose the seat, he is, in the case of proof of corrupt practices, also disqualified from holding public offices.

Further, unlike here in Uganda, such a candidate also can be convicted of criminal offences and be sentenced to imprisonment by the same court,. The proceedings are therefore quasi-criminal in nature and the Indian Courts insist that because of that the charges in a petition must be properly pleaded and strictly proved as in a criminal trial, i.e., proof must be beyond reasonable doubt.

In Uganda, Subsection (7) of S.59 of the PEA [and S.63 (7) of the Parliamentary Elections Act, 2005, respectively] bar this Court and the High Court from convicting any person of a criminal

offence when hearing an election petition. Again the two laws do not penalise any person who commits electoral offences by way of disqualifying the offender from holding public office for any period. Indeed even the basic law, the Constitution, is silent on this latter aspect yet the previous Ugandan Elections laws provided for disqualification. That is why I believe that the burden of proof in election petition trials is closer to a balance of probabilities. As I said earlier, this Court held in Presidential ElectionPetition No.1 of 2001 that the standard of proof of allegations in the petition are to the satisfaction of the court but not beyond reasonable doubt. That is in accord with S.59 (6) itself.

Furthermore, I think that at this stage the directive words of Article 126 (2) (e) must be born in mind when considering pleadings. Paragraph (e) of Clause (2) of Article 126 states -

"In adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply the following principles –

e) Substantive justice shall be administered without undue regard to technicalities".

Dr. Byamugisha relied on Order 6 Rule 2 of the Civil Procedure Rules for the proposition that various particulars, e.g., dates when corrupt practices or electoral offences were committed and names of persons who received bribes should have been stated in the petition and or the accompanying affidavit.

The rule sates-

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings".

As I have stated the effect of this rule was modified by the introduction of the Civil Procedure (Amendment) Rules, 1998. The old rule 1 of Order 6 which preceded rule 2 was amend. The new 06 Rule 1 reads:-

"*O.6 rule1*

a) Every pleading shall contain a brief statement of the material facts on which the party pleading relies for claim or defence as the case may be ...

b) Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on ..."

I think that the effect of this amendment appears to me to modify rule 2 in that the summary of evidence to be adduced at the trial should normally provide the requisite particulars.

Interestingly an inquiry (a trial) of a Presidential Election Petition in Uganda is heard on the basis of evidence by affidavits, unlike conduct of Election Petition in India upon whose law Dr.

Byamugisha relied. (See Rule 14). There, the evidence is adduced orally.

Moreover, although the import of Rule 22 of the Presidential Elections (Election Petitions) Rules is yet to be expounded, it appears to me that the effect of that rule is to minimize formal objections to the contents of a Presidential Election Petition. The rule reads -

"22 proceedings upon a petition shall not be defeated by any formal objection or by miscarriage of any notice or any other document …"

It is helpful to note Rule 4 of Order 45 of C P Rules which states:-

"4 Any special rules of procedure not contained in these Rules which may have been or may be made by the High Court shall, where they conflict with these Rules, prevail and be deemed to govern the procedure in the matter therein mentioned."

The expression "by the High Court" is immaterial. The Presidential Election (Elections Petition) Rules are special rules and accordingly the above rule makes those rules prevail.

I have said, and I repeat it here, that the necessity for a petitioner to lodge a petition within 10 days after a declaration of presidential election results inevitably makes processing a petition problematic. This is made no better by the requirement to try the petition and conclude it within 30 days after the petition is lodged in court. The combined effect makes it pretty difficult for parties, especially a petitioner, to lodge a perfect petition. Dr. Byamugisha cited the Mwanawasa case (infra) of Zambia. It seems that the Zambia law relevant to the filing, the hearing and determination of a presidential election petition is far much more liberal than our laws. A petition is supposed to be filed and determined within 180 days. In that case, a consolidated presidential election petition which was filed in early 2002 and which should have been concluded within 180 days, took over three years before it was concluded.

My participation in the hearing of the 2001 and this present petition makes me conclude that the period prescribed by Article 104 of our Constitution and by the Presidential Election Act within which the petition must be heard and determined is practically too short. I believe that the dictates of democratic governance require that a dispute challenging the validity of a presidential election should be heard and expeditiously determined within a practically reasonable time. Such reasonable time should be such that parties are able to assemble relevant evidence, lodge a petition and an answer thereto, do research and have ample time to present their respective cases. Thereafter the court should have sufficient time to adequately consider materials presented by parties before giving its judgment. The election of the President involves the whole country as a constituency. Whereas in this petition, there were over 200 Parliamentary constituencies and nearly 20000 polling station, for a petitioner (or petitioners) who may not have been an incumbent, or who may

have entered the presidential race for the first time, to be able to assemble all relevant material evidence within the prescribed ten days is obviously not easy. In saying so, I am not here condoning sloven preparations of any Presidential Petition or any other election petition, for that matter. The office of the President is the highest in the land. So contest for it in court should be properly done and the trial should follow procedures provided by the law. Although I do not share the opinion by my distinguished and learned brother, Dr.Justice Kanyeihamba JSC, that our current law provides for an inquiry rather than a normal full trial. That opinion could carry sympathy in view of the very short period provided for the institution, the hearing and determination of a presidential election petition. I am however not persuaded that the use of the word "inquire" in Art 104 (3) and (5) displaces a trial as known in court practices in this country which is adversarial in nature.

Article 104 stipulates that a presidential election is to be challenged by a petition to this Court. Normally almost all forms of petitions in courts are tried by courts.

The use of the word "Inquire" rather than "try" in clause (3) of Article 104 may be due to the draftman's interpretation of what the Constituent Assembly delegates agreed on or meant. The draftsman appears in other parts of the constitution to have used different other words to describe a trial. Thus in clause (4) (b) of Article 137 states:-

"……..the Constitutional Court may-

(b) refer the matter to the High Court to investigate and determine the appropriate redress."

And clause (7) of the same Article 137 states: -

"Upon a petition being made…… the Court of Appeal shall proceed to hear and determine the petition……."

Again in Articles 86(1) and 140(1) the Constitution empowers the High Court to "hear" and determine matters referred to it. Incidentally clause (3) of Article 86 anticipates that aggrieved persons seeking to challenge the election of a Speaker, Deputy Speaker or MP would apply to High Court.

In all these, I understand the use of the words "investigate" and "hear" to really mean to try the matter. The same should apply to the word "inquire" in Article 104. I have looked at the draft constitution which was debated by the Constituent Assembly resulting in the present Constitution. Clause 107 of the draft constitution anticipated the challenge to be by way of a petition presented to High Court which would hear and determine the same.

So a normal trial was anticipated. A decision of the High Court was appellable to this Court. This was to be the same procedure in respect of challenging an election of a member of parliament.

Be that as it may, I think that the petition, the accompanying affidavit read together with the petitioner's supplementary affidavits and the various affidavits sworn by other deponents, to some of which I have referred, in support of the petition, disclose a cause of action and give sufficient particulars of the alleged electoral offences and the alleged irregular practices. In fact the accompanying affidavit of the petitioner enumerated various dates on which the alleged various electoral offences were allegedly committed.

In my considered view, therefore, neither O.6 r.2 nor Bullen Leake, Jacobson Precedents nor Gosh's commentaries on Indian election laws are good authority for the proposition that the petition did not disclose a cause or causes of action.

Dr. Byamugisha referred to a passage in the judgment of the Zambia Supreme Court in Presidential Election Petitions No.1-3 of 2002 Anderson Kambela Mazoka & 2 Ors Vs Levi Patrick Mwanawasa (Supra). In a unanimous judgment, the Supreme Court of Zambia reiterated its earlier view, after referring to the judgment of Lord Denning in Bater Vs Bater (No. 2) (1950) 2 ALLER 458 the court approved what it had previously stated in Chiluba case thus:

"The bottom line however was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections; *the few examples of isolated attempts at rigging only served to confirm that there were only few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted "rigging*" as suggested by the witness who spoke of aborted democracy.

Apparently there was evidence in the Zambia Supreme Court trial that the alleged rigging or defects or flaws complained of in the petitions were isolated. That distinguishes the Zambian petition from the present petition. In the preceding pages, I have referred to affidavits of witnesses who support the allegations that bribery, intimidation and violence were widespread, the principle of secret ballot was violated in many areas, and multiple voting was wide spread as was pre-ticking of ballot papers in favour of the 2nd Respondent.

If find it unnecessary to discuss most of the contentions about whether statements made by the second respondent were mudslinging, abusive, defamatory or delegatory.

UMAR BASHIR (KAKOZA) GROUP

On bribery I want to examine the evidence of Umar Bashir (Kakooza) and Lukwaya and compare it with that of Esther Najjemba. The allegations of bribery are set out in para 12 of the petition. The first two are witnesses of the petitioner while the last witness is of the 2nd Respondent who also himself swore an affidavit on the bribery question. It is pertinent to refer to that affidavit. Umar and Lukwaya deponed their affidavits on 18th March, 2006. According to Bashir's affidavit, a lady called Esther Najjemba addressed Bashir and a group of youths on the evening of 24th December 2005, at 7.30 p.m, at Sam Sam Hotel, in Bakuli, a suburb of Kampala. The group included Lumu, Fred and Iga Rashid. She expressed concern why Bashir group did not support the second respondent. During the meeting, the youths complained of poverty and unemployment. Esther took the group to State House, Nakasero, where they arrived at about 10.00 p.m. The group later met the 2nd respondent at about midnight. The 2nd 0respondent went through his manifesto with Bashir group and inquired why they did not support him. When they complained of poverty and unemployment, the 2nd respondent advised the group to form associations through which he would channel financial assistance to them provided they crossed from FDC to NRM and campaigned for him. The group agreed whereupon the 2nd respondent directed one of his AIDES to give each youth some money. Bashir was given shs 100,000/=.

The 2nd respondent promised to give more money if he proved they had crossed when he meets them again on 24/12/2005 (This must be 27/12/2005 because that is the date referred to by Lukwaya and by Esther Najjemba for the second meeting).

Because the AIDE who gave the money on 24/12/2005 warned Bashir and group that they would be trailed if they did not cross from FDC, Bashir crossed to NRM. He was thus perduaded by money not to vote for the petitioner. Bashir is corroborated substantially by Lukwaya who swore his affidavit on same day (18/3/2006) as Bashir. He was a chairperson of Lungujja parish youth group where he is a registered voter. Lungujja parish is in Rubaga North Constituency, Kampala. On 27/12/2005, Mugabi Robert an apparent supporter of 2nd respondent complained that Lukwaya had made it impossible to display President Museveni posters and told Lukwaya that the President wanted to meet all youths of the constituency who did not support him. Mugabi organised for the introduction of Lukwaya to Esther Najjemba who organised for about 40 youths to meet the 2nd respondent at State House, Nakasero. Among the youths who met the 2nd respondents were Umar Bashir Kakoza, Chief Mbowa of Lusaze, Lume Fred, Yunus Kasirye and Katende. They boarded a Coaster Bus from the same Sam Sam Hotel in Mengo. The group reached State House and were entertained to dinner up to 11.00 p.m. They held discussions with the 2nd Respondent for about one

hour whereupon he advised them to form youth associations through which he would channel funds for then immediately. He asked the group to vote for him. Lukwaya deponed that on 24/12/2005 youths including Bashir had visited State House and each reported receiving shs 100,000/=. Among the youths were those mentioned above. Following this, Lukwaya reported the matter to Beti Kamya who apparently condemned the whole thing at a press conference.

Dr. Byamugisha had submitted that there was no evidence that Bashir and group were voters. The evidence of Lukwaya shows that he was a registered voter and he and Bashir had been campaigning for the movement since 1996. Najjemba corroborates him on this.

Najjemba, has been a supporter of and moboiliser for NRM and the 2nd Respondent since 1996. She knew Bashir as NRM supporter in 1996 and 2001. In her affidavit, she referred to Bahir, Lumu Fred and Iga Fred and continued as follows: -

(d) That through my coordination I invited the three persons, among others, to Sam Sam Hotel in Mengo for the purpose of mobilising them to vote for the NRM.

(e) That during our discussions, they raised problems of theirs which government had failed to solve as follows:

i. Youth unemployment

ii. High tuition fees.

iii. Very high taxes for businessmen.

iv. Poverty.

(f) That for the purpose of my mobilisation I had intended to meet the President to explain to him the problems the youth were facing which problems I had already received from various youth groups.

(g) That I telephoned the Principle Private Secretary requesting an appointment to meet the President and explain to him the concerns of the youth and she gave me the appointment.

(h) That I had collected the Youth aforesaid to go with me and present the President with their problems.

(i) That we arrived at State House at about 10.00 p.m but he could not see us until 1.00 a.m in the morning because of a busy schedule.

(j) That when we met him, four of us stated the problems we had come to discuss with the President, but they were not discussed because it was late and he was leaving for Rwakitura for Christmas.

(k) That he did not take us through his Manifesto or ask us why we did not support him.

(l) That however, before he left, he advised us to form Youth groups to fight poverty through the

poverty eradication programme.

(m) That he did not say that he would himself channel financial assistance to those groups nor did he say that assistance from him would be provided on condition that we crossed over and campaigned for him.

(n) That before he left, he instructed the Principle Private Secretary to get the State House Legal Officer to assist them to register an Association. He also instructed her to make an arrangements for us to reach our homes.

(o) That finally, he promised to meet us after Christmas for full discussions of the problems but he did not promise to give us any money at the next meeting.

5. That I have also read the affidavit of Henry Lukwaya dated 18th March, 2006 and reply to it as follows:

i. That a subsequent meeting with the President was arranged for us by the Principle Private Secretary on the 27th of December 2005.

ii. That we travelled from Sam Sam Hotel in two motor vehicles (a Coaster and a Minibus).

iii. That when we arrived at State House, the President was busy and we were asked to go for dinner in the meantime and this was a normal routine for visitors at State House as I had been there and experienced this several times before.

iv. That we did not see the President until about 1.30 a.m and by that time, he was again too tired to discuss our problems with us.

v. That the President did not ask us whether we were FDC Youth or why we did not support him.

vi. That the President instructed the Principle Private Secretary to make us another appointment for after the Presidentialelections.

vii. That he did not conclude by asking us to vote for him nor did he give us any money."

Clearly in most material respects, Ms.Najjemba corroborates the testimony of both Bashir and Lukwaya. She naturally denies payment of money and the asking for these people by 2nd Respondent to vote for the second respondent which in the context of this petition is understandable and significant. Najjemba stated that the 2nd respondent instructed his principal private secretary to make arrangements for their transport home. On the facts I have no doubt that this was a euphemism for money payment.

If these people were not voters how could they be persuaded to mobilize for the NRM? If the 2nd respondent did not want the votes of this group what explanation is there for hosting them at State House on the eve of Christmas day and two days thereafter? What sound explanation is there why

they had to see the President after a scheduled election? Was this not intended to thank them for crossing to NRM, mobilisation and for voting for him?

The second respondent replied to the affidavit of Bashir and Lukwaya on 21st March, 2006. In paragraphs 14,15,16 and 17 of his replying affidavit, which I quote earlier, the 2nd respondent answered Bashir and admitted meeting the group at Nakasero State House and holding some discussion with the youth group. The Youth raised the issues of unemployment, high school fees and taxes and general poverty. He advised the group to form group associations through which they could get funds. In paragraph 16, he deponed -
"As I was leaving for Rwakitura, I asked my Principal Private Secretary to get a State House Legal Officer to assist them in forming the associations. I also instructed her to arrange for their transport back home and promised to meet them after Christmas."
The instructions were given at night after mid-night.

In para 17 he denied going through his manifesto with the group and denied asking them for their support. He denied promising them financial support. He denied asking them to cross over and campaign for him because the group was taken to him as NRM mobilisers. He denied asking AIDES to give the group money for their support. But he admitted meeting them again on 27th December, 2005. He also admitted asking his Principal Private Secretary to arrange for another meeting after the elections. In paragraph 18, the 2nd respondent replied to the affidavit of Henry Lukwaya. He accepted hosting the Youths to dinner at State House, but denied asking whether they were FDC Youth or not, nor whether they would support or vote for him because they went to him as NRM mobilizers. Several matters come out of this evidence. By all accounts Najjemba acted as the agent of the second respondent because she was an NRM mobiliser. The Principal Private Secretary was obviously acting on instructions of the 2nd respondent and so she was his agent. Same with whoever was his legal assistant.

It is common knowledge that the President of Uganda has many advisors in different aspects of Uganda governance, politics and other public life. Further the 2nd respondent, as the leader of NRM must be having many advisors on same aspects within the NRM party. Among the obvious examples of advisors are Ministers, Ministers of State and Public Servants. In paras 5, 6 and 7of his replying affidavit to which I have just referred, the 2nd respondent deponed to the existence of Central Executive Committee of NRM and what it and its officials were tasked to do at National, District and Constituency levels during election campaigns.

I should think that in addition to special advisors like Ministers, Ministers of State, MPs, Public Servants, officials in the committees mentioned in paras 5 and 6 know and would advise the 2nd respondent on the perceived high level of unemployment among the youths, the high level of tuition fees, the high level of taxes and the prevalency of poverty. It therefore did not require some group of Youths (or FDC supporters) to get special appointment after the 2nd respondent had been nominated by his party as presidential candidate, for some surban Youths from Rubaga Division to visit the 2nd respondent at State House both on the eve of Christmas day and two days after Christmas, during festive period, in order for these Youths to inform the 2nd respondent about their concerns on the unemployment, high school fees and high taxes. I find the evidence of Bashir and Lukwaya credible. I believe them. These youths must have gone to State House to get money. Lukwaya deponed and he had proved that he was considered to be the one hindering the display of the 2nd respondent's posters. In other words, he and his group were hindering the campaign effort of the 2nd respondent and this has not been challenged by any other evidence. The real purpose of Najjemba leading the Youths to State House on 24th and 27th December, 2005 is not hard to find. It was to persuade the Youths by whatever means availed for them to abandon FDC leader and campaign for and vote for the 2nd respondent and I so find.

The price for the change over was money. If the Youths were poor and unemployed what better way of persuading them than giving them money on Christmas Eve. Then 2nd respondent promised to meet the same Youths after elections. The message is clear. Youths must have been told to work hard to ensure that 2nd respondent wins. Otherwise what was the objective of the message that he would meet the Youths after the elections??

The evidence as it is, does not prove that the 2nd respondent personally directly paid the money to the Youths. What Bashir proves and what can be inferred from the affidavits of Najjemba and the second respondent is that the Principal Private Secretary paid the money. From the evidence available so far, I think that any payment effected by that Principal Secretary was effected with the knowledge or consent and approval of the second respondent. That Secretary is the personal staff of the 2nd respondent carrying out his instructions. She is therefore his agent in this respect for the purposes of the PEA.

So for all purposes and intents it has been proved that the 2nd respondent breached S.64 (1) of the PEA. This brings the conduct of 2nd respondent within the ambit of section 59 (6) (c) of PEA.

S.64 (1) reads this way: -

"64 (1) A person who, either before or during an election with intent, directly or indirectly, to

influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any, money gift or other consideration to that other person, commits an offence of bribery……..”

It is unnecessary for me to elaborate on these provisions except to relate them to S.59 (6) which also reads as follows:

“59(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the Court.

(a) …….

(b) ……..

(c) That an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.”

It is significant that both on 24th and 27th December, 2005, it was Esther Najjemba, a self confessed NRM moboliser or agent who led the youths to meet the second Respondent. She led them not to the NRM offices or Headquarters but to the official residence of the second respondent. What is more, these youth were attended to by no less an official than, among others, the Principal Private Secretary to the President, i.e. one of the Senior Personal officials who attend to the personal affairs of the 2ndrespondent .That emphasises the importance attached to the two meetings and its purpose during night at the time of campaigning. These factors constitute very clear and unambiguous evidence of personal knowledge, consent and approval of whatever took place on the two days.

Although the evidence of Umar Bashir and his group is sufficient for me to answer the 4th issue in the affirmative, I shall allude to other incidents to illustrate bribing by agents of the 2nd Respondent. I have in mind Mr. Mayatsa the NRM party Chairman in Mbale District during the period of campaign and on the day of election. Witnesses such as Wataka James, Mutonyi Juliet, Khaitsa Lofisa, Timbukha Joseph, Musaki Eunice, Milton Watyekele and Nabalayo Mary, all depone to the fact that Mayatsa, the NRM, Mbale District Chairman and NRM election coordinator for same district bribed and intimidated voters. He simply denied this in his affidavit in response. I believe these witnesses. According to these witnesses, Mayatsa bribed and also intimidated voters by firing in the air and told voters to vote for the 2nd respondent. According to these witnesses, this made FDC supporters to change their mind and to vote for the 2nd respondent.

Mayatsa’s admission that he only got a policeman with whom he moved around on 23/2/2006, the voting day, tends to support these witnesses who deponed that he moved around with an armed military policeman intimidating voters and telling them to vote for 2nd respondent. It does not matter whether the armed man was military police or ordinary policeman. Further the presence of

arms at polling station on polling day is out lawed. There was no explanation for the presence of armed policeman who was not on official electoral duty.

Earlier, I referred to the reply affidavit of the 2nd respondent in which he indicated how the National Executive Committee of NRM, of which he is the chairman, distributed money to NRM leaders at the District level to enable them conduct campaigns for voters to vote for him and other NRM leaders. Zedekiya Karokora, Chairman, LC5 Rukungiri corroborates this. In my opinion what Jorum Mayatsa did was in reality executing and carrying out election work for the 2nd respondent. In terms of S.59 (6) (C), the second respondent would be regarded as having consented to or approved what Mayatsa did.

There is the evidence of James Ozo and Byaruhanga in Kamwenge District implicating NRM chairman in that District. There is the evidence of David Magulu implicating the NRM District Treasurer, Mr. Bwire Bakale, in Kaliro District. He was an agent. There are other instances.

I also think that the conduct of Fox Odoi does make him an agent commiting electoral offences. I refer to the evidence of Geofrey Ekanya, the Member of Parliament for Tororo County. I have already summarised his evidence while discussing other issues especially the third issue. On the polling day (23/2/2006), Mr. Fox Odoi, a Legal Assistant to the 2nd Respondent (as President) terrorised voters in Tororo town. Mr. Odoi who according to Ekanya, was armed with a gun accompanied by gun weilding LDUs blocked Tororo/ Mbale Road, in Tororo town, and forced passengers out, undressed them and ordered the LDUs to beat them up. He took some of those people to Tororo police station. Some of these victims made affidavits substantially supporting Ekanya, although some of them subsequently denied being beaten by Fox Odoi. Mr. Fox Odoi has given his own version denying beating up people. But he admits being at the scene. I do not believe Mr. Fox Odoi that he was on floric of his own.

Mr. Odoi did not do all this on an election day to advance his own cause. As personal Legal Assistant to 2nd respondent, he must have been doing the respondent's work as Ekanya says.

In Para 23 of his affidavit accompanying his petition, the petition deponed that Mr. Fox Odoi, the Legal did to the President, 2nd respondent harassed, assaulted and intimidated his supporters in Tororo as deponed by Ekanya. As I pointed out earlier, a witness for the respondents called Epakasi Lawrence of Aukot village Tororo District claimed he voted on 23/2/2006. He deponed that on his way home about 2km on Tororo/Mbale Road, he and four other men were arrested by policemen at that place for no reason. He deponed that Mr. Odoi was at the scene with some policemen. He denies being assaulted by Fox Odoi. He swore that the following day the Monitor Newspaper published on the front page photographs of himself and the other people who were arrested. He

denied reports in the news paper that he and the others had been assaulted by Fox Odoi. This man's evidence substantially corroborates the evidence of Ekanya and of the petitioner about harassment of voterssupporting the petitioner by Mr. Fox Odoi, on the day of voting. The other persons who were with Epakasi and also swore affidavits about the incident are Omalla Richard, Okware, and Kamu. The evidence of the two of them is almost identical with that of Epakasi Lawrence. They deny what the petitioner states in para 23 of his affidavit about their assault and intimidation by Mr. Odoi and being FDC supporters. They claim to have seen Odoi for the first time on 23/2/2006, the voting day when Odoi was in the company of armed policemen. Omalla was arrested when he was going to vote and he and his compatriots were taken to Tororo Police Station where they were released in the evening. The following day he saw a photograph of himself and the other men on the front page of Monitor Newspaper (showing that he and others were being tortured). Subsequently he made a statement at CID Headquarters denying he was assaulted by Mr. Odoi. Okware's affidavit made similar statements as that of Omalla except that one amplified on reasons for his arrest. In para 7 thereof he states: -

"7 That I was arrested with Epakasi, Omalla, and others for allegedly being ferried to vote".

I note the following.

- *Whereas Epakasi claims he was arrested after he had voted and was on his way home, the others say, they had not voted yet.*
- *Second, if the incident happened in Tororo where there is an established police station and where they were detained initially, why did they make statements at CID Headquarters in Kampala, denying assault and harassment by Mr. Odoi after news papers reported the assault?*
- *Third, these deponents appear to be simple ordinary men. How is it that each of them, after being arrested and detained by the police in Tororo, were able to move about in Tororo town and fortuilously each saw their photographs on the front pages of the Monitor following which they were all ferried to CID Headquarters to make statements denying they were assaulted and harassed by none other than Mr. Fox Odoi?*

These deponents swear that they were in Tororo Town on the voting day. They were at the scene where Monitor news paper apparently captured their pictures as persons who were being tortured under the supervision of Mr. Fox Odoi, the legal Aide to the 2nd Respondent. They suddenly appear at CID Headquarters in Kampala to deny that Mr. Odoi tortured them. This tells a lot of what must have happened.

Mr. Fox Odoi Oywelowo made his own affidavit. In paragraphs 5 to 12, he swore as follows-

"5 On the day of the Presidential Elections, I went to Tororo Central Police Station to report alleged

acts of bribery of voters by Forum for Democratic Change Members in Tororo.

6. That while I was at CPS, I received a report from Apollo Ofwono, the Movement District Chairperson that FDC Supporters were ferrying people who were ineligible to vote in different polling stations in Tororo.
7. That I received the report when I was with the officer-in-charge CPS, George Abaho. He decided that the police should go to verify the reports and that I should accompany them.
8. That the police intercepted one of the vehicles carrying the said people along Mbale Road. Some of the passengers ran away while others including Omalla, Epakas and Okware were arrested by the Police.
9. That a crowd of people from the area formed with the apparent intention of lynching the suspects and I assisted the police in dissuading the crowd from assaulting the suspects.
10. That at no time whatsoever, did I intimidate, torture or assault any supporter of the petitioner or any person at all.
11. That at all times I was in Tororo in my personal capacity and not on official duty.
12. That I am not and have never been an agent of the second respondent or the National Resistance Movement."

This affidavit reveals that-

- There is conflict between the other three deponents on the one hand and Mr. Fox Odoi on the other about why on 23/2/2006 these people were arrested. Were they just walking as Epakasi claims? Where were they going to vote? Were they ineligible voters as Mr. Odoi depones?
- Were they supporters or not supporters of FDC? An inference can be drawn from Mr. Odoi's own affidavit that either these people were FDC supporters or they had been bribed by FDC to go and vote. The former appears to be a logical inference which made him punish them as he did.
- Although Mr. Fox Odoi claims that he was in Tororo on his own, he does not state what is it that took him to Tororo on that important voting day, when his boss was campaigning for the presidency.
- If Mr Fox Odoi was not an agent, on what grounds did he get reports of bribery by FDC?
- If he was not an agent of the 2nd respondent, why should a whole District Movement Chairman report to him about FDC ferrying ineligible voters? Why should he have accompanied the police rather than leaving the chairman going with the police to arrest suspected ineligible voters?

Considering the whole situation, I draw the following inferences:
Neither Mr. Odoi nor the three men are telling the whole truth why the men were arrested. It is

most probable that these men were arrested for being supporters of FDC and were detained so as to be denied the opportunity to vote. The fact that they were whisked away to make statements at Police Headquarters in Kampala instead of Tororo Police Station suggests that because their mistreatment attracted media publicity, they were taken to Kampala to make statement at CID Headquarters exonorating Mr. Fox Odoi of beating them! They were probably forced to make these statements of half truths. This incident illustrates the subtle manner of harassing supporters of opponents of an incumbent and the urgent need to reform the law relating to conduct of trial of Presidential Election Petition.

Was Mr. Fox Odoi acting as a mere eccentric or a fanatic or as a legal aide to the president who is at one and the same time a candidate for the presidency?

The logical inference I can draw is that Mr. Fox Odoi Onywelewo was in Tororo on the voting day, 23rd February, 2006 to look after the voting interests of the 2nd respondent to whom he was a legal Aid. All his activities bring him within the armbit of an agent of the 2nd respondent and, therefore, the 2nd respondent can be held responsible for Mr. Odoi's conduct on the presidential election day.

Because of the reasons I have endeavoured to give I was among three Justices who answered issue 3 in the positive and the late Oder; JSC (RIP), and I answered the 4th issue in the positive.

Before I end I wish to make observations especially on the need for respect for Court and course of justice.

Mpiima Koloneria, Presiding Officer at Kobolwa Polling Station in Pallisa first swore an affidavit supporting the Petitioner. His affidavit was filed in Court. A few days later, the respondents prepared yet another affidavit which the same Mpiima swore in effect amending the first affidavit denying some activities which he had stated in the first affidavit.

Secondly, on 18th March 2006 the petitioner filed an affidavit supporting corruption sworn and signed by one David Magulu of Kaliro Town who was hired by police to take and did take police to Nawampiti. Four days later the respondents drew yet another affidavit in the name of "one David Maguru" also a driver and of same Kaliro Town. This David Maguru drove policemen to the same place called Nawampiti on the same mission apprarently. Although the "Maguru" offered by the respondents claimed he did not know how to write and he appears to have thump printed at the end of his affidavit, he was betrayed because whoever administered the oath to him wrote (by the thump print) the name "D. Magulu" and not "D.Maguru" which was typed in the affidavit.

What counsel for the respondents should have done in the case of Mpiima and Magulu is to ask for both Mpiima and Magulu to be produced in court for cross-examination rather than to produce another affidavit sworn by the same witness denying part of what he stated earlier to the opposite

party. This is tantamount to preverting the course of justice.

The same can be said about the four voters who were arrested in Tororo having been tortured under the supervision of Mr. Fox Odoi, detained there and subsequently surfaced at CID Hesdquarters, Kampala to deny what took place in Tororo.
I wish to say that participating in the hearing of this petition is in effect participating in the trial of the president of my beloved country. I hope that views and opinions my learned brothers and I have expressed will help to advance the virtues of constitutional democracy in our motherland; at least in reforming the relevant laws.

On the basis of the evidence before me and for the reasons, I have set forth herein, I was satisfied that the petitioner established his allegations. I held that the petitioner's prayers (1) and (2) should be granted. I would annul the election and order a rerun.

I would order that because of the national importance of this petition, each party shall bear its own costs. I further order that if the petitioner deposited money as security for costs the same be returned to him.

Delivered at Mengo this 31st day of January 2007.
J.W.N.Tsekooko
JUSTICE OF THE SUPREME COURT

EXEGESIS ACCORDING TO THE GOSPEL OF JUSTICE TSEKOKO

BACKGROUND

This Presidential Election Petition was brought by Rtd Col Dr Kizza Besigye, the Petitioner, against the Electoral Commission and Yoweri Kaguta Museveni, challenging the validity of the results of the Presidential election, held on 23 February 2006. The election was organized by the 1st Respondent. The Petitioner and the Mr. Museveni were among the five candidates who contested in the election under a multiparty dispensation.

On 25 February 2005, the Electoral Commission declared Mr. Museveni the winner of the election, having obtained over 50% of the valid votes cast. The Petitioner who was the runner-up, was dissatisfied with the declaration of results. On 7th March 2006, the Petitioner lodged the petition in this Court challenging the validity of the election results on various grounds.

FINDINGS AND POINT OF DISSENT OF JUSTICE TSEKOKO IN THE ELECTION PETITION.

Just like the rest of the Justices of the Supreme Court, Justice Tsekoko found that there were widespread violations of electoral laws, it held that these violations were not personally committed by President Museveni or with his knowledge or approval by his agent. His point of departure from the majority of the court was the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner.

SUBSTANTIALITY TEST

In Uganda, the constitution under Article 104(5) authorizes parliament to make laws for the conduct and annulment of presidential election. Pursuant to such authority, the parliament enacted the Presidential Elections Act under which the parliament outlined the grounds for annulling presidential elections. Section 59(6)(a) of the Act provides that:

" non-compliance with the provisions of this Act if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner."

Justice Tsekoko further stated that Section 59(6)(a) of the Presidential Election Act, "appears to imply a license to a candidate to cheat or violate e law but do it in such a way that the cheating ought not to be so much as amount to creating a substantial effect on result". This view was welcomed by the public who seem to think that the courts are simply acting in favor of the ruling

party when they uphold elections even if there had malpractice as long as such did not affect the results. This view was welcomed by the public who seem to think that the courts are simply acting in favor of the ruling party when they uphold elections even if there had malpractice as long as such did not affect the results.

"Cheating must be such as can be tolerated by the courts!! This notion of substantial effect is found in the English law from which we drive our own law. The notion of **"substantial manner"** could be a recognition of many things. It can be argued that an election exercise such as that of a President of a country involves a lot of preparations by many actors. It can be argued that preparation for election should end soon or that the exercise even though it is done once in every so many years, it is costly and, therefore, some violation of the law need not be treated as fatal. Therefore, a repeat of such an election is bound to cost the country more resources. As against these possible arguments, there are considerations of virtues of a free and fair democratic election.

If the principles enshrined in our laws, and especially the Constitution, are properly observed during a free and fair democratic election, losing candidates and their supporters will surely be satisfied and, therefore, allow the country to develop peacefully. But if a presidential election is won through fraud, cheating or through the flouting of the law and the constitution, dissatisfied candidates and their followers may create instability and disaffection among the population. Allowing candidates licence to cheat even as little as cannot affect results would render the election exercise a farce, a play thing or frivolous. Indeed, tolerating cheating and fraud in elections can imply that holding elections itself is not desirable or necessarily. Yet proper election should give legitimacy to winners.

The substantiality test has jeopardised the integrity of the electoral process across Africa as incumbent administrations have flouted electoral rules and engaged in illegalities in order to achieve the outcome that they desire. This view, which is based upon the misuse of the 'substantive effect rule', has been propounded by different African courts contrary to the concept of the rule of law and constitutionalism. The substantive effect rule entails that acts or omissions and illegalities committed during elections should not disannul an election unless these acts or omissions and illegalities are so extensive so as to affect the results.

The Supreme Court of Uganda has on all election petitions relied on the substantive effect rule to hold that although there had been illegal practices and irregularities, these would not have significantly reduced the numbers between the petitioner and respondent. A similar approach was taken following the 2001 Zambian and the 2012 Ghanaian presidential elections. In the former case, the 'substantial effect rule' was expanded beyond the numerical outcome to include the geographical spread of the irregularities, while in the latter case, although significant irregularities

were committed contrary to the Constitution, the court went on to rule that the election was conducted substantially in accordance with the Constitution. The approach taken in each of these cases appears to endorse an approach that focuses on the numerical impact of irregularities and in so doing undermines the need to run elections in accordance with constitutionalism.

A LEAF TO PICK FROM THE RAILA AMOLO ODINGA & STEPHEN KALONZOMUSYOKA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & UHURU MUIGAI KENYATTA.

DRAWING LESSONS FROM THE ODINGA 2017 DECISION[1113]

The petition following the outcome of the August 2017 election, presented an opportunity for the Supreme Court to explain the substantive ground upon which an election could be annulled. In this regard, the court laid out two tests. The first, the court held, was the constitutional requirement based upon the principles that the "the electoral process and results should be simple, yet accurate and verifiable." In their judgment, the Supreme Court concluded that "the presidential election of 8 August 2017, did not meet that simple test" and they were unable to validate it. The second test concerned the question whether there were illegalities and irregularities committed in the conduct of the elections. The court turned to examine the petitioner's allegations that the election process was not only conducted devoid of constitutional aspirations but that it was also marred with irregularities and illegalities that rendered its result unverifiable and thus indeterminate. The court dealt with both concepts separately, but first it sought to distinguish between an irregularity and an illegality.

The court defined illegalities as a breach of the substance of a specific law while irregularities denote a violation of specific regulations and administrative arrangements put in place. The petitioners in this context claimed that the presidential election of 8 August was characterised by systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election. Some of the alleged illegalities included blatant non-compliance with the law, while irregularities included infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the IEBC, for the management of the elections.

[1113]RailaAmoloOdinga& Stephen KalonzoMusyoka V Independent Electoral And Boundaries Commission, Chairperson, Independent Electoral And Boundaries Commission & Uhuru Muigai Kenyatta

TIME TO CONSIDER THE QUALITATIVE NATURE OF ELECTIONS

The substantiality test is out of touch with the qualitative nature of election irregularities that it offends justice and brings the credibility of the court into disrepute. This is the time to adopt a qualitative test that considers the totality of circumstances and their effect on the quality of the election. A test that examines whether or not there was a level playing field, free and fair campaigns, fair use of state resources, transparency in printing election materials, transparency in tallying and reporting election results and whether the state took concrete steps to remove barriers that unduly restrict the exercise of the right to vote. Over emphasis of the quantitative effect of the election results assumes that everything can be adequately quantifiable but we all know that certain things cannot be adequately quantified.

Furthermore, the substantiality test is a deeply flawed requirement because, it transforms a question of law into a question of fact. Yes, the petitioner has the burden of proof to prove the irregularities and their magnitude but it is a question of law if those irregularities were substantial enough to render an election unfair. Of course the starting point is the quantitative analysis of those factors that can be sufficiently and credibly quantified. It is also true that non-serious irregularities should not annul an otherwise properly conducted election but grave and serious violations of election standards planned and executed by state agencies controlled by the incumbent should annul an election.

The case gave birth to the ill conceived burden on the petitioner to show that the irregularities he or she has proved would have substantially changed the outcome of the presidential election. The same requirement applies to other elections but lower court have been more relaxed in their application of the rule. In circumstances, where the irregularities in question are voter stuffing, or striking eligible voters off the register and similarly quantifiable irregularities it might be possible to predict the number of votes affected. However, when the irregularities are qualitative in nature, it is not possible to predict how many votes are affected by the irregularities. How do you predict the quantitative effect of let’s say a media blackout on election results? Obviously a candidate who is unable to campaign either in person or through the media is gravely disadvantaged but how do you determine the number of votes he or she lost by being unable to effectively campaign. How do you determine the quantitative effect of the use of state resources such as money, state media, public servants, state funded presidential pledges and many more by the incumbent candidate on the election results? Does it for example gain him or her a million votes or grant him or her an advantage of 40,000 votes.

After quantifying the quantify irregularities the court must examine the qualitative irregularities that cannot be adequately quantified. The test should be whether the qualitative irregularities were grave enough to render the election unfair and give the incumbent an unfair advantage. It should be

relevant to the consideration of the incumbent gaining an unfair advantage from the irregularities that he failed to take reasonable steps to ensure that the other candidates have a fair playing field by putting in place measures to prevent and remedy any violations or irregularities that occur. The court should ask itself the following questions.

- If there was voter intimidation was it serious enough to stop a substantial number of eligible voters from voting or from casting their vote for their preferred candidate. Did the incumbent candidate take reasonable steps to ensure that security forces, state agencies and his or her supporters do not intimate voters.
- If there was voter suppression, was it such that it was difficult or unduly burden full for eligible voters to register to vote or vote without undue hardship. Did the incumbent take reasonable steps to ensure that eligible voters can easily register to vote or easily cast their vote without incurring high expense or exposure to infectious diseases or travelling long distances or making prohibitively long lines.
- If there was use of state resources by the incumbent was it such that it gave him or her a substantial advantage over the other candidates. Did the electoral commission and the incumbent candidate take reasonable steps to ensure a level playing field? Would the incumbent candidate have performed substantially less impressively if he or she had no access to state resources?
- If there was abuse of state power by for example intimidating media houses into refusing to air adverts of the opposition or turning off internet access was it of such a grave or serious nature as to have prevented the other candidates from campaigning or was it such that it gave the incumbent an unfair advantage.
- Did the incumbent candidate and the electoral commission put in place measures to ensure a level playing field, equitable access to resources? Were campaign rules fairly and equitably enforced. Did they put in place measures to ensure transparency in printing election materials and distributing them? Did they put in places measures to ensure transparent tallying of votes and transmission of election results? Did they put in place measures to ensure that citizens see the results as transparent and the election as fair?

This totality of circumstances test looks at the quality of the election and imposes an obligation on the state in line with the constitution to ensure that the election is free and fair. It disincentives abuse of power and misuse of State resources by the incumbent candidate and creates an incentive for him or her to ensure that the election is free and fair. If strictly enforced, it has the potential to strengthen the rule of law and strengthen the democratic processes. Imagine a world where the incumbent is actually advantaged by taking steps to promote a free and fair election and disadvantaged by abuses of power.

GOSPEL ACCORDING TO JUSTICE PROF. DR. KANYEIHAMBA, J.S.C VERBARTIM

I will begin my findings on this petition with a reminder that the overriding constitutional dogma in this country is that constitutionalism and the 1995 Constitution of Uganda are the Alpha and Omega of everything that is orderly, legitimate, legal and descent. Anything else that pretends to be higher in this land must be shot down at once by this Court using the most powerful legal missiles at its disposal. The Constitution of Uganda is a binding contract between the people of Uganda and their successive governments. It was made by the people after some six years of protracted negotiations throughout the Country under the auspices of the Constitutional Commission and the Constituent Assembly. This Court is the last sanctuary for all people within Uganda who are challenging any violations of the Constitution or breach of any law. Consequently, this petition must be considered and resolved with the people's Constitution guiding this Court.

The Uganda Constitution which is the supreme law of the land provides in Article 103(1) that the election of the President shall be by universal adult suffrage through a secret ballot. It is also provided in clause 9 of that Article that, subject to the provisions of the Constitution, Parliament shall by law prescribe the procedure for the election and assumption of office by a President. Subsequently, Parliament enacted several Acts for this purpose which include the Presidential Elections Act, the Electoral Commission Act and the Parliamentary Elections Act under which Presidential and Parliamentary elections in Uganda are organized and conducted.

Article 104 which is headed, *challenging a Presidential election*, provides as follows:-

(1) Subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) A petition under Clause 1 of this Article shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed.

(4) ----------

(5) After due inquiry under Clause (3) of this Article, the Supreme Court may:

(a) dismiss the petition

(b) declare which candidate was validly elected; or

(c) null the election

(2) Where an election is annulled, a fresh election shall be held within twenty days from the date

of the annulment.

(3) If after a fresh election held under Clause (6) of this Article there is another petition which succeeds, then the Presidential election shall be postponed, and upon the expiry of the term of the incumbent President, the Speaker shall perform the functions of the office of the President until a new President is elected and assumes office.

(4) For the purposes of this Article, the provisions of Article 98(4) of the Constitution shall not apply.

(5) Parliament shall make such laws as may be necessary for the purposes of this Article, including laws for grounds of annulment and rules of procedure.

From the way they are worded, it is clear that the only respective purposes of Articles 103(9) and 104(9) are to empower Parliament to make laws and rules of procedure for the election and assumption of office of the President and the grounds for upholding or annulment of such an election. Parliament is not empowered to convert the said inquiry into a trial or limit the powers of the Supreme Court from considering and taking into account any evidence touching on the election of the President that may assist the Court in coming to the right decision. Thus, in the South African case of Ferreira v. Levin No. 1996 (1) S.A 984 (C.C), the court invited written submissions from professional bodies whose work could have been affected by the court's decision.

It is my view therefore, that this court's duty is to conduct an inquiry into the allegations contained in the petition and, after due consideration, declare its findings, give reasons thereof and make appropriate orders, if any. There is no provision in the Constitution for a trial and judgment by this court. The inquiry meant in the Constitution is radically different from an ordinary trial whether of a criminal, civil or administrative nature.

The implications of Article 104 are easily discernible. An inquiry into a Presidential election must be conducted, concluded and its findings and reasons given within the period prescribed by the Constitution. The idea that the Supreme Court can summarise its findings and give a decision and then give reasons outside the period fixed by the Constitution is indefensible. It could not have been the intention of the makers of the Uganda Constitution that if an election is annulled, a fresh one could follow immediately without regard to the reasons that may be given by all or any of the judges on the panel. To suggest that the Electoral Commission and the parties concerned could meaningfully carry out or participate in a fresh election, following the annulment of another by the Supreme Court and before the reasons for the decision of that Court are unknown is to indulge in speculation. It is only logical to expect the Electoral Commission and other actors in the Presidential election to act correctly and legally after reasons for the annulment of the previous

election are known and publicised. To do otherwise could be putting the cart before the horse. It is imperative that reasons why one election is upheld and another is nullified, should be clearly spelt out and known before a fresh and new election is held. Only this way can the mistakes made in the previous election be known and subsequently avoided.

The other reason why a Presidential election should be inquired into and not regarded as a trial is to avoid delay. In fact, the reading of the provisions of Article 104 shows that not only must the inquiry into a Presidential election be conducted and concluded expeditiously but should the proceedings suggest further delays, the Constitution provides the answer in Clause 7 of the same Article which avoids further delays and complications in the ascertainment of a President, by providing that the Speaker shall perform the functions of the President.

It is thus very clear to me that the Constitution deliberately created a procedure for determining a Presidential election petition which is different from those designed to cater for trials. Nothing could be clearer than Article 104(3) which for, emphasis I repeat here, *"the Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed."* No trial or judgment are intended or implied. Under the Uganda laws and practices, a trial which is necessarily followed by a judgment is differently structured and conceived. A trial must be followed not only by the evaluation of facts and the applicable laws, but also by a judgment which must contain reasons for the decisions therein. In the majority of cases; whether of a civil or criminal nature, judgments are given on notice and may sometimes stretch to two months or more. Moreover, the pleadings, arguments and submissions tend to be confined to the evidence and facts presented by the parties or their counsel. The Oxford Standard Dictionary defines the word to inquire as "to find out through information or to investigate." H.W.R. Wade and C. F. Forsyth, the learned authors of the 8th edition of 'Administrative Law' published by Oxford University Press describe an inquiry as intended "to investigate into an objection by a citizen or a number of them and give that objection the fairest possible consideration." So, just as those authors speak of statutory inquiries in the context of administrative actions, one may speak of a constitutional inquiry into a Petition presented under Article 104 of the Uganda Constitution. Under Uganda laws, there is the Commissions of Inquiry Act, Cap. 166 in which the concept and purpose of an inquiry are clearly stated and where emphasis is placed upon the reasons leading to the findings and conclusion of such an inquiry. It follows that reasons for the decisions in an inquiry are integral parts of the findings and conclusions of the tribunal. One may not act on findings alone without knowing the reasons and rationale for such findings.

In my opinion, the delay to give reasons for the findings of the Supreme Court was never

contemplated by the makers of the 1995 Uganda Constitution. Such delay is democratically and constitutionally unacceptable. In my view, it is imperative that the nation should be informed expeditiously why any disputed Presidential election was upheld or nullified by this court and this can only be discerned from the reasons given by the court. Trials of civil or criminal or other types are by nature subject to long and drawn out procedures. In many instances, such procedures and delays are determined or caused by the parties themselves or their counsel with possible indefinite adjournments. It is not unknown for cases to drag on for years, sometimes stretching to several or more years.

I investigated into the petition, compiled and assessed the evidence availed to the court, wrote my reasons, circulated the same to my colleagues of the Supreme Court in early May last year, that is 2006. I was guided and in some cases, compelled by the reasons I have so far advanced with regard to the necessity that Presidential election petitions be dealt with and concluded expeditiously. As a matter of fact, it is only in the second week of January of this year that my colleagues except one who did so earlier, released and circulated their own draft reasons. This is notwithstanding that had the court allowed the petition, a fresh Presidential election would have had to be held within twenty days from the date of the court's decision. It cannot have been the intention of the makers of the Constitution that a fresh election would be held by the Electoral Commission or allow others to participate in it without knowing the reasons why the previous election had been cancelled. Nor can it be suggested that findings and reasons for a dismissed petition are different from those advanced for an allowed petition and that whereas the latter must be disclosed immediately, the former can be delayed for an indefinite period. In light of this anomaly, I respectively suggest that this court, sooner rather than later might wish to revisit its decision in the Presidential election petition of 2001 under Article 132(4) of the Constitution which provides that:-

"The Supreme court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so."

If this court feels inclined not to do so, Parliament should be moved to do the necessary in clarifying this law.

The facts and circumstances leading to this petition were summarised in our majority decision which was read on the 6th, April, 2006. I will nevertheless summarise them for the purposes of my own findings. Dr.KizzaBesigye, the petitioner, was one of the Presidential candidates in the election that was held on 23rd, February, 2006, the results of which were declared by the 1st Respondent on 25th February, 2006 to the effect that the 2nd Respondent had emerged as the winner

of the election. In that declaration, the 1st Respondent announced that the 2nd Respondent had obtained 59.28% of the total valid votes cast while the Petitioner was the runner-up with 37.36% of the votes cast, and as the 2nd Respondent had obtained more than 50% of the votes, he was declared by the 1st Respondent to have been duly elected President of the Republic of Uganda.

The Presidential election was held and conducted under a multiparty system unlike previous ones that had been held since 1996 under the monolithic National Resistance Movement Political System. The Petitioner ran for election as the candidate of one of the participating political organizations which is registered as Forum For Democratic Change (F.D.C), while the 2nd Respondent stood for election as the candidate of the National Resistance Movement (N.R.M). There were two other Presidential candidates representing political parties, namely, MiriaKaluleObote for the Uganda People's Congress (UPC) and John KizitoSebaana representing the Democratic Party (DP). There was a fifth candidate, Bwanika Abed who stood as an independent Presidential candidate.

In his petition, Dr. KiizaBesigye complains that the 1st Respondent failed to comply with several provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act and actually infringed some of the provisions of the Constitution and these Acts of Parliament. He also complains that section 59 (6) (a) of the Presidential Elections Act is contrary to the provisions of Article 104 (1) of the Constitution. The Petitioner further complains that the entire election process in 2006 Presidential election was characterized by acts of intimidation, lack of freedom and transparency, unfairness and violence and the commission of numerous offences and illegal practices. The petition makes further allegations of breaches of the law by the 1st Respondent in the disenfranchisement of voters by way of deleting them from the voters' register and failing to cancel results from polling stations where gross electoral multipractices had occurred. The petition complains of further malpractices allowed in the election by the 1st Respondent such as multiple voting, vote stuffing, failure to declare results in accordance with the law and the absence of freedom and fairness in the whole electoral process.

The Petitioner's allegations against the 2nd Respondent are listed to include the illegal practices and offences committed by him personally. The petitioner alleges that the 2nd Respondent used words or made statements which were malicious or which contained sectarian words or innuendos against the Petitioner and his party and, made abusive, insulting and derogatory statements against the Petitioner, FDC or other candidates. Additionally, the petition alleges that the 2nd Respondent made defamatory and derisive, mudslinging, insulting and false statements against the same parties. The Petitioner further alleges that the 2nd Respondent committed acts of bribery of the electorate personally or by his agents with his knowledge and consent or approval, before and during the

elections designed to interfere or which interfered with the free exercise of the franchise of voters.

In support of the petition, counsel for the Petitioner, presented a number of affidavits with annextures, made submissions and cited authorities. In response, the Respondents, through their counsel denied all the allegations against them and their counsel presented affidavits together with various annextures, authorities and made submissions in support of their responses.

At the commencement of the proceedings of the inquiry, this Court framed five issues for the determination of the petition. These were:
Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and the Electoral Commission Act in the conduct of the 2006 Presidential Elections.
Whether the said elections were not conducted in accordance with the principles laid down in the Constitution, Presidential Election Act and the Electoral Commission Act.
Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.
Whether the alleged illegal practices or any electoral offences in the petition were committed by the 2nd Respondent personally or with his knowledge and consent or approval.
Whether the petitioner is entitled to the reliefs sought.

The inquiry into the allegations of the petition proceeded partly under the Constitution and partly under the Presidential Elections Act and the Electoral Commission Act. Both the inquiry and the consideration and findings of the court must be constitutionally completed and the decision of the court pronounced publicly within a period of thirty days which reinforces my firm opinion that the framers of the Uganda Constitution intended petitions in Presidential elections to be expeditiously disposed of by way of inquiries.

At times during the hearing of the petition, a number of counsel for the parties tended to spend too much time on definitions, explaining and arguing about the meaning and implications of certain terms and expressions in the law even when they were submitting before Justices of the Supreme Court with all that it implies. In my opinion, the thrust and impact of an inquiry of this nature are best presented by maximum concentration upon what actually occurred before and during the election. Detailed facts and events and the actual circumstances implied by each allegation of such malpractices as bribery, intimidation and disenfranchisement need to be given with particulars and actual occurrences by credible witnesses, if possible, giving testimony produced or deponed to the satisfaction of the court because this is an essential and important inquiry that could have grave

consequences for both the parties and the nation as a whole.

Be that as it may, the parties and their counsel managed to present evidence and submissions to enable court to deliberate on the petition. Within a few days of completing the hearing of the inquiry, the court rose to consider its findings and decision which as already noted, it delivered on the 6th of April, 2006.

On issue No.1, the court found unanimously that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections by the 1st Respondent in the following instances:

(a) In disenfranchisement of voters by deleting their names from the voters' register or denying them the right to vote.

(b) In the counting and tallying of the results.

On issue No.2, the court found, again unanimously, that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act and the Electoral Commission Act in the following areas:

The principle of free and fair elections was compromised by bribery, intimidation and violence in some areas of the country.

The principles of equal suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing and incorrect methods of ascertaining the results.

On issue No.3, by a majority of four to three, the court found that it was not proved to the satisfaction of the court that failure to comply with the provisions and principles as found on the first and second issues, affected the results of the Presidential election in a substantial manner. I was one of the three dissenting Justices.

On issue No.4, by a majority decision of five to two, the court found that no illegal practices or other offences were proved to the satisfaction of the court to have been committed in connection with the said election, by the 2nd Respondent personally or by his agents with his knowledge and consent or approval. I was one of the majority Justices who made this finding.

I will be giving reasons for all the courts' decisions on all the issues. I will start with issue No.3. After perusing the affidavits, their annextures and heard counsel for the parties on the authorities and their application, the court was almost evenly divided as to whether to answer this issue in the affirmative or the negative. I dissented from the four members of the courts' panel who eventually decided to resolve the issue in the negative and dismissed the petition.

At the commencement of the inquiry's proceedings, counsel for the Petitioner made an application to stay the proceedings of the inquiry so that the Petitioner can first petition in the Constitutional Court for a declaration that section 59(6)(a) of the Presidential Elections Act is inconsistent with Article 104(1) of the Constitution. At the time and in our summary findings, I concurred in the courts' decision that it was inappropriate to have had that application while we were hearing the petition but in my opinion, the observation by the Court that there is no inconsistency between the section in question and Article 104(1) of the Constitution which we made hastily deserves further review. After Counsel made submissions on the provision, this Court rose and deliberated briefly and then gave its decisions immediately.

It is my opinion that by enacting section 59(b)(a) into the Presidential Elections Act, 2005, Parliament created a clog on Article 104 (1) of the Constitution. I am fully aware and I was acutely mindful of the fact that to hold that a Presidential election is in some way flawed, is not an easy thing to contemplate, for to do so may lead to serious consequences for both the winning candidate and the nation. For this reason, every judge and every court will not make such a decision lightly or without compelling evidence. Such a decision must be reached after careful consideration of substantial evidence that amply justifies the decision. In my opinion, there was sufficient evidence presented in this petition to enable the court to decide that the results of the Presidential election of 2006 had been so fatally affected by irregularities, malpractices and illegalities substantially as to affect the final results in a substantial manner and therefore those results ought not to be upheld by this court.

I now turn to the issues framed by the Court. In my opinion, having answered in the affirmative both the first and second issues framed by the court, it became imperative for me to answer issue No.3 in the affirmative also. To decide otherwise would, in my opinion, manifestly conflict with the unanimous findings of the court on issues No.1 and 2. Once a court finds that the Constitution, the supreme law of the land and other country's laws have been flouted, that court must do its bounden duty and grant the remedy sought. In my view therefore, I could not see any rational or defensible alternative to answering issue No.3 other than in the affirmative. I am fortified in my resolve by a decision of the Supreme Court of South Africa in the case of Speaker of the National Assembly v. De Like, 1999 (4) S.A. 863 (SCA) which emphatically declared that:

"The Constitution is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Any citizen adversely affected by any decree, order

or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the court".

The provisions of Article 1 of the Constitution on the sanctity and binding effect of the Constitution must be unconditionally applied and respected. Clause 1 of the Article provides that all power in Uganda belongs to the people who shall exercise their sovereignty in accordance with this Constitution. In the 2006 Presidential election, the people of Uganda were endeavouring to exercise their sovereign power which they had to do in accordance with the provisions of the Constitution. It should be emphasized here that both the principle of people exercising their power through elections and the obligation for the same people to do so while complying with the Constitution are co-equal. Neither is subordinate nor superior to the other.

In my opinion, to find otherwise would be tantamount to holding that whenever any person or body is exercising powers derived from or delegated by the Constitution, such exercise can result in measures or acts which override the provisions of that same Constitution. A result of that kind cannot have been contemplated by the makers of the Uganda Constitution for this would be the effect if it were to be held that the purpose and effect of section 59(6)(a) of the Presidential Elections Act, 2005 is to direct the Supreme Court to ignore the consequences of what this court found unanimously in issues No.1 and 2 including violations and breaches of the Constitution and laws of the country provided that they did not affect the result in a substantial manner which holding would, in my opinion, be based purely on conjecture and personal inclinations of judges. In this particular petition, such an opinion would be grossly unfair to Ugandans because the 1st Respondent refused adamantly to produce the only evidence which could have assisted the Petitioner, Respondents and this Court to prove and be satisfied that the allegations that there were irregularities, malpractices and illegalities were justified or unjustified.

Section 56(2) of the Presidential Elections Act which is mandatory provides that;

(2) Upon completing the return under subsection (1), the returning officer shall transmit to the commission the following documents-

(a) the return form;

(b) a report of the elections within the returning officer's electoral district;

(c) the tally sheets; and

(d) the declaration of results forms from which the official addition of the votes was made.

The 1st Respondent either adamantly refused or was unable to comply with the request of counsel for the petitioner and the directive of this Court to produce returning officers reports from electoral

districts.

The Constitution provides in Article 103(1) that the election of the President shall be by universal adult suffrage through a secret ballot. This court found unanimously, that this provision was violated. In my opinion, it matters not whether there was no additional evidence that these violations which affected many areas of the country did not spread to many more others. I have found no provision in the Constitution nor was any cited before this Court other than a similarly decided Presidential Election Petition No.1 of 2001, that in any election where breaches of the Constitution and laws have blatantly occurred, they should be ignored or tolerated by the Supreme Court provided the Court is satisfied that those breaches did not affect the result of that election in a substantial manner. In my view, if there were such a law it would deserve to be struck down because it would be existing as a clawback provision from the provisions of the Constitution which is the supreme law of this country.

The Constitution further provides in Article 59 that every citizen of Uganda of eighteen years of age and above has a right to vote, that he or she has a duty to register as a voter for public elections and *referenda*, and that the State shall take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote. Voting is not compulsory in this country. This is a good reason why those who have taken the trouble to be registered as voters should be given every encouragement and assistance to vote. Instead, either by design, bribery or intimidation and violence, many of them were prevented to freely exercise this right. Many who chose to turn up in possession of either their registration certificates or polling cards were denied the right to vote or in some instances, were chased away from the polling centres or simply told that they could not vote because their names had been omitted or deliberately deleted from the register of voters without their knowledge. This meant that the State or its agents, instead of assisting and ensuring that all citizens qualified and registered to vote did so, actually prevented many of them from exercising their constitutional right to determine who governs them. Volume 2(d) of the Petitioner's affidavit contains the testimonies of some forty deponents swearing to diverse acts and practices disenfranchising voters. Typical of such affidavits is one by Isaka Hire Saturday who depones as follows:

"That I am a male adult citizen of sound mind. That I am a registered voter having been duly registered and issued with a certificate No.0269498 (Annexture "A"). That on the 23rd February, 2006, I proceeded to old park polling station, Busia Town Council, SamiaBugwe North to vote for my candidate Dr. KizzaBesigye. That after lining up and reaching the presiding officer's desk, he informed me that my name was not on the register. That he returned my certificate after checking it and advised me to leave."

Much more damning of these illegal practices were reports of independent observers. Thus, Mr. Kiago Geoffrey of DEM Group swore and signed an affidavit in which he states:

"I was an election monitor with DEM Group at Kampala T/C. I reported to the polling station at 6.00 am and presented my credentials to the presiding officer and assumed my seat at the station. That before the voting begun, some people came with a yellow numberless pick-up and directed all the voters to vote only NRM candidates. ... saying that they would come back later to establish whether the voters had done so. I wrote a report to the country supervisor of DEM Group informing him what had happened. In the afternoon, the same group returned and ordered Kintu, the presiding officer to stop the elections, took over the polling station. A polling constable whose name I could not readily establish then ordered the presiding officer to hand over all the remaining ballot papers which the latter did. The group then began ticking the remaining ballot papers in favour of the NRM candidate and ordered polling officials to balance and sign the declaration forms, ---. Shortly afterwards, the police came and carried away the polling materials."

This court found unanimously that the provisions of Article 59 of the Constitution were violated.

Article 61(a) of the Constitution provides that the Electoral Commission shall ensure that regular free and fair elections are held and that the Commission shall organize, conduct and supervise elections in accordance with the Constitution. This court found that the provisions of this Article were violated nationwide.

The unanimous findings of this court indicate quite clearly that Article 1(4) of the Constitution which provides that all the people of Uganda shall express their will and consent on who shall govern them through regular, free and fair elections of their representatives was infringed in many instances, deliberately. There were several other malpractices such as multiple voting, vote stuffing, bribery, intimidation, violence and partisanship on the part of officials and security forces all supposed to be neutral in an election which was conceived on the basis of multipartism. In Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Council, 1999(1) S.A.374 (c.c) the Constitutional Court of South Africa stated that:

"It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that which is conferred upon them by law. At least in this sense, then, the principle

of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need to merely hold that fundamental to the interim Constitution is a principle of legality. There is of course no doubt that the common law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action', the principle of legality is enshrined in s.24 (a)(1c). In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in the case remains a constitutional question."

In my view, constitutionality and legality as provided for in our Constitution are matters on which compromise should never be permitted. Issue No. 3 which was framed by this court can be said on the face of it to be the most difficult to resolve because its determination depends on the consideration of matters beyond what is purely legal. The answer to this riddle is essentially governed by the words used in Section 59(6)(a) that the court must be satisfied that the result was not affected in a substantial manner. The provision transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment.

In my opinion, it is implicit in the provisions of Section 59(6) (a) that before coming to a decision which complies with those provisions, a judge must be guided by much more than rules and principles of law. The provision appears to have been inserted in the Act to militate against decisions which arguably may be correct and constitutional but might appear to be awkward and unacceptable because of their possible consequences. Ultimately, the decision on issue No.3 will depend on the valour to consider and choose between a number of possible alternatives, each of which perhaps may be perfectly justified by findings on the facts and acts but whose consequences the decider is not certain. In my view, Section 59(6)(a) appears to have no other purpose than to force judges to consider and reflect on possible political consequences of their decision before making it. It creates a subjective test for the manner in which judges may use their discretion and personal conscience in reaching decisions that may result in controversial consequences. It was for fear of the use of such subjective discretion that in my reasons for the Courts' decision in Attorney General v. Paul Ssemwogerere& Hon. Zachary Olum, Const. Appeal No.3 of 2004, I observed that:

"In my view, Constitutional principles and rules should always be interpreted objectively and impartially without regard to consequences except in very exceptional circumstances which do not exist in this appeal. It would be an error to construe constitutional provisions on the basis of what that construction might lead to. It is untenable in a case of this nature to suggest that the

Constitutional Court or any other court has or can exercise discretionary powers and decline or grant a remedy sought by a petitioner or litigant on the basis of some extraneous issues other than judicial and constitutional."

In these reasons, I have endeavoured to emphasise the supremacy of the 1995 Constitution of Uganda. Where Parliament is empowered to make a law to amplify a constitutional provision, it must do so, *intra vires*. It must not make bad law. In my considered opinion, section 59(6)(a) of the Presidential Elections Act which compels judges to operate in the near impossible circumstances and choices I have described, is bad law.

It is very important to bear in mind that in this Petition, this Court found that:

(1) There was non-compliance with the Constitution and Election laws.

(2) The principle of free and fair elections was compromised by bribery, intimidation and violence.

(3) The principles of equal suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing and incorrect methods of ascertaining the results.

In my view, these findings were more than sufficient to compel a court to come to the conclusion that these substantial irregularities, malpractices and illegalities had the effect of affecting the results in a substantial manner without being subjected to the constraints of the provisions of Section 59(6)(a) of the Presidential Elections Act. Had the court found that the allegations were not well founded or were inadvertent or merely technical, it would equally dismiss the petition using its constitutional and legal powers. The unanimous findings of this court on framed issues Nos. 1 and 2 are compelling. The only final decision this Court can make is to order the holding of a fresh election. By such decision of this court, the political parties and candidates participating in the election as well as the Electoral Commission and its agents will have become more knowledgeable about what must and must not be done. This opportunity appears to have been lost to the nation of Uganda when by a majority of four to three, this court declined to nullify the Presidential Election of 2006.

Following the Presidential election in 2001, there was Petition No.1 of 2001, the first of its kind under the 1995 Constitution. The panel of this Court which heard and decided that petition also found that the provisions of the Constitution and the electoral laws of the country had been extensively violated. However, as in this petition, the court decided to dismiss that petition by a narrow margin of 3 to 2 because the majority felt as they have done in this petition that the offences they found to have occurred in that petition had not affected the results in a substantial manner. In

my opinion, this Court in this petition and in petition No.1 of 2001, has raised the standard of proof required for an annulment of a Presidential election far beyond the capabilities of petitioners and the expectations of this nation to the extent that makes it impossible to predict what may happen in future.

It is my considered opinion however that for a result of a Presidential election to be flawed, the petitioner need only produce sufficient evidence to prove that the Constitution and laws of Uganda were violated in a substantial way and this finding alone should lead the court to hold that the results were affected in a substantial manner. There can be no mathematical formula to be used by Justices of the Supreme Court in reaching any decision on such petitions. There can be no justification for the view that since these illegalities, irregularities and malpractices were few and far in between, they did not constitute enough evidence. Such justification would, in my opinion, be fallacious. Judges cannot be expected to use speculative or doubtful mathematical calculations on the evidence presented and then turn round and say that their decision is an accurate and acceptable one. The only credible, constitutional and legitimate basis on which such a decision can be made is the extent to which, deliberately or otherwise, the Constitution and laws of Uganda were substantially violated. In my opinion, this should be the only concrete criterion upon which the court should safely act. The affidavits by Dr. Odwee and others, the experts in statistics were somehow helpful and assisted the court in understanding some of the issues. However, in my opinion, these reports were quite inconclusive and partial and did not convince this court to follow one or any of the routes suggested by those experts in order to come to any rational conclusion.

Incidentally, the Petitioner, his lawyers, the Respondents and their respective lawyers had little time in which to collect the evidence and materials in support or against the petition. It was especially more difficult for the Petitioner's team which was searching for relevant information much of which was in the possession of the 1st Respondent or its agents. Some of the affidavits and submissions indicated a reluctance and occasionally hostility towards the Petitioner's team as evidenced by the affidavits of Lucia Naggayi of Makindye West, Kamateneti, Ingrid Turinawe and her annexture "B" in Vol. 2 (c) of the Petitioner's affidavits and the replies by way of affidavits of George Maingo, James Were and Laban Muhwezi on behalf of the Respondents, to which I will refer later. The team was doing its work against partisanship exhibited by many public agents and institutions and supporters of the respondents. The Justices of the Supreme Court who shouldered the responsibility of pronouncing their findings on the petition had only thirty days from the date of its filing to consider and pronounce themselves on the matter. If the framers of the Constitution had intended the hearing of Presidential elections to be treated as ordinary civil or criminal trials and to

use mathematical numbers in their verdict and decision, there would have been a provision for the necessity of collecting all the results in the whole country and giving more time to all concerned to analyse those materials. Certainly, there would have been need for all the reports of presiding officers at the election polling stations to be submitted and received by the parties and the Court before the hearing of the petition. This is one of the biggest handicaps that face parties and court in this kind of petition.

Despite this limitation, the Petitioner and his counsel managed to reveal many of the irregularities, malpractices and illegalities complained of in the petition which occurred in a number of areas they were able to investigate in the short period they had before filing the petition. In any event, the Petitioner's allegations were often supported by affidavits and reports of independent observers, some of which were recognized and fully accredited as observers in the election by the 1st Respondent. Significantly, as already noted, many of the allegations of illegal acts, malpractices and irregularities could have been proved or disproved by perusal of the reports of the election officials throughout the election exercise countrywide, but alas, as the court found, the 1st Respondent failed to produce them even though the law required it to do so. These same reports which are supposed to contain detailed information of what occurred before and during voting at polling centres throughout the country would have greatly assisted the parties to strengthen their submissions on some aspects of the petition. They would certainly have helped this court to get at the truth of some of the accusations.

In the absence of the reports, the petitioner and his counsel were entitled to rely on some other evidence which was also availed to this Court. The numerous affidavits filed by the parties contained much of the information needed for decision. The petitioner and his counsel filed some five volumes of affidavits while the affidavits of the respondents were covered in six volumes with a large number of deponents for each side. Equally important, were the various reports compiled during the election and filed for the purpose of hearing the petition. Several of these reports were made by respected and independent observers to whom I will revert later in these findings. Thus, it is revealed in the affidavits that whereas in some areas agents of the petitioner caught ferrying or bribing voters were arrested and detained, those doing exactly the same for the 2nd Respondent were either assisted or ignored by his agents and members of the security forces.

The report of the Foundation for Human Rights Initiative (FHRI) dated 25th February, 2006 contains numerous examples of irregularities, malpractices and intimidation. At P.3, it noted the following incidents:

"The EC split up some polling stations without notice to the voters. The FHRI, EOC noted that there were voters whose names appeared on registers in totally different parishes from those in which they thought they were registered and which were indicated on the voter's cards or on their voter registration slips. A number of voters shuffled between stations, in some cases for over 4 hours before they found their names or simply gave up. In Kikulu Zone in Kisasi College School polling station, in Kawempe North, one Kyakabale was arrested while giving out extra ballot papers to voters who are known NRM-O supporters at the polling station. In Kamukuzi M-Z polling station, Mbarara, one George Senzira, a polling assistant gave Pascal Nabasa, a voter, additional papers serial numbers 00170956 and 00170954. The incident was noted by the polling agents and the matter was reported to the Police.

In many areas, the FHRI, EOC noted that in some polling stations voters arrived to find that their names had been ticked already. It was noted that in Rubaga, Kampala at the West Church N-Z polling station, some candidates' agents were denied access to the voters' register by the presiding officers while other candidates' agents were given access and allowed to share desks with the presiding officers. In Mbarara, presiding officers refused to let people who were on the register to vote whereas in MakindyeGombolola polling station, people who were neither on the register nor held voters' cards were allowed to vote after being identified by the area LC Chairman. In Makerere, Mukwaya's polling station, the area LC3 Chairman was openly campaigning for the NRM Presidential candidate and the polling constable failed to stop him."

In Bungatira, Acwa, Gulu District, in Makindye, in Soroti and Kampala, the observers' reports contain several incidents of violence, intimidation and harassment by agents and members of the security forces against voters. They contain incidents of vote buying and bribery of voters.

Action for Development Observer Group monitored some districts which included Masaka, Tororo, Rukungiri, Pallisa, Kiboga, Lira, Soroti and Mbarara. Among its findings were that: omissions of names on the register were common. People feared the rumours that if people did not vote President YoweriMuseveni back into power, there was a possibility of war erupting. This fear was detected in the districts of Masaka, Kiboga, Rukungiri and Tororo. People whose names were not on registers would vote if they insisted but women would be turned away. In Nyanza, Kamonkoli and in Pallisa District, there were not enough election materials. At one polling station there was only one Presidential candidate, YoweriMuseveni with his photograph displayed. Other reports show that in some areas voting continued long after the constitutional closing time whereas in others, voting started very late. Multiple voting was very common in Mbarara barracks. In some

areas such as Lubongi polling areas in Tororo District, persons under age had been registered and they were allowed to vote.

The report of the Democracy Monitoring Group which consisted of three civil society organizations namely: Uganda Joint Christian Council (UJCC), Action For Development (ACFODE) and Uganda Journalists Safety Committee (UJSC) noted that in Rwemiyaga, Rubaya, Kabale District,

"the elections were fair. However, there was general singing of all people and rejoicing that the money from Mr. Museveni camp will make him win. The money came in two batches (sic.) as follows: the first round they received 50,000/= cash and the second round they received 40,000/=. This money in general was distributed amongst all villages in the sub-county. In my opinion, this money induced most voters to vote for Museveni. The second issue was rampant threats that if people did not vote for NRM, there would be civil war and this forced people to vote for Mr. Museveni lest they are not (sic.) killed. So for these reasons, it seems that people did not vote according to their will."

The affidavit of the 2nd Respondent on the question of facilitation of NRM candidates and his agents, states, *inter alia*:

"7. That the main strategy for the campaign was physical voter contact tasked to the NRM branch/village task forces throughout the country.

8. That the primary responsibility of each branch/village task force was to persuade each voter in its area to vote for me and all NRM candidates from village to national levels …

9. That a national budget for facilitating all NRM candidates' campaigns was prepared and approved by the Central Executive Committee …. A copy of a typical sample of the said payment voucher is attached hereto and marked as Annexture R2A1.

10. That the figures indicated in paragraphs 6 to 23, 25 and 27 of Musumba's affidavit are not true. There was no such regular pattern of distribution, and disbursements depended on amounts received at Central Executive Committee level and the facilitation needs at the various levels.

11. That all funds raised by the NRM were exclusively spent on facilitation of the campaigns as stated in this affidavit and no money was ever disbursed for the purpose of bribing voters as falsely alleged by ProscoviaSalaamuMusumba in paragraph 26 of her affidavit."

The payment voucher bearing the name of Mzee Muwumba Samuel who is the NRM District Chairman of Jinja District reveals that for that District alone Shs. 87,850,000 was dispatched by the NRM for facilitation.

Affidavits in support of the petitioner and evidence of independent observers show that much of the

money disclosed in the affidavits of the 2nd Respondent and the accompanying vouchers was actually spent in bribing voters. The 2nd Respondent and his supporters strongly deny the charge and depone that the money was used to facilitate agents and voters. In the case of Jinja District, the sum of Shs. 87,850,000 was released for the District on the 17th of February, 2006, several days before the election day. It is not disclosed when that money reached the constituencies in Jinja district and when it was actually distributed to recipients. Whatever the position, this is a colossal sum of money to effectively facilitate anyone within just a few days from voting. Under the circumstances, it is not easy to distinguish between the meaning of facilitation and that of bribery. However, what is crucially clear from all the evidence is that democracy and elections in Uganda have been truly monetized. It is no longer voting for the best candidate but the candidate who is the most able to facilitate or bribe voters. It is now the position that democracy in Uganda today depends on the wealth or financial capacity of candidates. In this kind of situation, it becomes a mockery to speak of freedom and fairness in the elections and voting system of Uganda. In my view, democracy and political power have almost been increasingly transformed into the exclusive property of the highest bidder in money terms and he or she who owns or controls the national purse is bound to be that highest bidder as aptly noted in the Commonwealth observers' Report *(supra).*

Jack Sabiiti, M.P for Rukiga County in Kabale District, and an FDC Parliamentary candidate, deponed that:

7. Most of the appointment letters were confiscated and as a result the petitioner did not have agents at most of the polling stations in time.

9. That on the eve of polling day there was widespread bribery of voters by the 2nd Respondent's agents who were escorted and protected by the police throughout Rwamucucu and Bukinda in Rukiga.

14. That at polling stations in Kamwezi and Bukinda sub-county, Kabale District, Charles Mayombo and Julius Ndihohabwe, agents of the 2nd Respondent openly distributed sugar and salt to voters while telling them to vote for the 2nd Respondent.

30. That the Chairman of LC3 Butanda Sub-county together with the GISO, Matiya, beat up FDC polling agents who ran away from the polling stations.

Hon. Sabiiti lists more than 20 other malpractices and illegalities allegedly committed by agents of the 2nd Respondent. In his supplementary affidavit, General MuntuMugisha of the FDC, lists a number of irregularities in the tally sheets and methods of verifying the results nationwide and called for a recount of all votes.

Mr. James Birungi of Kibaale County, Kamwenge District deponed that on the polling day, he was monitoring the voting process on behalf of the FDC when he met a pick-up carrying 15 LDUs/SPCs and moving in the area. The LDUs and SPCs would disembark from the pick-up from place to place and intimidate people shouting to people that if there were any supporters of the FDC amongst them, such people would be identified and punished and that he found FDC voters to be indeed very scared. He claimed that there were other malpractices such as allowing people to vote without verification, returning officers folding multiple voting cards and giving them to people to cast for the 2nd Respondent. He cites cases of serious vote buying and attempts by the agents of the 2nd Respondents in buying the agents of the petitioner and possible voters with sums of money ranging from Shs. 500,000 to 20,000. He cited the case of one Mr. Musise Rogers who operated a bodaboda between Kamwenge and Kabarole who was rejoicing that he had just received about Shs. 15,000 in bribery and he had then decided to vote for President Museveni because FDC had no money to offer.

Patrick Kitimbodeponed on events that occurred in Iganga District which he monitored for the FDC on the polling day. He stated that the 2nd Respondents' agents and supporters wearing yellow NRM T-shirts and holding guns, beat FDC supporters and blocked many of them from voting or moving anywhere near polling stations, that FDC agents were kidnapped and detained by the 2nd Respondents' agents who are also local council officials. He further deponed that the FDC agents were prevented from the voting table and were therefore unable to see what the presiding officers were doing. Hon. Augustine Ruzindana, M.P deponed on events in Ntungamo District on election day. He stated, *inter alia*, that soldiers and intelligence operatives were involved in effecting arrests and harassment of the Petitioner's supporters and agents. He further stated that there was widespread distribution of money and commodities such as blankets, *bitambi*, iron sheets, sugar and salt as inducements to voters to vote for the 2nd Respondent.

Abdu Katuntu who was Chairman for FDC in Bugwericounty also made a report on the 2006 Presidential elections. He deponed that, amongst other occurrences, a group of armed men wearing NRM party colours camped at Busese Mixed Primary School and traversed Bugweri County campaigning for the 2nd Respondent and Mr. KirundaKivejinja, who was the NRM Parliamentary candidate. The said group was led by one Lt. Mulindwa also known as Surambaya, that these men moved from village to village threatening and intimidating people who did not support the 2nd Respondent and Mr. Kivejinja. He further stated that these armed men assaulted a number of FDC supporters and several cases were reported to Idudi Police post vide the following references

SD/17/22/01/06, SD/18/22/01, SD/19/22/01/06, SD/31/01/06, SD/13/19/08, etc, that on 21st January, 2006, the same men attacked Idudi trading centre and shot in the air and thereafter occupied the town for 2 hours, shooting with Ak47 assault rifles, pistols and using sticks while some of them were defacing the election posters of the petitioner and those of the deponent.

The deponent claims that he reported these incidents to the Minister of Internal Affairs, Dr. RuhakanaRugunda and pointed out the terror that was being perpetuated by this group. Apparently, the Minister promised to have these men disarmed and forced to leave Bugweri County. This was temporarily done. However, they returned to the District and on the eve of the election, they arrested two of the FDC campaign managers from Bukoteka village and detained them at their camp at Busese Mixed Primary School. The deponent also alleges that these same group of men invaded Busembatya Town Council on the eve of the elections and arrested a number of FDC supporters whom they tortured and maimed. The deponent attaches two photographs showing men in yellow shirts, some of whom are carrying guns and sticks. These events were not denied or fully explained to the court by the Respondents or their counsel beyond the general denials that any of these irregularities, malpractices or illegalities took place. The denials are supported by the Respondents' own affidavits and those of many officials of the 1sr Respondent, army and police officers and supporters of the 2nd Respondent. For nearly every petition alleging these offences against them, the Respondents filed a counterpart or more deponed to confirm the denials. Typical of these affidavits are the following;

"That I was the Ag. Sub-County Chief of Rukoni sub-county and my role was to receive results after polling: That the allegations contained in the said affidavit are false, malicious and unfounded. That during the entire campaign and election period, I did not witness any extraordinary presence of the Presidential Protection Unit in Rukoni Sub-county apart from an occasional presence of a small contingent of escorts that were protecting the Parliamentary candidate for Ruhama County, Mrs. Janet Museveni"

Paul BakoleBwire from Busia District deponed that in the recently concluded Presidential, Parliamentary and Local Council elections, he was part of the NRM District team charged with the responsibility of overseeing and monitoring the conduct of the electoral process. He states that on the 22nd and 23rd February, 2006, he moved to various areas of the District to monitor the situation and to pay out to the NRM officials' money meant for polling agents for their transport and facilitation of the NRM and its candidates. There were 8 agents at each polling station and each agent was entitled to Ug. Shs. 5000 (Five thousand only) for the day's work. He further stated that later he, together with others in his group, were met by the police who arrested them (for bribery

related offences). They were detained but later released on police bond. On search, the police found on his person a sum of Shs. 260,000 which was taken by the police as exhibit. This is one of the rare occasions deponed on when security forces acted properly upon allegations that supporters of the 2nd Respondent were breaking the law.

Mr. MasikoJoramdeponed on events which Hon. Jack Sabiiti had claimed occurred at Bubaare sub-county, Kabale District, and said that the contents of paragraph 7 of Sabiitis' affidavit were untrue and that the elections were conducted in a peaceful atmosphere and he did not receive any complaints of any malpractice. Mr. Obong Geoffrey of Mbarara Police Station deponed that he and a colleague by the name of Rwigyema, a Prison Warder No. 8741 were deployed at Kamukuzi M-Z polling station and polling commenced at 8:00 a.m in the morning and was closed at 5:00 p.m in the presence of all but one agent (UPC agent) and observers, and that he did not witness any form of chasing away of agents nor the distribution of pre-ticked ballot papers in favour of any candidate.

Kakaire Ahmed who was Chairman of the Idudi Parish tribunal, in Iganga, deponed that the allegations made by one KaboodeAbudu and Nafula Christine in their respective affidavits in favour of the petitioner are false. MasodoB.Abbey of Bulungule Parish, Buyanga sub-county, Iganga District was the presiding officer at Nakawala N-Z polling station during the Presidential elections, 2006, and he deponed that, contrary to the contents of the affidavits deponed by one MuwazaSulaimani whom he knows personally and that of Nabaja Sarah, the complaints they contain are not true. Robert Mugabi was the presiding officer at Kirungu outside Quarter Guard, M-Z polling station – Code 41 and having read the affidavit of Ssebowa Ibrahim, he himself deponed that there was no such polling station as "Omumahe Polling Station", and that it is not true as alleged that the FDC agents were chased away from the polling station over which he presided near the barracks in Kichwamba sub-county in Kabarole District.

A Mr. Fox Odoi, a Legal Assistant in the office of the President deponed that on election day of 23rd February, he went to Tororo Central Police Station to report alleged acts of bribery of voters by the FDC members in Tororo and that at no time whatsoever did he intimidate, torture or assault any supporters of the Petition or any other person at all. Mr. Francis Museveni of Kibale Village, Bufundi sub-county, Kabale District deponed that the allegations contained in the affidavits of TwinomukagoVanice and of Hon. Jack Sabiiti in support of the petition are false and malicious and that no NRM government officials and or LCs forced any voter to vote from the table as alleged and there was no intimidation, bribery, alcohol and open/forced voting as alleged at all. Mr. Onen David Michael deponed as Assistant District Registrar of Nebbi District with responsibility of

updating and maintaining the District voter's Register. In his affidavit, he maintained that the allegations made by Samuel and RoselineAngom that they were prevented from voting are untrue. Many other deponents in support of the Respondents' denials swore that the election was free and fair and was not characterized by acts of bribery, disfranchisement, intimidation, harassment or violence as claimed by the petitioner and in the affidavits supporting him.

There is also evidence that acts of intimidation, bribery and breaches of the law were committed by agents or persons working for the election of the Petitioner. I am not persuaded by the arguments of one of the Petitioner's Counsel, Mr. Matovu, that a Petitioner is entitled to break the laws and violate the Constitution of Uganda provided that if at the end of the day, he or she is the loser, they cannot be affected by the provisions of the Constitution and laws of this country. In my opinion, this is a very cynical and unacceptable view of what true democracy and constitutionalism is all about. This kind of argument ignores the fact that one of the orders this court is empowered to give is that a petitioner may be declared as having won the election in which event he or she is expected to assume office as new President. If Mr. Matovu's ingenuous argument were to be accepted, the country would end up with a President who is equally or more tainted with illegalities which in my opinion would be a manifest absurdity. In consequence, Mr. Matovu's contention must be rejected as void of merit.

In my view however, it is not so much that any party or all of them who stood in the Presidential elections of 23rd February were guilty or innocent of the offences complained of as much as the fact that this court found them to be generally proved. What tainted this election is not the guilt of the parties but of the offences that were committed before and during its conduct. The violation of the Constitution and the laws of Uganda committed by diverse persons throughout the country is what is of crucial importance. For instance, section 23 of the Presidential Elections Act (Act 16 of 2005) provides that:

(1) During the campaign period, every public authority and public institution shall give equal treatment to all candidates and their agents."

Section 24(1) of the same Act obliges State owned media to give equal treatment to candidates to present their programmes to the people.

It is clear that these provisions were blatantly violated, with the 2nd Respondent getting the lion's share of both the public authorities support including that of the 1st Respondent and of the State media.

The report of the Independent Democracy Section of the Commonwealth Secretariat whose representatives monitored the Presidential election noted that:

"The NRM-O, taking maximum advantage of the existing and operational Movement structures, used government resources, vehicles and personnel and received overwhelming coverage on state television and radio. It was noted that the NRM-O and the Movement with its organs, share many of their senior personnel. This office-sharing arrangement has been note in Bundibugyo, Kamwenge and Kabarole in the Western Region."

Incidentally, the Commonwealth observer team appears to have been misinformed about the NRM-O. There was no such political party called the NRM-O participating in the 2006 elections. Following the NRM "conversion" to multipartism, its leaders decided that they too would participate in the forthcoming elections as a party called the National Resistance Movement Organisation (NRM-O). However, when it came to registration, the leaders of the party registered the National Resistance Movement (NRM) as the party participating in the 2006 elections. They also registered the NRM symbol of a bus and its colour of yellow as those of the same NRM party to participate in the 2006 elections. It is this party which participated in the 2006 elections. It is at this stage that other prospective participating political parties and others should have challenged this apparent deception. They did not, and have only themselves to blame.

Be that as it may, the Commonwealth observers Report states that:

"Notwithstanding those provisions of the Presidential and Parliamentary Elections Act that restrict the use of state resources for election campaigns, it was not uncommon to find that the NRM-O Presidential candidate and many NRM Parliamentary candidates availed themselves liberally of the facilities and resources which only government could provide."

On bribery and other inducements, the Commonwealth observers' report continues:

"During the campaigns, government pronouncements were routinely made at NRM-O platforms and in manifestos with government affairs in a way that was indistinguishable from bribery. Bribery is incompatible with free and fair elections. Our team in Mbale specifically observed the distribution of cash to voters on the eve of polling day. The NRM-O Presidential candidate spoke out against the practice of inducing voters with gifts of soap, sugar and salt. This practice was not restricted to anyone political party, although the most resourced party, was the most frequent offender."

DEMGROUP noted that cases of bribery were 'rampant' during the campaign and on polling day, although many cases were not reported to the police. On polling day, the incumbent MP in Arua district was arrested on allegations of vote buying as was the incumbent woman MP for Yumbe District.

The Commonwealth observer team report on violence, intimidation and harassment is equally

damning. With all these grave reports, it would surely have been a little short of a miracle for anyone to expect the 2006 Presidential elections to be free and fair. In my view, had the Presidential elections of 2006 been organized and conducted in accordance with the Constitution and laws of Uganda, the 2nd Respondent would have obtained less votes and the petitioner would have got more than they received. There is no formula by which anyone can tell how much the difference would have been. The only sure way is to have a fresh election which complies with the Constitution and laws of the country. Only in that way, can Ugandans be certain about the results as to who won fairly and lost equally.

In my view, the illegalities, malpractices and irregularities reported and proved to the unanimous satisfaction of this court dug too deep in the foundations and legitimacy of the Presidential elections of 2006 and leave no shadow of doubt that that election was fatally flawed and a fresh one ought to be ordered and held. For these reasons my response to issue No.3 can only be in the affirmative. I find that the Presidential election results of 2006 were affected in a substantial manner.

I now turn to framed issue No.4. This issue concerns illegal practices and electoral offences allegedly committed by the 2nd Respondent personally or by his agents with his knowledge and consent or approval. The petitioner lists these malpractices and offences in paragraphs 11 and 12 of his affidavit as follows:

11. Your petitioner avers that the 2nd Respondent personally committed the following illegal practices and or offences, while campaigning.

(a) Used words or made statements that were malicious, contrary to S.24 of the Presidential Elections Act.

(b) ade statements containing sectarian words or innuendos against your petitioner and or his party and other candidates, contrary to S.24(5)(c) of the Presidential Elections Act.

(c) Made abusive insulting and or derogatory statements against the petitioner, F.D.C and other candidates, contrary to S.24(5)(c) of the Presidential Elections Act.

(d) Made exaggerations of the Petitioner's period of service in government and the reason why he moved from the several portfolios your Petitioner held in government and he also variously ridiculed the petitioner, contrary to S.24(5)(e) of the Presidential Elections Act.

(e) Used derisive or mudslinging words against the petitioner.

(f) Used defamatory and or insulting words contrary to S.23(3)(b) of the Presidential Elections Act.

(g) The 2nd Respondent made statements which were false either knowingly or recklessly at a rally namely,

(i) That the FDC frustrated the efforts to build another dam.

(ii) That I was working in alliance with Kony PRA and other Terrorists.

(iii) That I was an opportunist and a deserter.

12. The petitioner further contends that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval.

(a) Bribery of voters just before and during the elections, contrary to S.64 of the Presidential Election Act.

(b) Attempting and interfering with the free exercise of the franchise of voters contrary to S.26 (c) of the Presidential Elections Act.

(c) By agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar and other beverages and making promises of giving such beverages.

The 2nd Respondent denies each and every one of the above allegations. He deponed a lengthy affidavit containing many excerpts of what he said he stated on diverse places and times and giving explanations and reasons for his assertions. These detailed statements are contained in the affidavit of YoweriKagutaMusevenideponed at Kisozi on the 12.03.2006. He categorically denied a number of the allegations made in paragraphs 11 and 12 of the petition. On offences allegedly committed by persons who could be regarded as his agents, he deponed as follows:

27. That in reply to paragraph 21 of the Petitioner's affidavit, I did not authorize any interference with the free exercise of voters' franchise nor was what is alleged to have been done, done with my knowledge, consent or approval.

28. That the conduct of the person referred to in paragraph 22 of the Petitioners' affidavit in connection with the killing at Bulange was not with my knowledge and consent or approval. I am aware that the person has been charged before a court of law and due process of the law is taking its course.

29. That the alleged conduct by Fox Odoi in paragraph 23 of the Petitioner's affidavit was not authorized by me and was done without my knowledge and consent or approval and it is the subject of police investigations. Fox Odoi was not my agent and I was very displeased when I was informed about the incident.

In my view, SS.23 and 24 of the Presidential Elections Act which deal with the rights of a candidate and the possible offences he or she may commit during election campaigns are contradictory and therefore unhelpful to this court because the two sections first mix up a number of issues and then proceed to contradict each other.

Section 23(1) provides that;

"During the campaign period, every public officer, public authority and public institution shall, give equal treatment to all candidates and their agents."

Section 23(2) provides that;

"Subject to the Constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act."

The next set of rights and freedoms of candidates are to be found in Section 24 which provides that:

(1) All Presidential candidates shall be given equal treatment on the state media to present their programmes to the people.

(2) Subject to any other law, during the campaign period, any candidate may, either alone or in common with others, publish campaign materials in the form of books, booklets, pamphlets, leaflets, magazines, newspapers or posters intended to solicit votes from voters but shall, in such publication, specify particulars to identify the candidate or candidates concerned.

Subsequently, the two sections provide what may be described as clawback provisions. Section 23(3) provides that a person shall not, while campaigning use any language-

which constitutes incitement to public disorder, insurrection or violence or which threatens war, or which is defamatory or insulting or which constitutes incitement to hatred.

Thus, sub-section 3(b) annihilates the unhindered rights and freedoms the Act appears to create for candidates in its other provisions. Similarly, section 24(5) derogates from the freedoms and rights already given by creating the seven so-called offences in the campaigns which it enumerates in its paragraphs (a) to (g).

It appears to me that the draftsmen of this Act failed to appreciate the serious nature of the contradictions they allowed to slip into the statute. Be that as it may, a court faced with these contradictions must utilise other sources of law including its own concept of what is fair and just in the particular case to resolve disputes.

In law, the allegations made by the Petitioner as having been committed by the 2nd Respondent have to be proved strictly as any other criminal charges under the Uganda Criminal Code and criminal proceedings. The reason for this high standard of proof is that a candidate found guilty of them may face serious consequences including criminal charges under section 59(9) of the Presidential Elections Act, 16 of 2005. Counsel for the Petitioner contended that with regard to the offences he enumerated and described as having been committed by the 2nd Respondent would, if proved, make the 2nd Respondent personally and strictly liable. If that be the case, in my opinion

therefore, it is imperative then for the petitioner to prove those allegations beyond reasonable doubt. The burden on the petitioner becomes greater than the preponderance of proof on a balance of probabilities.

The authors of "The Election Laws of India" published by the Law Publishers (India) PVT.Ltd, 1998, observe that:

"The Supreme Court (of India) has indicated a note of caution that in election speeches, appeals are made by candidates of opposing political parties often in an atmosphere surcharged with partisan feelings and emotions. Use of hyperboles or exaggerated language or adoption of metaphors and extravagance of expression in attacking one party or a candidate are very common and court should consider the real thrust of the speech without labouring to dissect one or two sentences of the speech, to decide whether the speech was really intended to generate in proper passions on the score of religion, caste, community, etc. In deciding whether a party or his collaborators had indulged in corrupt practices regard must be had to the substance of the matter rather than mere form or phraseology.

I am persuaded that the above passage represents the proper balance when considering the effect of the wrongs complained of in this petition. In order to constitute an election crime or corrupt offence, the facts and circumstances of it must be such as are tainted with malice sufficient to constitute *mensrea* of the crime. The particular candidate who is accused of the offence and the person against whom it was committed must be so closely identifiable that a direct *nexus* is proved beyond reasonable doubt between the maker and the alleged victim or victims. A number of the allegations in this petition have been freely admitted by the Respondent who at the same time has given reasons and explanations in his defence which in my opinion are feasible and acceptable. Yet, these accusations have to be proved beyond reasonable doubt.

The statements complained of in this petition are nothing more than boasts, exaggerations and vulgarities typical of political insults intended to enhance the speaker's chances of success in an election and dampen those of his or her opponents in turn. For a political rival to call another a failure or an opportunist or a weakling does not, in my opinion amount to anything capable of being interpreted as an offence against the law, sections 23 and 24 of the Presidential Elections Act, notwithstanding. In consequence, my answer to issue No.4 would definitely be in the negative. I would absolve the 2nd Respondent of the charges and allegations made against him personally.

Finally, I come to issue No.5. In my opinion, the Constitution strictly prohibits any violation of any of its provisions or those of any legitimate law of Uganda. In my view, it is the solemn and bounden duty of Uganda courts to ensure that the sanctity and sovereignty of the Uganda Constitution and the legitimacy of its laws are respected and complied with, unconditionally. Once the Constitution is violated and Uganda laws flouted, there can be no other law or cause for which

the appropriate remedy may be denied a party. That remedy must be granted. None of the candidates in the 2006 Presidential election has convinced me that they did not break the constitution and electoral laws of Uganda and therefore none deserves to be declared the winner of that election. I would therefore allow this petition.

It was because of the reasons I have given while discussing the framed issues that I agreed that a fresh election be held in accordance with the provisions of the Constitution. I would make no order as to the costs of this petition. I would annul the Presidential election held on 23rd February, 2006 and order that a fresh election be held in accordance with the constitution.

Before concluding these reasons however, I am constrained to observe that the non-compliance with and violations of the principles of the Constitution, the Presidential Elections Act and the Electoral Commission Act, which this court has unanimously found to have occurred, were caused principally by the continued existence and sustenance of electoral structures created and personnel appointed originally to serve one political organization, being called upon and entrusted with, in 2006, to organize and conduct elections in which more than one political party including that one organization, were seriously and acrimoniously competing for power.

The partisan nature and behaviour of the national electoral agents, the security forces including the police, the UPDF and the government Press and other media to the extent of showing bias and, in some instances, open animosity while actively working for and favouring one set of candidates as was clearly shown in many affidavits, annextures and observers' reports during the hearing of this petition, can only be of the greatest national concern.

There can be no justification for the view that the irregularities, malpractices and illegal acts were few and far in between. Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda. In my view, to prove that the results of a Presidential election were affected in a substantial manner, all that a petitioner needs to show is that both the Constitution and the laws of the land were substantially violated. It is also my view that thereafter the court must come out bravely and vigorously protect the Constitution and legitimate laws of Uganda.

Failure to protect and defend the Constitution and Laws of the Country would tantamount to the abdication of the judicial function just as to travel outside them in search of an answer to a petition would be embarking on a voyage of discovery beyond the realm of constitutional and legal boundaries.

Dated at Mengo this 31st day of January 2007.

Dr. G.W. Kanyeihamba

JUSTICE OF THE SUPREME COURT

EXEGESIS OF THE GOSPEL ACCORDING TO JUSTICE PROF. DR. KANYEIHAMBA, J.S.C

INTRODUCTION

Elections and the adjudication of disputes arising therefrom are embedded in constitutionalism and the rule of law. Constitutionalism in this sense speaks to the adherence of both the letter and spirit of a constitution; that is, the core values upon which a constitution is based (such as a democratic governance system, human rights, independence of the judiciary and the rule of law). Given the direct link between elections and the governance structures within a constitution, elections and the resolution of disputes emanating therefrom are of great importance since it is through elections that government is constituted and power distributed. Thus, the conduct of free and fair elections in an environment where political leaders are committed to constitutionalism contributes to quality governance. In the same vein, the independence of national institutions responsible for the elections (such as the electoral commissions) and adjudication of disputes that may arise thereafter (such as the judiciary) ought to be guided by similar ideals. It is these ideals of establishing a new dispensation of democratic governance in which the management of elections was undertaken in line with constitutionalism that formed the heart of the Constitution of Uganda, 1995.

JUSTICE KANYEIHAMBA

In a dissenting opinion, Justice Kanyeihamba, (2006, paras 1-24) found that there was sufficient evidence presented for the Court to decide as follows: that the presidential election was so badly conducted, and fatally affected by irregularities, malpractices and illegalities, as to affect the final results in a substantive manner; therefore, the result of the election ought not to have been upheld. He decried the fact that 'the Court, having unanimously found that the alleged contraventions of the electoral laws occurred, they were bound to annul the election, and to find otherwise would be based purely on the conjecture and personal inclination of the judges' (2006, para.19).

He went further, saying (2006, para. 20): Such an opinion would be grossly unfair to Ugandans because the 1st respondent refused adamantly to produce the only evidence which could have helped the petitioner, 2nd respondent, and this Court, to prove and be satisfied that the allegations that were irregularities, malpractices and illegalities were justified or unjustified.

In other words, according to Justice Kanyeihamba, where the Court found unacceptably widespread contraventions of electoral laws that affected the quality of the election, it should have annulled the election.

LEGAL PRINCIPLES FOR ANNULLING ELECTIONS

The legislative intent of s.59(6)(c) appears to be the need to prevent presidential candidates from committing electoral offences similar to those witnessed during the 1980 general elections. As discussed above, during the 1980 elections presidential candidate Milton Obote and his supporters intimidated voters and threatened their political opponents with death. This lawlessness disenfranchised the voters and also disadvantaged Obote's challengers in the elections. Despite this, Obote was declared president and his Uganda People's Congress the winner of the elections.

Under the current presidential electoral legal framework, similar acts are recognised as electoral offences and they are prohibited by the Presidential Elections Act and the Electoral Commission Act. Though the Supreme Court found violations of electoral laws it held that they were not committed by President Museveni, or with his knowledge or approval by his agent. Therefore, it could not invalidate the elections on the basis of s.59(6)(c). This suggests that the provision imposes an obligation on presidential candidates to conduct themselves in a manner that does not defeat or violate electoral laws. Sub section (c) also implies personal liability. Violations of electoral laws, even those from which a presidential candidate gains unfair electoral advantages, do not engage the candidate's liability if they are not committed by the candidate or by their agent with the candidate's knowledge or approval. Therefore, under s.59(6)(c), the Supreme Court may only invalidate elections where a presidential candidate fails to conform to standards of electoral conduct, or where the candidate's agent with the candidate's consent or approval, violates electoral laws. With regard to s.59(6)(b), this provision is designed to remedy the exclusion of persons who do not meet the constitutional criteria for the presidency. It is intended to preserve the calibre of presidential candidates from which the electorate can choose.

These legal principles are applied by the courts in the adjudication of electoral complaints in order to protect the will of the people. The danger, however, is that regardless of collusion in electoral laws and institutions in a country or jurisdiction, the legal principles for adjudicating electoral complaints assume that the outcomes of elections are pure and uncorrupted. They should only be invalidated in exceptional circumstances. In many countries electoral laws indicate that the complainant must prove that these irregularities changed the outcome of the election in a substantial manner. This is in instances where the validity of the election is challenged on the basis of irregularities. This is because elections are meant to give a voice to the will of the people and to provide governments with the authority to exercise power. Therefore, technical irregularities during elections should not affect the declared results unless they distort the will of the people by changing the election outcome. Courts in many jurisdictions have held that election outcomes should only be overturned in extraordinary circumstances, where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clear; and most importantly where such improper behaviour has distorted the will of the people.

THE SUBSTANTIALITY TEST V THE STRICT APPROACH TEST.

In deciding election petitions, two schools of legal thoughts have been adopted, One school of thought pushes for substantiality test. This was heavily supported by Justice Benjamin Odoki and Joseph Mulenga. On the other hand, the second school of thought which is the strict or qualitative approach was heavily supported Justice Professor George William Kanyeihamba and Wilson Tsekoko. The school of thought claims that noncompliance with the electoral laws automatically leads to nullification of the election. It looks at the quality of the election.

The Court has placed undue reliance on a quantitative test in interpreting the phrase 'affected the result of the election in a substantial manner', and set an extremely restrictive and nearly impossible standard for a petitioner to meet. The substantiality test states that numbers are important in assessing the effect of noncompliance with the law on the election result.

The Majority of the Court found that in applying PEA s.59(6)(a) to this matter, it was respecting the spirit of the law in the Constitution art.1(4). This deals with the sovereignty of the people and provides that 'the people shall be governed through their will and consent' (2016, para.19). It therefore opined that s.59(6)(a) enables the Court to reflect on whether the proved irregularities affected the election to the extent that the ensuing results did not reflect the choice of the majority of voters as envisaged inart.1 (4) of the Constitution, and in fact negated the voter's intent (2016, para.20).The Supreme Court have declared that although the mathematical impact of noncompliance is critical in determining whether or not to annul an election, its evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Nevertheless, the court if not satisfied that noncompliance did not affect the result of the election in any substantial manner will not annul the election.

ELECTION RESULTS: A QUESTION OF QUALITY NOT QUANTITY

The legitimacy of a democratic government is established in large measure by credible elections. Credible elections occur in an electoral environment in which the citizenry can participate without fear or obstruction; political parties, candidates, and the media can operate freely; and independent state and democratic institutions function fairly and expeditiously. Also, electoral laws must be fair, they should be adhered to, and they should be capable of translating votes into the free will of the people in order to preserve the credibility of elections. It is therefore important that the law should seek to protect all aspects of the electoral process in order to preserve the credibility or quality of elections. In some jurisdictions, electoral laws seek to achieve this aim. Examples of these include the Election Act 173 1988, s.56(a) of South Africa which allows the Electoral Commission or the

Electoral Court to declare elections invalid where a serious irregularity has occurred concerning any aspect of an election. Also the Electoral Act 2010, s.138 (b) of Nigeria provides that elections may be annulled by reason of corrupt practices or noncompliance with the provisions of the same Act.

Courts have also strived to protect the quality of elections. In the case of Valance v Rosier, the Supreme Court of Louisiana (1996, para. 32) held that:

"If the court finds that the proven frauds and irregularities were of such serious nature as to deprive the voters of the free expression of their will, or as to make it impossible to determine the outcome of the election, it will decree the nullity of the entire election even though the contestant cannot prove that he would have been elected but for such fraud or irregularities."

This case stands for the proposition that where widespread violations of electoral laws occur, they affect the quality of the elections because they distort the will of people and therefore the elections should be annulled.

Another example of where the court invalidated an election because it was conducted so badly that the credibility of the election could not be assured, is in the Hackney Case, Gill v Reed and Holms[1114]. In this case, only 2 of the 19 polling stations were closed; as a result, 5 000 voters could not vote. The court did not engage in the impossible exercise of determining which candidate would have benefited from 5 000 votes had they been cast. It annulled the election on the basis that it was badly conducted and in noncompliance with electoral laws. In this context, the term 'election result' is conceived of as a question of quality informing an election's outcome. It is seen as the entire electoral process not limited to only the votes tallied, because the outcome of the election cannot be guaranteed where the processes that deliver it are corrupted

Uganda's only post-independence attempt at conducting elections in 1980 was marred by electoral illegalities. Also, history indicates that unelected leaders have held political power at all costs. These factors, including the need to reverse the country's history of political and constitutional instability, (as expressed in the Preamble and art.1(4) of the Constitution) motivated the country's desire to hold free and fair elections in order to be ruled by consent. During the public debates on the Constitution, Ugandans demanded that 'electoral laws should be built into the new constitution in order for elections to be the mechanism for the smooth transfer of power from one administration to another'. In Presidential Election Petition No.1 2006, the Supreme Court found instances of ballot paper stuffing in at least 22 out of the 69 districts. Over 2000 ballot papers were stuffed at one polling station and more than 600 people voted at a sham polling station. It also found evidence of falsification of results by the Uganda Electoral Commission, and voter intimidation and voter

[1114][1874] 2 O M & H 77 E.L.R 263

bribes by persons associated with the president (2006, para.124). In PEP No.1 2016 the court criticised the Uganda Electoral Commission for late delivery of voting materials, which led to a substantial number of voters being unable to vote. The commission was also accused of failing to provide a credible explanation as to why the results of the election were delayed or missing in 1787 polling stations (paras. 97 and 123). It also noted that in some cases, the petitioner's agents were denied information to which they were entitled. Among other acts of electoral lawlessness, the police and other security agencies interfered with the petitioner's electioneering activities (paras 145-149).

These widespread electoral malpractices violated core constitutional values in that they undermined the principles on which the new democratic dispensation in Uganda was founded. In doing so they affected the quality of elections as envisioned by the citizenry of Uganda and as provided for in the Constitution. The conclusion was that the election was not only noncompliant with domestic electoral laws but also disregarded core constitutional values. Thus the quality and result of the election were affected in a substantial manner, in terms of s.59(6)(a). The result of the elections is interpreted to mean the number of votes cast but not the quality of the electoral process, as has been preferred by the Supreme Court, fails to protect the quality of elections. It also defeats fair political contestation and it is inadequate in protecting the will of the people.

CONCLUSION

Despite the Supreme Court's findings of widespread violations of electoral laws, it held that these violations were not personally committed by President Museveni or with his knowledge or approval by his agent. The overall effect of such electoral offences was that they distorted the will of the people. The legislative intent of s.59(6)(c) is to prevent presidential candidates from both committing electoral offences similar to those witnessed during the 1980 elections, and benefitting from them. Given the Court's findings, it is reasonable to conclude that President Museveni acquired advantages in the elections as the result of electoral offences which also disadvantaged the electorate. The law should allow for elections to be annulled in instances where a candidate gains advantages over competitors, or disadvantages the electorate as a result of widespread violations of electoral laws. This should be regardless of whether the violations were personally committed by the candidate declared as president or with their knowledge or approval by their agent. Where electoral gains are a result of offences such as intimidation or bribing voters, the will of the people is distorted and this influences the outcome of the elections. The will of the people cannot be said to be protected where there is evidence of widespread and distorting electoral violations. The fact that these irregularities are ignored is largely because the violations were not committed by the

victorious candidate, or by agents with the candidate's knowledge or approval. Perfect compliance with electoral laws in every instance is unlikely, and the Court should avoid nullifying an election for minor violations or technical requirements. However, the law should indicate whether the violated electoral laws are mandatory or directory. Mandatory provisions would include those that prohibit voter disenfranchisements, such as bribing voters and voter intimidation. Widespread violations of such provisions distort the will of the people and should form the basis of annulling an election regardless of whether or not they are committed by the victorious candidate, or by their agent with their knowledge or approval. Directory provisions would be those that require candidates to conduct themselves in a respectful manner towards each other, such as those which prohibit defamatory remarks among candidates. The Supreme Court has acknowledged the presidency's domination over all institutions of government and that President Museveni has gained an unfair advantage over his competitors through using state resources in the electoral

Adopting a qualitative approach would mean moving away from a mathematical approach to the issue to an approach which assesses, in the words of Justice George Kanyeihamba, "... the extent to which, deliberately or otherwise, the Constitution and laws of Uganda were substantially violated."

A CRITICAL ANALYSIS OF THE CONSTITUTIONAL COURT DECISION OF KENYA IN THE CONSOLIDATED PETITION NO E282 OF 2020.

Background of the petition

On 18th March, 2018, President Uhuru Kenyatta and Mr. Raila Odinga had what is now famously known as the "Handshake". The President and Mr. Raila Odinga had just come off a hard fought and intensely contested Presidential Elections in 2017 in which they were the main contenders. The first round of Presidential elections was held on 8th August, 2017 and was characterized by allegations of vote fraud leading to its overturning by the Supreme Court. The repeat elections were held on 25th October, 2017. Mr. Raila Odinga boycotted the repeat elections handing the victory to the President. These circumstances, however, hardly cooled the political climate which remained charged. It is on these grounds that the President started an initiative which he described as being "towards a united Kenya." After the famous "Handshake" with Mr. Odinga, the President appointed the Building Bridges to Unity Advisory Taskforce (hereinafter, "BBI Taskforce") comprising of 14 committee members and 2 joint secretaries through Gazette Notice No. 5154 of 24th May 2018. The key mandate of the BBI Taskforce was to come up with recommendations and proposals for building a lasting unity in the country.

The BBI Taskforce came up with an interim report in November, 2019. On 3rd January 2020, vide Gazette Notice No. 264, the President appointed the *Steering Committee on the Implementation of*

the Building Bridges to a United Kenya Taskforce Report (hereinafter, the "BBI Steering Committee") comprising of 14 members and 2 joint secretaries.

The terms of reference of the BBI Steering Committee were stated in the Gazette Notice as follows*: The Terms of Reference of the Steering Committee shall be to:*

(a) conduct validation of the Taskforce Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and

(b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report, taking into account any relevant contributions made during the validation period.

There is some controversy on how exactly the Report of the BBI Steering Committee, after it was handed over to the President, became the Constitution of Kenya Amendment Bill, 2020 (herein after, "The Constitution of Kenya Amendment Bill"). However, it is not in dispute that the BBI Secretariat then put in motion the process to collect signatures in support of the Popular Initiative associated with the Constitution of Kenya Amendment Bill. Thereafter, the BBI Secretariat submitted the signatures to the Independent Electoral and Boundaries Commission (IEBC), for verification and submittal to the County Assemblies and Parliament for approval.

There were eight petitions originating from the above facts which the court consolidated.

THE ISSUES FOR DETERMINATION

i. Is the Basic Structure Doctrine of Constitutional interpretation applicable in Kenya?

ii. If the Basic Structure Doctrine applies in Kenya what are its implications for the amendment powers in Articles 255 to 257 of the Constitution of Kenya?

iii. What is the constitutional remit of amendment of the Constitution through a Popular Initiative? This issue further twins into two sub-issues:

(a) *Who can initiate a Popular Initiative under our constitutional set up?*

(b) *Is the BBI process of initiating amendments to the Constitution in conformity with the legal and constitutional requirements?*

iv. Should the President and Public Officers who directed or authorized the use of public funds for the BBI Constitutional Amendment Process be ordered to refund the monies so used?

v. Was the President in Contravention of Article 73(1)(a) of the Constitution for claiming authority and purporting to initiate constitutional changes through the BBI Process?

vi. Is there an adequate legislative framework in place to guide constitutional amendments through Popular Initiative; and if not, is that fatal for the on-going constitutional amendment processes?

vii. Is it permissible for County Assemblies and Parliament to incorporate new content into or alter existing content in a Constitution of Kenya Amendment Bill through a Popular Initiative following Public Participation exercises?

viii. Does the Constitution envisage the possibility of a bill to amend the Constitution by Popular Initiative to be in the form of an omnibus bill or must specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions?

ix. Was it unlawful for the Promoters of Constitution of Kenya Amendment Bill to leave out the proposal for an Independent Constitutional Health Services Commission from the Constitution Amendment Bill?

x. Is it lawful for a Constitution of Kenya Amendment Bill to set a specific number of constituencies under Article 89(1) of the Constitution?

xi. Is it lawful for a Constitution of Kenya Amendment Bill to directly allocate and apportion the constituencies it creates without a delimitation exercise using the criteria and procedures as set out in Article 89 of the Constitution?

xii. Has the IEBC carried out nationwide voter registration? If not, can the Proposed Referendum be carried out before the IEBC has done so?

xiii. Is the IEBC Properly constituted to conduct the proposed referendum including verifying the minimum voter support required for the Popular Initiative and submitting the Constitution of Kenya Amendment Bill to the County Assemblies?

xiv. Is a Legal/Regulatory Framework to regulate the verification and other processes required under Article 257(4) and (5) of the Constitution? If so, does such a Legal/Regulatory Framework exist?

xv. Is it a violation of Article 43 Rights for the Promoters of the Constitution of Kenya Amendment Bill and the Respondents to be pursuing constitutional amendments in the midst of COVID-19 Pandemic?

xvi. Should an Order issue directing the President to dissolve Parliament pursuant to the Chief Justice's Advice issued pursuant to Article 261(7) of the Constitution?

xvii. What Reliefs, if any, should be granted?

ANALYSIS AND DETERMINATIONS BY THE COURT

This analysis focuses on the issues before the court that relate to the amendment of the Kenyan constitution and the power of the president in relation to the amendment of the constitution.

ISSUE 1

THE BASIC STRUCTURE DOCTRINE AND ITS APPLICATION TO KENYA

The Petitioners 'in this case argued that the Constitution of Kenya, 2010 contains essential features and fundamental characters and foundational values that enjoy transcendental existence, whose derogation is not contemplated in the Constitution by way of constitutional amendments. These, features, they argue, form the Basic Structure of the Constitution and includes the following chapters of the Constitution: Chapter One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the executive and Chapter Ten on the Judiciary.

The Petitioners further argued that while other parts of the Constitution can be subjected to improvements and modifications to meet the needs of all generations, the Basic Structure they have identified cannot be amended. The Basic Structure forms, they argue, eternity clauses or unamendable provisions of the Constitution. We can identify the Basic Structure, the Petitioners argue, by looking at the text, spirit, structure and history of the Constitution.

The Petitioners further argue that the Basic Structure can only be altered through the formation of a new Constitution by the people in the exercise of their Constituent Powers; not even a referendum subsequent to Parliamentary action can be used to change the Basic Structure of the Constitution.

The court agreed with their arguments and found that;

a) The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya.

b) As applied in Kenya, the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power.

c) The sovereignty of the People in constitution-making is exercised at three levels:

i. *The Primary Constituent Power* is the extraordinary power to form (or radically change) a Constitution; the "immediate expression of a nation and thus its representative". It is independent of any constitutional forms and restrictions and is not bound by previous constitutional rules and procedures. In Kenya, the Primary Constituent Power is exercisable in four sequential processes listed in paragraph (e) below.

ii. *The Secondary Constituent Power* is an abbreviated primordial Constituent Power exercisable by the whole polity in an abbreviated process to alter the constituting charter (Constitution) in non-fundamental ways, that is, without altering the Basic Structure. In Kenya, the Secondary

Constituent Power to amend the Constitution is exercisable through a referendum subsequent to public participation and Parliamentary process. It, also, can only be perfected by following the amending procedures in Articles 255-257 of the Constitution.

iii. *The Constituted Power* is created by the Constitution and is an ordinary, limited power; a delegated power derived from the Constitution, and hence limited by it. In Kenya, the Constituted Power is exercised by Parliament, which has limited powers to amend the Constitution by following the procedures set in Articles 255-257 of the Constitution.

d) The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Primary Constituent Power.

e) The Primary Constituent Power is only exercisable after four sequential processes have been followed:

i. *Civic education* to equip people with sufficient information to meaningfully participate in the constitution-making or constitution-altering process;

ii. *Public participation and collation of views* in which the people – after appropriate civic education – generate ideas on the type of governance charter they want and give their views about the constitutional issues;

iii. *Constituent Assembly Debate, consultations and public discourse* to channel and shape the issues through representatives elected specifically for purposes of constitution-making or constitution- alteration; and

iv. *Referendum* to endorse or ratify the Draft Constitution or Changes to the Basic Structure of the Constitution.

From a holistic reading of the Constitution, its history and the context of the making of the Constitution, the Basic Structure of the Constitution consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution. This structure outlines the system of government Kenyans chose – including the design of the Judiciary; Parliament; the Executive; the Independent Commissions and Offices; and the devolved system of government. It also includes the specific substantive areas Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including land and environment; Leadership and Integrity; Public Finance; and National Security. Read as a whole, these chapters, schedules and the Preamble form the fundamental core structure, values and principles of the Constitution. This fundamental core, thus, cannot be amended without recalling the Primary Constituent Power of the people.

IMPORTANCE OF THE DOCTRINE

The basic structure doctrine has become a more significance way beyond the view and expectation of its proponents. The idea that though parliament has wide powers to amend the constitution, its powers are unlimited and does not extend to the power to tamper or do away with clauses which are basic to the structure of the constitution has now become of more importance as a safeguard against the actions and interventions of a party that may be controlling majority in Parliament abusing its majority position to eradicate, erode and diminish the structure of the Constitution by doing away with vital provisions. This may be due to their view that such provisions are becoming a wall against their retention of power or performing their desires by introducing provisions that benefit their desires of entrenching in powers for long.

Though many of the Constitutions prescribe expressly provisions for their amendment by describing an elaborate procedure, many of these provisions are not enough to afford it protection. This can occur where the governing party or group of people or ruling party has majority of members of parliament which circumstance they can rely on to pass any amendment which circumstance they can rely on to pass any amendment. Therefore, in such a situation, the express provisions of the Constitution shall be insufficient to afford the Constitution protection. **Sikiri, CJ in Kesavananda Bharat v State of Kerala**[1115]explained the importance of the doctrine in guarding against the abuse of parliamentary majorities and warned about the likely consequences of such. He observed that;

"A political party with two thirds majority in parliament for a few years could so amend the constitution as to debar any other party from functioning, establish totalitarianism, enslave the people and after having effected these purposes make the Constitution un amendable or extremely rigid. This means that it would no doubt invite extra constitutional revolution."

Therefore, since that can be anticipated by the majority of the constitutional framers and the people, the need to protect the Constitution has driven the judiciary to apply the basic structure to protect and preserve the Constitution. In view, the basic structure is the only shield the people have through the judiciary to protect the spirit of the Constitution where it faces graduated stabbing by the majority members of the ruling party. Therefore, in circumstances where the separation of power doctrine has been violated where by the executive holds a root in the judiciary then the desires of the people to protect such entrenched provisions shall not succeed which may render the supreme law weak by losing its spirit.

Having considered that, it's the basis of the reasoning why the five justices of the Constitution

[1115] AIR 1973 SC

court and the seven supreme Court were unanimously in deciding that Article 102(b)[1116] of the Constitution is not part of the basic structure of the Constitution. In their finding, those that form the basic structure are those that are entrenched which were categorized and placed under the umbrella of Article 260.[1117]

It's on this point that I shall now deal with the limitations of the basic structure doctrine as a mechanism for clear understanding of the doctrine.

LIMITATION OF STATES OF EMERGENCY

Though the doctrine holds out to be an effective protection tool against the violation of the Constitutional spirit, it has its own limitations. Basically, these are hidden in the fact that the doctrine is not a rule of law, it is a philosophy of jurisprudence that can be adopted by the constitutional Court to determine whether the amendment goes to the root of the Constitution or not. The impact of this is that it at judge desertion to find out and determine whether it is so. Justice Mulenga as he then was stated that the "law is debatable". By this he meant that the you can rarely assert the exact legal position on any matter with the accuracy of geometry.

This explains why many of the judges of the Constitution Court failed to come to a consensus as to what provisions conform to the basic structure of the Constitution. As noted, it is because the doctrine is not a well-established principle in the jurisprudence of various countries. This largely affects and limits its application.

THE CONSTITUTIONAL REMIT OF POPULAR INITIATIVE

The constitutional court observed that; Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law making power of the governing body cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests.

Therefore, it is our finding that Popular Initiative as a means to amend the Constitution under Article 257 of the Constitution is a power reserved for *Wanjiku*. Neither the President nor any State Organ can utilize Article 257 of the Constitution to amend the Constitution.

[1116] Constitution of the Republic of Uganda, 1995 (As amended)
[1117] Constitution of the Republic of Uganda, 1995 (As amended)

LEGAL ISSUES ARISING FROM THE PRESIDENT'S INVOLVEMENT IN THE BBI PROCESS

The court on this issue observed that; While the President's efforts to unite the nation are to be lauded and, indeed it his obligation *'to promote and enhance the unity of the nation'* he cannot initiate any move, disguised as a Popular Initiative to amend the Constitution, contrary to the means prescribed by the Constitution itself for such an amendment on the pretext that he is '*promoting and enhancing the unity of the nation*.' Said differently, it is not within the President's power to initiate proposals to amend the Constitution, ostensibly as a Popular Initiative, under the pretext of promoting and enhancing the unity of the nation. The Constitution can only be amended as prescribed in Articles 255, 256 and 257 of the Constitution. It must be noted that according to Article 132(2) (a) the President is enjoined *'to respect, uphold and safeguard this Constitution'* in exercising his authority.

In taking initiatives to amend the Constitution other than through the prescribed means, the President has, without doubt, failed to respect, uphold and safeguard the Constitution and, to that extent, he has fallen short of the leadership and integrity threshold set in Article 73 of the Constitution and, in particular, Article 73(1)(a) thereof. We so find.

It goes without saying that considering the illegitimate purpose for which the BBI Steering Committee was conceived, nothing legitimate can come out of that outfit. It is void *ab initio* and whatever it may want to consider as its achievements including the Constitution Amendment Bill are of no legal consequence.

This decision has a lot of significance and several lessons can be drawn from it in relation to Uganda's executive context.

Chapter seven of the constitution of the Republic of Uganda provides for the executive arm of government. And Article 98 states that 'There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.'

Pursuant to Article 98 (5) the president of Uganda enjoys liability from court processes in his capacity as president however one lesson we can draw from the constitutional court decision of Kenya in the consolidated petition no e282 of 2020 is that;this blanket immunity should be limited so that, civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.

Secondly, as observed in the constitutional court's ruling, Kenya has the **POPULAR INITIATIVE**

as a mode of amending its constitution. This mode is intended to allow the common man to take part in amending a constitution they feel is no longer fitting their aspirations and from this decision it's clear that the president and any other government organs cannot imitate constitutional amendments under this mode. This is yet another lesson we pick from this decision

DEMYSTFYING THE DE MINIMIS NON CURAT LEX DOCTRINE (EMPHASIS ADDED)

DEMINIS NON CURAT LEX

While maxims play an important part in the development and growth pf the law, legists differ as to their merit. Some, in the past, have regarded them as being of the same force and effect as statutes, more critical writers consider them misleading, on the ground that they are not worth their face value, others take a middle ground, treating maxims as useful servants but dangerous masters.

Courts of law exist to enforce rights and redress wrongs, not to encourage litigation, hence they will not take jurisdiction of moot cases, nor take cognizance of vexatious suits. In general, it would be unnecessarily irksome and tedious, and beget a marked tendency to delay justice, if courts were to require the mathematical precision of a micrometer. Therefore, it is necessary and expedient that the law should not be concerned with trivial.

MAXIM, ITS ORIGIN AND FUNCTION

The maxim is variously stated and variously translated in treatises and reports. One of the earliest English collections of maxims. The maxim *de minimis non curat lex* translates to "The law doth not regard trifles." Later translations frequently use the verb "concern" instead of "regard." Although it may appear to be an unimportant distinction, it is believed that the subsequent discussion will show that the translation using the verb "regard" more truly expresses the real purpose and use of the maxim. The translation of the maxim using "concern" was a source of much humor to a writer in the Albany Law Journal' in I880 who discusses many cases in which the law obviously did very much concern itself with trifles, generally not mentioning the maxim. Cases are cited, for instance, where the issue hinged on the meaning of one word or upon the presence or absence of a punctuation mark, or, as he laughingly points out, "a hair from the head of the prophet Mohammed." Actually, in every case in which the de minimis maxim is cited or applied, the law is concerning itself with what is found to be or alleged to be a trifle. These trifles, however, are not regarded as being a worthy basis for a decision or other action by the court.

The maxim was not known as a maxim in the Civil Law until about the Fifteenth Century. Instances in which its principle has been applied to particular problems can be found as far back as

Callistratus, and Ulpianus and Paulus, in writings compiled in Justinian's Digest; but in the list of rules in condensed form contained in the Digest neither de minimis nor a variation of it was included. One of its earliest appearances as a maxim was in I644 in Augustini Barbosa book of maxims, TractatusVarii, where it was stated as de minimis non curat Praetor and quod Praetor non curat de minimis. From these beginnings modern writers in Civil Law now state the maxim as we know it.'

The development of de minimis in the Common Law followed a similar pattern. Bracton, writing in the Thirteenth Century, discussed situations in which the principle of the maxim was applied, but the maxim was not stated as such.' Coke, writing in the Sixteenth and Seventeenth Centuries, stated the principle in its present day form,' but he apparently did not yet regard it as a maxim.'5 In the Eighteenth Century Blackstone used the maxim as an independent principle of law, as it is now used.' The earliest collection found in which the maxim is included is by Thomas Branch, and was published in the United States in 1824. Since that time the use of the maxim has increased steadily in all courts and the field of its application has steadily broadened.

One of the earliest reported English cases in which the maxim was stated and applied is its present form is that of York v. York, digested in Viner's Abridgement as holding: "No action lies of a waste but to the value of a penny; for de minimis non curat lex."

FACTORS CONSIDERED IN APPLYING MAXIM

It is readily apparent that a principle which has reasonableness as its ultimate end cannot be easily defined. It cannot be said that six dollars, six inches or six minutes is de minimis, apart from a specific fact situation. The tolerances allowed in constructing a hand pump of the type often seen in farm yards cannot be used in making a syringe for use by a physician. As one author has said, "No precise criterion exists to determine what is the minimum the law will notice. The cases in which de minimis is used cannot, therefore, be readily reconciled, and, since identical fact situations rarely occur, there is seldom direct precedent to be applied in a new case."

It is for this reason that the historical origin and development of the maxim is important. In the absence of a controlling authority arising out of a similar fact situation, the only help that can be gotten from the many cases in which de minimis has been used is an indication of certain factors which have been considered by the courts in applying or refusing to apply de minimis.

THE DOCTRINE OF DEMINIS NON CURAT LEX IN KENYA

The doctrine of *deminis non curat lex* was discussed by Prof. PLO Lumumba during the **Raila Amolo Odinga& another v Independent Electoral and Boundaries Commission & 2**

others[1118]while discussing the impact of the irregularities on the integrity of the election. Prof. Lumumba submitted that elections are about numbers and that they are about who gets the largest number of votes. Such irregularities as complained of by the petitioners could not in themselves overturn the sovereign will of the people. Further, if the quantitative discrepancies are so negligible (in this case, allegedly slightly over 20,000 votes), they should not affect the election. Prof. Lumumba submitted that

"What you have before you is a petition replete with allegations, a petition that is dead on arrival…there is no case that has been proven. *De minimis non curat lex* (Of small things, the law knows no cure)," said Lumumba."

The Court however declined to consider only the numbers but rather chose look at the elections as a whole, as a process rather than an event. To look at, not just the numbers, but the entire conduct of the election. An election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

The Supreme Court of Kenya asked the following questions; Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables?

Not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

Courts have to strived to protect the quality of elections. If the court finds that the proven frauds and irregularities were of such serious nature as to deprive the voters of the free expression of their

[1118][2017] eKLR.

will, or as to make it impossible to determine the outcome of the election, it will decree the nullity of the entire election even though the contestant cannot prove that he would have been elected but for such fraud or irregularities. This case stands for the proposition that where widespread violations of electoral laws occur, they affect the quality of the elections because they distort the will of people and therefore the elections should be annulled.

The doctrine of *deminis non curatlex* should not be used as a leeway for electoral candidates to commit electoral offences but rather to ensure there are no trivial cases brought to Court for annulment of an entire election for trivial irregularities. The determination of what is trivial is always a case for court to determine on a case to case basis. While applying this doctrine to dismiss vexatious suits, Court should ensure its not used as an excuse to undermine quality of elections, it therefore appears the substantiality test would be the litmus test.

AMICUS CURIAE (A FRIEND NOT BEYOND)

Amicus curiae are a Latin word that means **friend of court**. However, its transition as a friend of court has caused confusion as to its present nature and scope and its true origins. Part of the uncertainty over the meaning of this term is the result of many different definitions of the ancient institution in various legal dictionaries and judicial pronouncements. Though a reference to a dictionary definition for the understanding of the meaning of the word amicus curiae beyond its literal English translation as a friend of court, may not be entirely helpful, it is important in apprehending the nature of the institution.

According to the modern law Lexicon that is inspired by old English Legal Commentaries, an amicus curiae is one who volunteers or on invitation of the court, instructs the court on a matter of law concerning which the latter is doubtful or mistaken or informs him on facts, a knowledge of which is necessary to a proper disposition of the case[1119].

The corpus Juris Secundum defined an amicus curiae as a friend of the court as one who, not a party, but, just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.[1120]

The Mellinkoffs Dictionary of American Legal Usage, on the other hand, states that this friend of the court is someone not a party to the litigation but usually favoring one of the parties, and

[1119] P. RamanathaAiyar, The Law Lexicon, 2nd ed. See also Wadhwa and Co. Naypur, 1997 at 102, with reference to 2 Co .Litt.178, considered by the Malaysian High Court in Tai Choi Yu v Ian Chin Hon Chong[2002] 5M.L.J.581(H.C) In Austria, according to the Macquarie Dictionary, an amicus curiae is a person not a party to the litigation who volunteers or is invited by the court to give advice to the court upon some matter pending before it David Hay, Words and Phrases Legally Defined.

[1120]ThompsonWest, 2003 vol.3B at 170.

permitted to make an argument to the court.[1121]

The definitions stated above tend to rise more questions us to who a friend of court is? Is he a friend to court or a friend of court? Is he a respected invitee, a mere volunteer or a stranger to court?

The Black's Law Dictionary tend to give a more seemingly clear definition as to who an amicus curia is though to my understanding, the institution may defer basing on the jurisdiction. It defines amicus curiae as a person who is not a party to a law suit but who petitions the court or is required by the court to file a brief in the action because that person has a strong interest in the subject matter.[1122]

From the above definition, it seems clear that amicus curiae can be a person who applies to court to be part of the suit or it can be a person required by court to apply to be part of the case simply because the court needs some expertise which is in possession of such a person. Many scholars have undermined the institution due to its limited relevancy in the modern situation and the lots of ambiguities rotating around it. Bell house and Lavers observed that there are few legal terms as unhelpful and as imprecise as the amicus curiae[1123]**.** To them the ambiguity of the concept coupled with the absence of rules governing the appointment, appearance and purpose of the institution in many jurisdictions although aiding its flexibility and development has nevertheless occasionally produced some strange results.[1124]For example in Exparte Lloyd, a lawyer who had accepted retainers from both parties found himself in a predicament. The Lord Chancellor hearing the case felt he had no authority to advise the lawyer as to which party he ought to represent. However by appointing himself as amicus curiae and then advising the lawyer on the matter, the court thus became its own friend.[1125] Important to note is that before appreciating its application in Uganda's jurisprudence, attention should be drawn to its origin.

ORIGIN OF THE INSTITUTION (AMICUS CURIAE)

Many scholars still hold debates in their hearts as to the origin of this institution. For years, the origin of amicus curiae has remained unclear and controversial. Though most of them present a view that the institution holds its origin from Common law despite its presence in civil law juridictions.[1126]Other scholars attribute it to a Roman law basing on their understanding and

[1121] David Mellinkott, Dictionary of American Legal Usage St Paul, Minn: West Publishing Co. 1992 at 27
[1122]Blacks L aw dictionary 9th Edition at page 98.
[1123]A Role in Arbitration; (2004) 23 C.J.Q.187.
[1124] MOHAN, S. Chandra. The Amicus Curiae: Friends No More? (2010).Singapore Journal of Legal studies, 2010;(2), 352-374, Research collectiom School of Law.
[1125] A 19th Century case reported in Exparte Brockman 1345. W 977, 233 Missouri. Reports 135 and referred by Samuel Krishou "The Amicus Curiae Brief :From Friendship to Advocacy (1963) 72 Yale LJ. 694 and 695.
[1126] Frank M. Covey .Jr "Amicus Curiae:Friend of Court"(1959-1960) a Defaul L. Rev. 30 at 34-35.

researched filled in their writings.[1127] But that said, Amicus Curiae is greatly an institution of common law. This can be traced from the old definitions, descriptions and the early cases recorded in the Year Books. In the Canadian case of Grice, Ferguson J observed that amicus curiae is one who was a bystander, where a judge is doubtful or mistaken in a matter of law may inform the court in its ordinary use the term. The term implies the friendly intervention of counsel to remind the court of some matters of law which has escaped its notice and in regard of which it is in danger of going wrong.

At common law, any person could appear before court as an amicus curiae to advise court. According to the Year Book cases from 1353, this was an accepted practice. [1128]This can be traced from the abridgement (1573), which had three known references to the amicus practices. There was a statement that in an improper indictment, any man as amicus curiae can inform court of error in order to prevent the court from suffering.[1129] Further in 1686 case of Horton and Ruesby, Sir George Treby informed the court that as a Member of Parliament he had been present in Parliament when it passed the statute of frauds and Perjuries and appears to have been allowed to enlighten the court on what he perceived to be the true intention of Parliament in enacting the Act.[1130]

It is worthwhile to note that such interactions of third parties could only be possible by amici who bystanders, although according to the statute of Hon. IV (1403), any stranger could move court as amicus curiae. This tradition included instructing, warning, informing and moving the court.[1131]This institution continued up to date "the honor of court" to deliver proper judgment in individual cases but also in the public interest to continue the rational development of the law. This was as a safeguard against judicial arbitrariness and for the preservation of free government.[1132]

REASONS FOR THE COMMON LAW ORIGIN OF AMICUS CURIAE

The long standing argument as to the origin of amicus curiae has led to a number of reasons posed by those from the common law corner. These are argued by different philosophers and scholars as explained herein under.

See also Alon Levy. "The Amicus Curiae: Another of Assistance to the court"(1972) Chitty LJ, 94.

[1127] As it has been traced back as far as the 14th Century and even to Roman Law. Williams, note 12 at 367.

[1128](1353) YB Hill 26 Edw.111. See Edward Ruffin Beckwirth and Rudolph Soberheim, "Amicus Curiae Minister of Justice"(1948) 17 Fordharm L.Rev.38."Notes on Amicus Curiae minister of Justice" (1920-1921) 34 Harv L found in the Walls Abridgement 200 and in 2 Viners Abridgement 475-476.

[1129](1353) Y.B.7 Edw.111.65.cited in Covey, Supra note 11 at 33.

[1130]Krislov, Supra note 2: Covey 34-35."The amicus curiae," note 12.In south Africa the amicus curiae has also been defined as a member of the bar, or other bystander, who advises the court regarding a point of law or fact upon which information is required.

[1131] See Baldwin note 16 at 69.

[1132]Johaness Chan, "Amicus Curiae and Non Party Intervention"(1997) 27 Hong Kong LJ 391 at 394.

THE INHERENT RIGHT OF COURT TO REQUIRE ASSISTANCE.

This argument is based on a construct of the common law based on the inherent jurisdiction of a court to require assistance from members of the legal profession to whom it had given special rights to practice their profession.[1133]

The Bystander theory. This theory has been proposed by one writer that it is another possible source from which the amicus curiae practice would have begun.[1134]He argues that this case rests on some secondary confirmation from early common lawpractice until the middle common law, a defendant in a serious criminal charge was not allowed counsel to represent him . The rationale for this was that the defendant had to answer the serious charge by himself and not through the lawyer. Harman Cohen explains that the resultant ritual of the accused being accompanied to court by his friends was partly to check on his accuser's entourage or ground against vengeance without law.[1135] Therefore, those bystanders that were not lawyers were then allowed to provide assistance to the court. Some support for this appears in Cokes Institutes and after the plea of guilty, the prisoner can have counsel assigned to him. Any learned man that is present may inform the court for the benefit of the prisoner of anything that may make the proceedings erroneous.[1136]It is therefore clear that the amicus curiae practice was brought into play to check on judicial errors and to thus ensure justice to those defendants that were not defended in criminal cases by allowing the litigants present in court to assist the judge.

HONOUR FOR COURT

This is the last but fundamental reason for amicus curiae. This was emphasized in the celebrated case of Protector v Geering 1656. It was stated that the purpose of amicus curiae was that it is for the honor of the court to avoid error in their judgments. Barbarism will be introduced if it be not admitted to inform the court of such gross and apparent errors in offices[1137].Further Justice Occonor of the Supreme Court of United States remarked that" the friends who appear today usually file briefs calling our attention to ponds of law , policy considerations or other points of view that the parties themselves have not discussed. These amicus briefs invaluably aid on decision making

[1133] Williams, Supra note 12 at 366. See also JohannessChan,"Amicuscuriaeand Non Party Intervetion" (1997) 27 Hong Kong LJ 39-394.
[1134] Covey, supra note 11. Covey accepts that there is no direct confirmation or denial for this theory from the early common law practice.
[1135] Herman Cohen. A history of the English Bar and Anornatus to 1450 (London: Sweet and Maxwell Ltd ..1929 at 4, 12-13 citing the works of Latin writings known as LegesHenniciprimi attributed to a scholar known as Quadripartitus.
[1136] Cokes Institutes 29 Brooke 1779. See also Chittys description: 1 Chitty, criminal law 308, 2nd edtn, (1832), cited in Covey supra note 11.
[1137] 91656), Hardres 585,145 E.R 394

process and often influence either the result or the reasoning of our opinions[1138].

Having embarked and explained the brief origin of the institution, it is right to draw attention to its applicability in Uganda jurisprudence

APPLICABILITY OF THE INSTITUTION IN UGANDA

As already noted, amicus curiae means a friend of court from the English version. The maxim has a wide application in Uganda though we are alive to the fact that there are no clear legislative provisions on Uganda statute books governing Court in determining which person or organization qualifies to be amicus curiae in any proceedings before court.[1139] Amicus curiae briefs are mainly filed in appeals concerning matters of abroad public interest. S.98 of the Civil Procedure Act of 2010 gives courts inherent powers to make orders which are necessary for the ends of justice or to avoid abuse of court process. It is under this law that the courts are given mandate to allow an application in regard to amicus curiae.

Further Order 50 of the civil procedure rules gives the court officers general powers to carry out duties pertaining to it. The mode of making such an application is by way of notice of motion supported by an affidavit. The most outstanding g provision in absence of provisions in the statute books **is section 39(2)**[1140]and the principles developed by court**. In Uganda,** initially the application for amicus curiae was only permitted where court had invited an expertise in a particular field of law whose expertise court needed to give its verdict. This means that applications by anyone without the invitation of court could be null and void .In **Attorney General v Silver Springs Hotel Ltd and Others**[1141]**,** the supreme court held that an appearance by amicus curiae had to be at the invitation of court and not by application of a party seeking that status. The court also further held that the friend of Court must be a person without interest in the suit.

This ruling was overturned by court changing the status of amicus curiae. **In NSSF and Another v ALCON International Ltd**[1142] court while relying on Article 132(4) which allows the supreme court to deviate from its previous decision considered an application for amicus curiae and only rejected it on ground that the applicant had not shown his expertise in the matter and had not demonstrated that he would be of assistance to the court in resolving the dispute before it. Further

[1138] Hon Justice Sandra Day Oconnor while acceping Henry Clay Medallion from the Henr Clay Memorial Foundation on 4th October 1996.

[11391139] Justice Bert Katurebe in the application foe leave of court as afriend of court in AmamaMbabazi v Museveni Electoral Commission and Attorney General SC Civil Application N0 2 of 2016.

[1140] The Judicature Act cap 13 laws of Uganda.

[1141] SCCA No 1 of 1989

[1142] SCCA No 15 of 2009,

in **Uganda v Thomas Kowyelo**[1143], the application was made subsequent to courts hearing of the appeal. However, court declined to hear the application on grounds that the hearing had already been closed and judgment in the hearing had already been closed and judgment in the appeal reserved.

It is important on this point to note that the application of Amicus curiae in litigation is now a practice which is increasingly being entrenched not only across the common law and civil jurisdictions but also in domestic and international legal tribunals. Because of the wave in the application of the institution of amicus curiae, Uganda has also embraced the application of the legal maxim but because of the absence of clear constructive law for its application, Ugandan courts have adopted principles developed by courts in various jurisdictions in determining the admission of amicus curiae. The guiding principles were well established by Justice Bert Katurebe in **Amama Mbabazi v Museveni , Electoral Commission and Attorney General**[1144]and these include;

That participation of amicus curiae is purely at the discretion of court.

Amicus curiae can be important and relevant in matters where court is of the opinion that the matter before it requires some kind of expertise which is in the possession of a specific individual.

The ultimate control over what the amicus curiae can do lies exclusively with the court.

The amicus must be neutral and impartial.

Thee submission must be noted to give assistance to the court not otherwise employ.

Limited to engagement with matters of the law.

Submissions draw attention to relevant matters of law useful focused and principled legal submissions not favoring any of the parties.

The amici must have valuable expertise in the relevant area of law and general expertise in the law does not suffice.

The points of law to be canvassed should be novel to aid development of jurisprudence

The application must be in the wider interest of public justice.

The interest of the amicus is its fidelity to the law.

Whereas consent of the parties to the proposed amicus role is a factor to be taken into consideration, it is not the determining factor. Furthermore, objections raised by the parties are a factor to be taken into consideration but is not the determining factor.

The most important guiding principle is the principle of impartiality and neutrality. It is now a settled rule of practice of courts in various jurisdictions that for a person to be admitted as amicus

[1143] Constitutional Appeal No 1 of 2012

[1144]Application for leave of court as a friend of Court Civil Application No 2 of 2016 which application was made by the Makerere Law professors.

curiae, they ought to preserve a status of neutrality and impartiality.

In **Secretariate of the Joint UNAIDS Programme on HIV/ AIDs v Human Rights Awareness Promotion Forum (HRAPF) and Attorney General of Uganda**[1145]**,** it was observed that what court is called upon to do is balancing the wider interest of injustice and the benefit of the participation of the intended amicus to court against the risk of the amicus descending into the litigation between the parties. An amicus is a friend of court and the court can only take what it considers relevant and non-partisan from the amicus and the ultimate control over what the amicus can do is the court itself. Therefore, it is important for the court to address its self on the role of amicus curiae. The idea of neutrality can be justified by the principle that justice must not only be done but also been to be done.

THE ROLE OF AMICUS CURIAE

As already noted, amicus curiae should be a person without personal interest in the case and does not advocate a point of view in support of either of the parties to the suit. Despite the fact that amicus procedure has not been entrenched in Uganda, the point of emphasis in the few cases in Uganda has continued to emphasize that the amicus should have no interest in the matter. **In Attorney General v Silver Springs Hotel Ltd and Anor**[1146]**,** court observed that one fundamental consideration for any amicus curiae to be admitted is that such a party must be independent of the dispute between the parties.

The role of an amicus in litigation, clearly distinguishes from other parties in litigation. The fundamental role of an amicus curiae can be drawn from the decision of the supreme court of Kenya in **Mumo Matemu and Others v Kenya Section of the International Commission of Jurists**[1147]when court observed that "the role of an amicus curiae is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for privilege of participating in the proceeding without having to qualify as a party, amicus curiae have a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat the arguments already made but must raise new contentions and generally these new contentions must be raised on the data already before the court."

It should be emphasized that these amicus submissions were originally intended to provide the court with impartial information that was beyond its notice or expertise which is where the name amicus curiae or friend of court derived.

The adversarial system is often the given explanation for the preservation of an amicus curiae that it serves as a useful and convenient tool to overcome the shortcomings of the adversarial system

[1145] Application No 1 of 2015
[1146] SCCA No 1 of 1989
[1147] Petition No 12 of 2013

which is essentially partisan or bi-polar.[1148].

Therefore amicus curiae intervention presents an opportunity for interest groups to advance their policy preferences by influencing the judiciary in key cases.[1149] One can argue that if the amicus curiae principle is well entrenched in Uganda legal system can help in checking on continued errors of the judiciary and presenting a well setting of hearings before courts. But it should not be undermined that though amicus briefs have been a practice accepted by the courts in Uganda, a number of challenges have come along with them. These briefs no longer provide court with impartial information. This is due to the fact that briefs are always filed by ideological allies of one or another party to the suit and most them file duplicate arguments due to the interests they possess in the suit.

[1148] George William. "The Amicus Curiae and Intervenor in the High Court of Australia: A comperative analysis" (200) 28 Federal law Review 365 at 367

[1149] Lorne Neudorf, PHD Candidate, Faculty of law, university of Cambridge, Barister and Solicitor (Canada) at 17.

CHAPTER FOURTEEN

THE EXECUTIVE AND THE BUGANDA QUESTION

ABSOLUTE BUGANDA

For a very long time, the form of government in Buganda was of the first type, an absolute monarch, but with wide powers left to the aristocracy *(Abakungu).* The absolute power of the kings *(baKabaka)* in all fields was never questioned until the Europeans made a repartition of powers. When Buganda came under the protection of the British Government, the absolute power of the Kabaka came to an end, but he remained one of the governing body.

BUGANDA AND THE CENTRAL GOVERNMENT (A MYSTERY THROUGH THE RESTORATION PERIOD)

A lot has been said though little has been brought to paper about Buganda's question in Uganda. In a further highlighted form, the position of Buganda in Uganda. Being the most organized group, the British found light in utilizing Buganda to colonize the whole of Uganda. The British desire was not to see Buganda achieve independence but rather to achieve a Uganda with Buganda under its control. Oloka Onyango states that it is this that influenced events in the territory especially in the 1940s and 1950s. He argues that political events within Buganda seemed to eclipse those in the rest of the protectorate starting from late 1940s to 1950s where the relationship between the two begun to achieve prominence.[1150]

The political events saw reforms such as removal of some racial restrictions on trade, formation of co-operatives, trade unions and witnessed the establishment of nationalist political parties though these went tribalistic in nature in their ambitions to pursue and receive the independence instruments for Uganda. Indeed, the post 1945 and 1950s reform's marked the beginning of struggles to control post –colonial Uganda. It was within this end in view that groups defined their interests and prepared them for the moment of truth[1151].During this period, Buganda manifested its intentions of being declared an independent state under monarchism. Buganda never desired to be part of Uganda and it seemed well clear that the British didn't hold this in mind. To the Baganda, placing them under Uganda was to deprive them of their strength and political status as the strongest kingdom which they never desired.

The roots of Buganda's interests from the rest of the protectorate can be rooted from the year of

[1150] J. OlokaOnyango (1997) The question of Buganda in contemporary Ugandan Politics, Journal of Contemporary African Studies, 15:2, 173-189.
[1151] Uganda ConstitutionalCommmission 1993 at page 48

1953 which saw the exile of the Kabaka Edward Muteesa II following his disagreement with the British over the East African Federation[1152].As Stefan Lougren, sates , the exile was due to Muteesa's rejection of the proposal by the British to merge Buganda and Kenya to form the East African Federation: Buganda's fear was with the white settlers taking over their land following what they had done in the Kenya Highlands, the most outstanding point was the kings desire to be the top most leader in the kingdom and country of Buganda which couldn't be achieved under the Federation. Because of this, it proved evident that the Baganda were to work hard to achieve their independence. [1153]

The Baganda were left with no option but to stage riots everywhere in what is known as the Kabaka crisis to force the colonialists to return the King. Upon his return in 1955 and the signing of the Namirembe agreement, the Baganda became more hardened to achieve their interests at whatever expense and ended up indulging themselves in political activities as an easier way of achieving their interests. They formed and joined the political parties like Democratic Party which was a Buganda political Party and latter witnessed the Kabaka Yekka party to define and defend the interests of the kingdom through the king. Much has been said but less can be forgotten about the existence of other monarchies in Uganda. But of course Buganda being the strongest, it made headlines in Uganda's history. Indeed, the kingdom had been in place for a while even before the colonization of Uganda. Buganda enhanced its supremacy in relation to other monarchies and after independence in 1962, Buganda was to maintain its authority and the Kabaka was even to gain the right to veto federal legislation which was later to cause the 1966 crisis.[1154]

Indeed, their tireless efforts finally paid off. Though they did not acquire complete independence, following the Independence Uganda in1962, Buganda acquired a federal status and the Kabaka assumed the largely ceremonial post of president. This was to defend the relationship between him and Obote Milton who was the Prime minister of Independent Uganda. Perhaps the blame for this is pointed at the Lancaster Constitution which failed to establish the form of government Uganda was to adopt. The 1962 Constitution had a weakness of failure to distinguish and highlight the power of the president who was Edward Muteesa and Dr Apollo Milton Obote the prime Minister.[1155]

Muteesa found it hard to balance the interests of Buganda and the country as a whole. It was because of the mistake by the 1962 Constitution to allow the king of Buganda to be the president of Uganda. Kanyeihamba explains that the major clash of him and Obote was with the referendum of

[1152]See Morris and Read 1966; pp 63-64
[1153] Stefan Lougren, Power of the Buganda: Uganda's kings Return: July 11 1996.
[1154] Ibid
[1155]Kanyeihamba.G. W. Evolution of the Constitution and Governemnt.

1964 that saw Buyaga and Bugangaizi deciding to be back to Bunyoro.[1156]Being the president, he had the constitutional mandate or duty to sign the official transfer of the counties but this seemed difficult for him. Buganda's interests filled his understanding than the national interests. Sealing the issue of lost counties would be a betrayal of his subjects upon his decline, the Constitution vested power in the prime minister to complete the action. This he undertook as prime minister. It's this that created the confrontation between Mengo and the Central government. The president who was the Kabaka of Buganda objected the move by Obote of transferring the lost counties to Bunyoro. This led to the collapse of the UPC-KY alliance and subsequent attacks on the palace by the soldiers led by Gen Iddi Amin.[1157]

The collapse of the alliance culminated into political tension between the two. Obote with no shame ordered Amin to attack the palace in1966 forcing the Kabaka to have a lonely exile to London where he died in poverty on 19th November 1969. Indeed, it was the first serious clash between Buganda and the central government. This was to affect the future politics of Uganda unless a step was taken. The whole mistake as already noted lay in the 1962 independence Constitution.

Because of the misunderstandings that had culminated between Obote's party as some supported Buganda, followed by other pressures directed towards him by other political parties like DP and other cultural Institutions, Obote turned all and sundry, culminating in 1969 with the banning of all opposition political parties as dangerous societies that would adversely affect peace and order in Uganda. [1158] The banning of political parties and all kingdoms in Uganda acted as a conducive environment for the then leader Apollo Milton Obote to adopt the Pigeon Hole Constitution that saw him assume the executive powers and became the executive president of Uganda making Uganda a Republic in 1967.

Indeed, the Kabaka crisis saw the end of kingship in Uganda not until 1993 when they were restored. The Baganda became more nervous and hatred for Obote increased. Most of them supported and became more supportive to anyone who was willing to defeat Obote. Among the many that saw this opportunity was Amin.

THE CRISIS OF BUGANDA, 1953-55

The Kabaka crisis occurred in the Uganda Protectorate between 1953 to 1955, during which Kabaka Mutesa II pushed for Bugandan secession from the Uganda Protectorate and was ousted

[1156]Kanyeihamba, G.W. Evolution of The Constitution and Governement.

[1157] Restoration of Kingdoms was a mistake Ugandans are paying for by AmonKatungulu Feb 14, 2019

[1158] Six organisations were banned . These included Democratic Party, Uganda National Union, Uganda Famers Voice, Uganda Conservative Party, Uganda National Socialist Party and the Uganda Vietnam Solidarity Party. Most of thereladerss however were arrested like Benedicto Kiwanuka and AbudallahNabudere.

and banished by British governor Andrew Cohen. Widespread dissatisfaction with the British government's actions forced the British government to retreat, culminating in the restoration of Mutesa as specified in the Buganda Agreement of 1955, which impacted the nature of Uganda's independence.

The Imperial British East Africa Company (IBEAC) gave the British Government administration rights over its holdings in modern-day Uganda in 1893. The IBEAC's territory at the time principally consisted of the Kingdom of Buganda, which had been annexed in 1892. The Uganda Protectorate was founded in 1894, and with Buganda's help, the territory was quickly expanded beyond Buganda's limits to an area that closely corresponds to modern-day Uganda. Buganda's status as a constitutional monarchy (headed by the Kabaka) inside the British-led Protectorate was formalized by the Buganda Agreement of 1900.

The Buganda Agreement of 1900 served as the foundation for the relationship between Buganda and the British colonial administration of the Uganda Protectorate for more than half a century. The deal was ostensibly reached between willing equal partners, with the British providing 'protection' to Buganda at Buganda's request. The granting of land to Baganda in a sort of freehold tenure known as 'mailo land' was a major component of the accord. As a result, European settlers were practically barred from purchasing land in Buganda. As a result, unlike what had transpired in neighbouring Kenya, Uganda had no white settlers. Buganda was also to be treated equally with any future provinces that would be added into the Uganda Protectorate, according to the agreement. Buganda was able to maintain an unparalleled level of internal autonomy within the Uganda Protectorate because to these provisions.

The British proposed a closer union between its East African possessions, Kenya, Uganda, and Tanganyika, in the 1920s and 1930s. Uganda, particularly Buganda, was adamantly opposed to the concept. The significant opposition stemmed from two factors that were intertwined. For starters, it was thought that an East African Federation would allow European settlers to settle in Uganda. The Baganda had no illusions about what would happen to their community if this happened, given how settlers treated indigenous Africans in neighbouring Kenya or further afield in Rhodesia and South Africa. Second, the Baganda believed that their ancient kingdom, with its valued customs and culture, would be eaten up by a much larger polity of an East African federation, which they were adamant about resisting. The British were forced to renounce the dream of an East African federation, albeit unwillingly.

Following the establishment of the Crown Colony of Kenya and the Trust Territory of Tanganyika, the British became more interested in providing 'common services' to the three territories. This led to the establishment of the East Africa High Commission and Central Legislative Assembly in

1948, which had jurisdiction over certain areas (such as integration of the various railway networks).

The nomination of Sir Andrew Cohen as Governor of Uganda in January 1952 sparked enormous optimism among those who supported quick African political progress. Sir Andrew's status as the "Whitehall Fabian" was solidified. Perhaps it was hoped that under his leadership, Uganda would not only move toward self-government, but also do so without the suspicion and racial hostility that has often preceded similar progress in other countries.[1159]

His influence was undeniably felt right away. He zealously pursued the Protectorate's economic development, despite commercial interests' complaints of his concern for the wellbeing of Africans. He promoted African cooperatives, tripled government education investment, and expanded social welfare spending. He used his social clout to fight racial prejudice with a tenacity that irritated many Europeans privately. Indeed, he appeared to be more at ease in the company of Africans than in the all-white company of Uganda's European clubs. Above all, he sparked political transformation by raising African participation on the Legislative Council and broadening the responsibilities of African local governments. On November 30, 1953, this Governor ordered the expulsion of Kabaka Mutesa II of Buganda.

Andrew Cohen was sworn in as the new Governor of Uganda in January 1952. He envisioned considerable reforms, such as increasing African participation in Uganda's Legislative Council and Governor's Executive Council. Following negotiations with Muteesa II, the Kabaka, several constitutional reforms for Buganda were proposed in March 1953, including having a majority of elected members in the Lukiiko and transferring a number of services from the Protectorate Government to the Buganda Government, such as education, health, and agriculture. Cohen advocated that the Protectorate devolve more powers to Buganda, but only if Buganda publicly accepted its role as a "component element" of the larger Protectorate. Kabaka Mutesa II accepted the offer, and in March 1953, a joint memorandum was produced.

However, the British colonies of Northern and Southern Rhodesia, as well as Nyasaland, were forming a federation at the same time. The Africans involved were opposed to the federation, but it did not stop the British, who were under pressure from the settlers in those territories, from pushing it through. Alarm bells rang off in Buganda when the Secretary of State for the Colonies proposed the concept of a federation for East Africa in a speech he gave in London in June 1953. Both the Lukiiko and the Kabaka raised significant objections. Indeed, the Baganda began to distrust the direction in which British administration was leading their kingdom, and significant calls for

[1159] Pratt R.C., 1955. The Anatomy of a Crisis: Uganda, 1953-55, International Journal, Autumn, 1955, Vol. 10, No. 4 (Autumn, 1955), pp. 267-275.

Buganda's separation from the rest of Uganda began to emerge. Buganda wanted her independence and separate identity restored and honoured by the British after she had willingly gone into what she deemed a protection agreement with them in 1900. The British, however, refused. This resulted in a political deadlock.

Secretary of State for the Colonies Oliver Lyttelton made a "passing allusion" to the possibility "...of much larger measures of unification and possibly still larger measures of federation of the entire East African territory" in a speech in London on June 30, 1953. The East African Standard published Lyttelton's views on July 2 and 3, prompting the Bugandan Government's Ministers (led by Paulo Kavuma) to write to Cohen on July 6 to express their objection to the scheme. The concept of a bigger federation modeled after the Central African Federation worried the Baganda people, who have historically prized their autonomy and independence. They believed that such a step would lead to the merger of other civilizations, destroying and engulfing their own culture and way of life.

Cohen reassured the Baganda that they had nothing to worry about, and that no decision about the formation of an East African federation would be made without their input. However, there remained a lingering suspicion in Buganda that Lyttelton had let the cat out of the bag. The episode served to crystallize anger and seeming slights dating back to the 1900 Agreement, prompting widespread calls for Buganda independence as the primary safeguard against British expansion among the Baganda. The Secretary of State's response, attempting to reassure Mutesa and his Ministers that "the inclusion of the Uganda Protectorate in any such federation is outside the scope of practical politics at the present moment," merely added fuel to the fire. Bunyoro and Toro Bakamas, as well as the Omugabe of Ankole, wrote to Cohen to convey their own anxieties.

Cohen took a direct approach to resolving the spiralling problem, preferring to meet Mutesa in person. However, a series of six private talks at Government House failed to produce a resolution on the question of Bugandan independence, and political instability continued. Frustrated, Cohen warned Mutesa that continuing to oppose the British vision of a united Ugandan state was a breach of the 1900 Agreement and a betrayal of the March 1953 joint proclamation, and that he had five weeks to rethink.

Despite the seeming ultimatum, Mutesa continued to press for Buganda separation, with the support of the Bugandan Lukiiko (Parliament) and other neighbouring Kingdoms. Due to his obstinacy, Cohen presented him with a letter on 30 November 1953, confirming that the British Government was withdrawing its recognition of him as the lawful monarch of Buganda under the requirements of Article 6 of the 1900 Agreement.

Cohen proclaimed a state of emergency because he was afraid that the Baganda would retaliate

violently. Mutesa was apprehended and deported to London, much to the surprise of the Baganda people. He would be free to live anywhere in the world, but he would not be allowed to return to Uganda. While Mutesa's supporters lobbied tirelessly on his behalf, he lived "like if on holiday," mostly at the Savoy Hotel.

Cohen had hoped for a new Kabaka to be placed right away, but that was not possible. Far from fixing the situation, exiling the Kabaka exacerbated it. Buganda's resistance was mostly peaceful, with public displays of "weeping, mourning, and collapsing in grief... Ganda, especially Ganda women, declared loyalty to the king and denounced Britain's betrayal of Buganda's alliance." This emotional response, which was based on the Kabaka's significance in Bugandan life rather than Mutesa's personal popularity, caught Cohen off guard, and the British struggled to find a method to counter it.

Following a well-received Bugandan delegation to London, new negotiations between Cohen and a constitutional committee chosen by the Lukiiko took place in Namirembe from June to September 1954, with Keith Hancock, then Director of the Institute of Commonwealth Studies in London, acting as the mediator. Despite the fact that an attempt to have the Kabaka's deportation declared ultra vires failed, the High Court in Kampala hinted that the employment of Article 6 was inappropriate. The British accepted Mutesa's return in exchange for a promise that he and future Kabakas would make a "solemn obligation" to abide by the 1900 Agreement. At the same time, a number of constitutional amendments were agreed upon inside the Government of Buganda and to the national Legislative Council, furthering Cohen's reformist ambitions. The Namirembe conference suggestions were adopted as the Buganda Agreement of 1955 after further discussions in London, and Mutesa returned triumphant to Buganda.

POSSIBLE CAUSES OF THE CRISIS

A DESPOTIC SOVEREIGNTY DEMYSTIFIED: THE POSITION OF 'KABAKA REDEFINED.

The 1953-55 Kabaka Crisis, a breakdown of relations between Governor Cohen and Kabaka Mutesa II was caused by a number of factors some of which were apparent whilst others were underlying as reported by different sources and renowned authors. The most striking and conspicuous reason for the crisis was an after dinner speech to the East African Dinner Club in London made by the Colonial Secretary, Sir Oliver Lyttleton, on 30th June 1953. He envisaged constitutional progress in terms of a federation of East African territories. This unguarded statement provoked deep fears of settler domination in East Africa, fears about which Baganda leaders had

always been particularly vocal, ever since moves for 'Closer Union' (as it was called) had been mooted in the late 1920s by Kenya white settlers.[1160] On the other hand as written by Paulo Kavuma the then Katikiro (Prime Minister) of Buganda, it (the crisis) came about as a consequence of Enoch Mulira threatening a suit against the Kabaka.[1161] It should be recalled that in 1939, at the age of 15, Muteesa succeeded his father as Kabaka. He was a student at King's College, Budo, and the prime institution of the Anglican Church. After further studies at Makerere College, he was sent by the British authorities to Cambridge for 3 years. Returning in 1948, he announced his engagement to Damali, the daughter of a prominent Protestant landowner, C.M.S Kisosonkole. Traditionalists viewed the proposed marriage as ultra vires, because Kisosonkole belonged to the Nkima (Monkey) Clan, whose head, the Mugema, was the ceremonial "jajja" (grandfather) of the Kabaka. The Kabaka consequently did not marry from this clan. But a glance at the genealogy in M.S.M. Kiwanuka's History of Buganda shows that this was not entirely true because quite a number of royal wives from the Nkima clan are recorded. The point was that n son of such a union had ever become Kabaka. The grave impediment for a Christian Kabaka was that, since he was expected only to have one wife and that wife happened to be ow'enkima (from the monkey clan), only the sons of such a union would be legitimate and possible successors. Muteesa himself had only inherited the throne because he was the son of the Christian marriage; Cwa himself favoured an 'illegitimate' son, George Mawanda. Despite these criticisms, the wedding went ahead in Namirembe cathedral in November 1948. Damali was never really accepted in court circles at the Lubiri (palace), where the Nalinnya, Alice Zalwango, the kabaka's 'official' sister, held sway. The staunch Anglican Chief Ham Mukasa had nicknamed her 'setani'. The Nalinnya was said to have encouraged the Kabaka in his extra-marital affair with Kate Lukira, wife of Enoch Mulira, who was from a prominent Kiganda protestant family and a brother to E, M.K. Mulira a strong hold delegate in Buganda.

MULIRA SUES KABAKA FOR ADULTERY

By 1949 both the Nabagereka (the official title of the wife of the Kabaka) and Kate Mulira were pregnant, and Mulira was threatening to cite the Kabaka in a divorce case. The scandals of 1949 subsided somewhat. Enoch Mulira dropped the threat of divorce proceedings in which the Kabaka would have been involved. On the 2nd of June, 1953 while at the coronation of the new monarch Queen Elizabeth II after the death of her father George VI on 6th February 1952, Kabaka Muteesa II in attendance of the ceremony wasn't accorded any recognition (a prestigious honour) something

[1160]Kevin Ward, The Church of Uganda and the Exile of Kabaka Muteesa II, 1953 -55, university of Leeds.
[1161] Paulo Kavuma, Crisis in Buganda 1953: The Story of the Exile and Return of the Kabaka, Muteesa II, Rex Collings, London 1979.

very unusual and this was on moral grounds on the basis of having an extra marital affair with a married woman whose husband has threatened to cite him (the Kabaka) in the formers divorce petition.[1162] This obviously didn't go well with the Kabaka who 'felt undesired/rejected' at the time. Upon his return as cited by Kavuma Paulo (then Katikiro of Buganda) he agitated for the independence of Buganda from the rest of the protectorate as an underlying reaction/response to the events at the coronation of the Queen of England with the most outstanding reason being the fear for a federation of East Africa which would culminate into loss of status and recognition for the Baganda.

The events that unfolded onto the Kabaka of Buganda were symbolic to the gradual succumbing autonomy of a 'king in his kingdom' to a point of almost appearing in a court of law as a defendant to a divorce petition. This was nevertheless amicably settled out of Court by the 'elders' in Buganda as an event very embarrassing to the Kabaka individually (in persona) and the entire Kingdom of Buganda (in rem). Measured against the past, the kabaka's despotic position bore a close resemblance to that of King David as interestingly noted by John Taylor, the principal of Mukono Theological College who was reckoned to have closer contacts with Ganda than any other any other member of the mission. Taylor's message to the colonial administration in England during the violent riots in Buganda was that although the British administration might think that monarchy was an institution that they understood, the Buganda model in fact bore a closer resemblance to that of King David that of Queen Elizabeth. He wrote, "I think it true, that the Kabaka is still the great husband figure to nearly all the women here, and one might almost say that from him all husband hood derives.... so every man feels that emotionally his authority in his home, and to a lesser degree in other spheres, derives from the person of the Kabaka.....In Buganda I doubt if there are a score of Africans who have really lost hope that the Kabaka will be restored to them. That is the gist of their prayers in the Churches"[1163]

POLITICAL CONCERNS

Sir Andrew finally presented the Kabaka with formal instructions from the Secretary of State that he pledge "that he would accept" to the Governor's plans for the unified and stable development of Uganda as a whole. Fearful of public order if the Kabaka openly defied the Secretary of State, and, one suspects, exhausted by the struggles with this young man who seemed to the Governor to be a major obstacle to his plans for the unified and stable development of Uganda as a whole, Sir Andrew had quite a situation. After Mutesa declined this obligation, recognition was revoked, a state of emergency was declared, and he was deported quickly. These actions could have been the

[1162] Paulo Kavuma, Crisis in Buganda 1953: The story of the Exile and Return of Kabaka, Muteesa II, Rex Collings, London, 1979

[1163] Roland Oliver, In the Realms of Gold, pioneering in Africa History, Routledge Taylor & Francis Group

result of an irritated Governor. However, it's possible that two sides of the scenario were overlooked.

The first is a legal one. While Mutesa most likely contributed to the crisis by raising concerns that resulted in a dispute between the Governor and the people, the Kabaka was in an extremely impossible constitutional situation. He looked bound at some point to be faced with an issue over which he would have to choose between continuous recognition by the British Government and the confidence of the Baganda, as required by the Buganda Agreement and yet advised by a Lukiiko of increasing democratic composition. He chose to oppose the Governor and reflect and give voice to popular sentiment in Buganda, which was probably comprehensible and certainly politically clever.

The second point to consider is political. Overnight, Mutesa's expulsion united practically the entire Buganda community in support of Mutesa and strong opposition to the Governor. The causes of this vehement and practically universal reaction were numerous. It was partly a reaction to foreign meddling in a private tribal dispute. It was partly an outpouring of resentment toward Europeans, which was always present in a colonial society. Ambitious politicians fostered it to a certain extent. Above all, it appears to have originated from still-strong tribe traditionalism and a subsequent devotion to the Kabakaship as a traditional institution.

As a result, the deportation, which was supposed to remove an impediment to the Governor's aspirations for Uganda's stable and democratic development, now threatens to make such progress impossible.

THE CONSEQUENCE OF COHEN'S SANCTION

It provided an issue for the reckless and demagogic Uganda National Congress to gain popular support for the first time. It was extremely difficult to maintain constructive co-operative connections between Baganda and British officials. Worst of all, it sparked a resurgence of tribalism in Buganda. There were certain to be many in any colonial culture who could only fit themselves inadvertently to the enormous changes brought about by the effect of western ideas, industry, and trade, and who were so uneasy, befuddled, and generally unfriendly. As a result, the prospect of organized xenophobia was constantly present and it also revived tribalism.

The deportation of Ugandans bolstered the power of these nefarious elements in Buganda. There are numerous indicators of this. The fate of Christian churches was one of the most upsetting. The Baganda, who had been the most heavily evangelized African tribe, began to drift away from Christianity. Church attendance is estimated to have decreased by 85%. Whole districts reverted to pagan religion, and prophets claiming to be possessed by the spirit of the Buganda god of war rose to prominence. Despite being banned since the 1949 riots, the Bataka Party, the political expression

of this tribalism, remained a considerable presence in this town. The Bataka and their ilk were, in many respects, the most frightening force of all, as a simply protest group fighting for nothing more than the resurrection of a bygone era.

Sir Andrew attempted to reclaim the initiative in the face of escalating animosity and dwindling cooperation. He encouraged the Great Lukiiko to appoint a commission to explore the constitutional reconstruction of Buganda under the unbiased chairmanship of the distinguished Sir Keith Hancock. This plan was on the verge of being rejected. However, after it was suggested that such proposals might hasten Mutesa's return, the Lukiiko elected an able all-Baganda committee that included several teachers, a headmaster, a university lecturer, two leading local government officials, a lawyer, a Bishop, two priests, and a Harvard Doctor of Philosophy who had flown in specially from New York where he had long resided. After three months of hard effort, this body, dubbed the Namirembe Committee, prepared a thorough constitutional reform plan for Buganda. They were able to win the Governor's consent to their ideas after some discussion. The hope rose that they would be accepted by the Lukiiko and that normal, peaceful political life might resume under the proposed arrangements, without Kabaka Mutesa II's potentially disruptive presence.

These hopes were dashed, however, when hearings in a case to determine the validity of Kabaka Mutesa II's withdrawal of recognition commenced in Kampala's High Court. Mr. W. K. Y. Diplock, Q.C., a great English barrister, and Mr. Dingle Foot, a talented Ugandan barrister, were sent to Uganda specifically to represent the plaintiffs.

Mr. Diplock created a picture of a Kabaka whose only crimes were his desire to consult his people's representatives and his insistence that he tell them truthfully that he personally found the Secretary of State's assurances unsatisfactory through a detailed examination of the records of the meetings between the Governor and the Kabaka. This had a massive political impact. This view was spread throughout Buganda by repeated and considerable attention in the vernacular press.

Feelings became more powerful once more, and the former worry with deportation was fully rekindled and amplified. By a sad misfortune, even the judgment itself contributed to the escalating issue. It was a lengthy and convoluted decision, as the case involved numerous legal technicalities. The Chief Justice essentially held that the withdrawal of recognition was not a justiciable issue: "It is my finding in this instance that the Crown can be and is the judge of its own case," he said. At least two noteworthy obiter dicta were contributed by him. "The Kabaka had evinced an intention to follow a disloyal policy," he claimed. Second, he added that the Secretary of State was erroneous in claiming that the deportation was justified under Article Six of the Agreement, in event his initial ruling was overturned on appeal.

The decision seemed incredibly complex for the enthusiastic audience waiting outside. The throng

grasped hold of the one piece of the decision critical of the Government's action, confused, uncomprehending, and with an overpowering yearning to believe that the Kabaka would return. The recounting relied on exaggeration and simplification, and word quickly spread that the Government had been proven wrong and that the Kabaka would return. As the false rumour faded away, it left behind an unavoidable legacy of increasing suspicion and hatred.

The public's demand for the Kabaka's return grew louder and louder. The government started to rethink its determination that the deportation was final. As far as one can tell, Sir Andrew's senior advisers were practically unified in their opposition to Kabaka Mutesa II's return, fearing that it would weaken the Government's authority and inspire future agitation. Personal animosity and distrust of Mutesa II undoubtedly played a factor. Finally, they feared that if Mutesa II were Kabaka, the new constitutional provisions would be impossible to implement. “Do you bring back a George III if you want to start a constitutional monarchy?” one administrator wondered.

Despite this warning and his personal involvement in the previous judgment, Sir Andrew determined that the argument for the repatriation was stronger. Without some assurance of it, the Namirembe ideas would almost certainly be rejected, causing substantial, maybe irreversible harm to the formation of a stable constitutional order. Anti-European attitudes would become more entrenched. It would be impossible to administer in a constructive manner. Extremists and backward-looking traditionalists would be in charge. Finally, the Namirembe ideas provided a point at which the return might be described as a reaction to changing circumstances rather than a wholesale policy change.

On November 16, 1954, the British Government declared a fundamental shift in policy, whether for these reasons or not.

This announcement had major constitutional implications. To begin with, it made public the extensive government reforms advocated by the Namirembe Conference and already agreed by the government in Buganda. In a nutshell, these measures would replace tribal despotism with a contemporary representative government framework. The ministers would report to the Great Lukiiko rather than the Kabaka. They would establish a Civil Service Board, taking responsibility of the local administration away from the Kabaka. They would increase the judiciary's independence. The Kabaka would become "the emblem of the oneness of the people of Buganda and of the continuity between their past, present, and future," according to the suggestions. It was anticipated that by elevating him, he would avoid becoming embroiled in controversy and therefore prevent a repeat deportation.

Sir Andrew added a vow to implement fundamental reforms in Uganda's Executive and Legislative Councils to these suggestions. On the government side, seven members of the public, five African

and two others, were to be added. Five of the seven would be ministers, three of whom would be African. The proportion of Africans to Asians and Europeans on the Council's representation side would be 3:1:1. When compared to Kenya's 1:1:2 ratio or Tanganyika's 1:1:1, Sir Andrew's innovations were clear winners. Finally, and most importantly, the Governor and Secretary of State promised that the Great Lukiiko would be able to pick a new Kabaka or secure Mutesa's return within nine months of the proposals being accepted. Hence, Lord Chandos' earlier "never" was reversed under the pretense of a new response to new circumstances.

The reorganization of the Buganda administration, the return of the Kabaka, the creation of a Ministerial system, the growth of African representation in the Legislative Council, and the securing of Bagandan participation in the Legislative Council were all part of these plans. This second argument was crucial because, in order for Uganda to evolve into a cohesive self-governing region, the Lukiiko's extreme tribalism in refusing to elect representatives to the Legislative Council would have to be overcome.

The Great Lukiiko formed a new committee of conservative, tradition-conscious men to investigate the Namirembe suggestions when it met. There was an unsettling political calm while the committee met. Many people were startled by their report's moderation when it was finally released. Despite some small changes suggested by the committee, the Namirembe suggestions were mostly accepted, as was Bugandan involvement in the Legislative Council. The Government, displaying greater political foresight than in the past, remained silent until the Great Lukiiko had decided on its position. The Lukiiko adopted the report on May 9, 1955, by a vote of 77 to 7, and initiated procedures to prepare the formal documentation. The Secretary of State agreed the next day that the report provided a good starting point for discussion and that a Colonial Office committee should meet with the Lukiiko group. As a result, an unexpected second chance to end the issue had been secured.

Regrettably, there were three more factors in the new situation that complicated and could have easily discouraged the new aspirations for a settlement. To begin, the Lukiiko appointed a second committee to travel to England and request the Kabaka's swift return. A breakdown was still possible if the government insisted on the new reforms being implemented before the Kabaka being returned.

Second, the Uganda National Congress kept trying to sabotage the chances of an agreement. They, too, had dispatched a delegation to London to demand speedy independence. They didn't have the numbers to pose a significant threat at the moment, but the possibility that a breakdown in negotiations would likely boost their support was a powerful motivator for both the government and Lukiiko members to achieve a deal.

THE UNTOLD STORY OF SUING THE KABAKA AND THE ORIGIN THIS IMMUNITY.

The deportation of the Kabaka was also a result of another incident. During the time of Sir Andrew Cohen as governor, the constituent assembly at the time had a member of parliament named Enoch Mulira. He served in the time between 1950-1962.It so happened that Kabaka Muteesa II had an affair with Mulira's wife. This did not sit well with Mulira and he sued the Kabaka for his actions in a court of law to which Kabaka Mutesa was found guilty for the same.[1164]

Prior to his conviction, there were a couple of incidents. There was a notion in the kingdom, which stands to date, that all the women in the kingdom belonged to the king. As such, the king was free to take whomever he liked. Secondly, the court that Mulira charged the Kabaka in was the one formed by the powers of the Kabaka, given that he would appoint the elders to sit in the same. He therefore argued that he could not appear before his own court.

Kabaka Muteesa was denied recognition on moral grounds in 1952 during the coronation of Queen Elizabeth, the then princess, based on a court case that stained him as an adulterous ruler. He was not pleased with this. When he returned to Uganda, he asked Sir Andrew Cohen to drop the concept of an East African Federation and to provide him a timetable for when Buganda would gain independence.

In answer to Muteesa's pleas, Cohen authorized Kabaka Muteesa II's deportation to England, which was carried out with immediate effect.

THE ORIGINS OF THE HIGH COURT OF ENGLAND

The Kabaka's unwillingness to appear before his own local court can be compared to the King's or Queen's Bench theory of the High Court of England. In England and Wales, the Queen's Bench Division, formerly known as the King's Bench Division (during a kingdom) and the Court of Queen's Bench, is one of three divisions of the High Court of Justice, the others being the Chancery Division (previously the Court of Chancery) and the Family.

Queen's or (during a kingship) King's Bench was once one of England's higher common law courts. It was so named because it descended from the English court held coram rege ("before the monarch") and hence traveled wherever the king went. The King's Bench heard trials involving the sovereign or cases involving eminent people who were privileged to be tried before him alone. It could also repair the errors and omissions of the other courts, and it mostly tried criminal or quasi-criminal cases after Henry III's civil wars ended (1216–72). It got its own chief justice in 1268, but

[1164] Paulo Kavuma, 1979. Crisis in Buganda 1953 the Story of the Exile and Return of the Kabaka Mutesa II, Rex Collings, London.

it took a long time to lose its strong ties with the monarch and become an independent court of common law.

The Court of King's Bench, properly known as The Court of the King Before the King Himself in the English legal system, was a common law court. The King's Bench was originally formed from the curia regis in the late 12th to early 13th centuries to accompany the monarch on his journeys. In 1318, the King's Bench joined the Court of Common Pleas and the Exchequer of Pleas in Westminster Hall, and it remained there until 1421. The Supreme Court of Judicature Act 1873 united the King's Bench with the High Court of Justice, making the King's Bench a division of the High Court. One Chief Justice presided over the King's Bench (now the Lord Chief Justice of England and Wales) and normally three Puisne Justices.

The development of the Court of Chancery and equitable doctrines as one of the two main common law courts, together with the Common Pleas, greatly challenged the King's Bench's jurisdiction and caseload in the 15th and 16th centuries. To reclaim its position, the King's Bench embarked on a radical reform program, replacing traditional writs with bills, which were less expensive, speedier, and more adaptable. While it did not immediately stop the flow, it did assist the King's Bench in recovering and increasing its workload in the long run. While there was a major drop-in activity from 1460 to 1540, once the new reforms took effect, the King's Bench saw a significant increase in business; between 1560 and 1640, it increased tenfold. The Court of Common Pleas became wary of the new developments when legal fictions like the Bill of Middlesex harmed its own business. In the 17th century, after fighting the King's Bench in a reactionary and progressively conservative manner, an equilibrium was reached until the merger in 1873.

The curia regis, one of the three core administrative bodies (together with the Exchequer and the Chancery) that composed the Court of Chancery, was originally the only "court." This curia was the King's court, made up of counselors and courtiers who accompanied the King on his travels across the realm. This was a descendant of the witenagemot, not a specific court of law. Eyre circuits, manned by itinerant judges and working in tandem with the curia regis, disbursed justice over the land on set routes at certain times. These judges were also members of the curia and presided over the "lesser curia regis," which heard matters on behalf of the King. Because the curia accompanied the King, it caused complications with the administration of justice; if the King left the country, or spent much of his career there, as Richard I did, the curia followed. To address this, a central "bench" was formed, with the Court of Common Pleas getting official recognition in Magna Carta so that common pleas might be heard in "some fixed place." The curia, which followed the King, and the Common Pleas, which sat at Westminster Hall, were therefore the two common law courts. The curia eventually became known as the King's Bench, and the court had to be presided over by

the King himself.

There is some controversy over whether the original fixed court was the Common Pleas or King's Bench. In 1178, a chronicler recorded that when Henry II:

“learned that the land and the men of the land were burdened by so great a number of justices, for there were, eighteen, chose with the counsel of the wise men of his Kingdom five only, two clerks three and laymen, all of his private family, and decreed that these five should hear all complaints of the Kingdom and should do right and should not depart from the king's court but should remain there to hear the complaints of men, with this understanding that, if there should come up among them any question which could not be brought to a conclusion by them, it should be presented to a royal hearing and be determined by the king and the wiser men of the kingdom.”[1165]

The Court of Common Pleas did not exist until the signing of the Magna Carta, hence this was originally viewed as the creation of the King's Bench. The latter idea held that Henry II's order established the Court of Common Pleas rather than the King's Bench, and that the King's Bench later broke from the Common Pleas. The first evidence of an autonomous King's Bench dates from 1234, when separate plea rolls for each court were discovered. The King's Bench was established as a fully independent tribunal in 1234, according to modern academics, as part of the legal reform that took place between 1232 and 1234. The King's presence in the court became increasingly sporadic under Edward I, and by 1318, the court had become independent of the monarch. Its most recent journeys around the country were to Leicestershire, Staffordshire, and Shropshire in 1414, and to Northamptonshire in 1421. The King's Bench became a permanent court rather than one that accompanied the King from then on. The King's Bench, like the Common Pleas, sat in Westminster Hall until its dissolution.

During the 15th century, religious courts and the Lord Chancellor's equitable authority, exercised through the Court of Chancery, challenged the common law courts' historic primacy. Because of their informality and the simple way of arresting defendants, these courts were more appealing to ordinary lawyers. The Chancery's bills of complaint and subpoena sped up court proceedings, and there was a substantial drop in the number of cases in common law courts from 1460 to 1540, corresponding with a large increase in cases in the newer courts. This loss of business was swiftly recognized by the King's Bench, which was urged by Fairfax J to devise new remedies in 1501 so that "subpoenas would not be utilized as frequently as they are now." The King's Bench began restructuring in 1500 to expand its business and jurisdiction, and by 1550, the tide had turned in their favour.

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The King's Bench was resurrected because to its employment of Chancery-like procedures, most notably the bill system. A writ would have to be issued first, with varying types of writs depending on the situation. If A wanted to sue B for trespass, debt, or detinue, the court would have to issue a separate writ for each action, incurring time and money for A, and then make sure B showed up in court. Bills, on the other hand, were typically used against court employees and inmates; as a result, the defendant was presumed to already be in the custody of the court and no appearance in court was required.[1166]

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The advantages to this method were that bills were substantially cheaper, and unlike writs did not tie the plaintiff down; once the case came to court the bill could be amended to include any action or actions the plaintiff wanted to enforce. In addition, by avoiding the Chancery writ, the case was substantially cheaper. The result was significant: the King's Bench's business increased tenfold between 1560 and 1640. The common law remedies were also significantly broadened during this time period. Action on the case was the primary remedy and method, which the justices expanded to include other things. It permitted the enforcement of parol promises in 1499, making Chancery subpoenas redundant; further advancements included debt collection, suing for defamatory statements (formerly an ecclesiastical affair), and action on trover and conversion cases. The majority of this reform occurred under Fineux CJ, who never lived to see the results of his efforts; it took more than a century for the reforms to fully reverse the business decline.

While these reforms were successful in establishing a balance between the old common law courts and the new courts, they were viewed with suspicion by the Common Pleas, which became extremely reactionary to the changes the King's Bench attempted to implement. While the King's Bench was more revolutionary, the Common Pleas became more conservative in its attempts to

[1166] Baker, J. H. (2002). An Introduction to English Legal History. Butterworths. ISBN 0-406-93053-8, p. 41
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avoid granting matters to the King's Bench. The disparity between the reformist King's Bench and the conservative Common Pleas was exacerbated by the fact that the three Common Pleas prothonotaries couldn't agree on how to cut costs, leaving the court both expensive and malleable, while the King's Bench became faster, cheaper, and more varied in its operations.

Slade's case illustrates the difficulties during this period. In the Medieval Common Law, only a debt writ in the Common Pleas, problem-stricken and archaic process, would endeavours for the repayment of debts or other matters. By 1558, by using assumptions which were technical for deceit, the lawyers had succeeded in creating a new approach, implemented by the Court of King's Bench.

The legal fiction used was that a defendant had committed deception and was liable to the complainant by failing to pay after he was promised to do so. The conservative common pleas began to overrule the decisions of the King's Bench on assume by the Court of Appeals, the Court of Exchequer, which led to friction between the courts. In Slade's case, John Popham, the Chief Justice of the King's Bench, deliberately motivated Common Pleas to take an assumption that the judges of the King's bench could vote in a higher court, allowing them to dismiss the Common Pleas and make assumptions the principal contractual action. The more activist Francis Gawdy became the Common Pleas Chief Justice after the death of Edmund Anderson and led shortly to less reactionary and more revolutionary Common Pleas.

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The unintended outcome was that all three common law courts, with similar proceedings, were equally competent to hold common pleas by the end of Charles II. By the 18th century it was common to speak and not differentiate of the "twelve judges" of all three courts, and the cases of assisted parties were also divided. He complained in 1828 that Henry Brougham:

“the jurisdiction of the Court of King's Bench, for example, was originally confined to pleas of the Crown, and then extended to actions where violence was used – actions of trespass, by force; but now, all actions are admissible within its walls, through the medium of a legal fiction, which was adopted for the purpose of enlarging its authority, that every person sued is in the custody of the marshal of the court and may, therefore, be proceeded against for any personal cause of actions. Thus, by degrees, this court has drawn over to itself actions which really belong to...the Court of Common Pleas. The Court of Common Pleas, however...never was able to obtain cognizance of – the peculiar subject of King's Bench jurisdiction – Crown Pleas... the Exchequer has adopted a similar course for, though it was originally confined to the trial of revenue cases, it has, by means of another fiction – the supposition that everybody sued is a debtor to the Crown, and further, that he cannot pay his debt, because the other party will not pay him, – opened its doors to every suitor, and so drawn to itself the right of trying cases, that were never intended to be placed within its jurisdiction.”[1168]

Brougham's speech was intended to demonstrate that three courts with identical jurisdiction were superfluous, and that doing so would result in a situation where the best judges, attorneys, and cases would all end up in one court, overburdening that body and rendering the others nearly useless. In 1823, the King's Bench received 43,465 proceedings, the Common Pleas 13,009, and the Exchequer of Pleas 6,778. The judges of the King's Bench were "immoderately overburdened," the judges of the Common Pleas were "completely employed in term, and greatly engaged in vacation also," while the Barons of the Exchequer were "comparatively little occupied either in term or holiday."

The Judicature Commission was established in 1867 in response to this and the findings of a commission reviewing the slow speed of the Court of Chancery. It was given a broad remit to investigate reform of the courts, the law, and the legal profession. From March 25, 1869, until July 10, 1874, five reports were released, with the first (on the construction of a single Supreme Court of Judicature) being the most consequential. The report disposed of the previous idea of merging the common law and equity, and instead suggested a single Supreme Court capable of using both. In 1870 the Lord Chancellor, Lord Hatherly, attempted to bring the recommendations into law through an Act of Parliament, but did not go to the trouble of consulting the judiciary or the leader of the Conservatives, who controlled the House of Lords. Lawyers and judges, particularly Alexander Cockburn, were vocal in their opposition to the bill. Following Hatherly's replacement by Lord Selborne in September 1872, a second bill was introduced after consultation with the judiciary; while it followed the same lines as the first, it was far more detailed.

[1168] Manchester, A. H. (1980). Modern Legal History. Butterworths. ISBN 0-406-62264-7, p. 130

The Supreme Court of Judicature Act 1873 consolidated the Common Pleas, Exchequer, Queen's Bench, and Court of Chancery into a single body, the High Court of Justice, but maintaining the differences between the courts. The Queen's Bench ceased to exist on July 6, 1875, with the exception of the Queen's Bench Division of the High Court. The existence of the same courts as divisions of one undivided body was a constitutional oddity that prohibited Chief Justices from being forced to retire or be demoted. As a result, all three Chief Justices remained in office (Lord Chief Justice Sir Alexander Cockburn, Chief Justice of the Common Pleas Lord Coleridge, and Chief Baron of the Exchequer Sir Fitzroy Kelly). Kelly and Cockburn died in 1880, allowing the Common Pleas and Exchequer Divisions to be abolished by Order in Council on December 16, 1880. The High Court was reorganized into three divisions: Chancery, Queen's Bench, and Probate, Divorce, and Admiralty.

Academics believed for a long time that the King's Bench was primarily a criminal court due to a misunderstanding by Sir Edward Coke in his Institutes of the Lawes of England. This was false; no indictment was tried by the King's Bench until January 1323, and no record of the court ordering the death penalty was discovered until halfway through Edward II's reign. With a royal ordinance in 1293 directing conspiracy cases to be brought to the King's Bench and the court's judges acting in trailbaston commissions across the country, the court did have some criminal jurisdiction. The early King's Bench jurisdiction was defined by A. T. Carter in his History of English Legal Institutions as "to correct all crimes and misdemeanours that amounted to a breach of the peace, the King being then plaintiff, for such were in derogation of the Jura regalia; and to take cognizance of everything not parcelled out to the other courts."

By the end of the 14th century, much of the criminal jurisdiction had waned, though the court retained criminal jurisdiction over all cases in Middlesex, the county in which Westminster Hall was located. The King's Bench had primary jurisdiction over "pleas of the crown," or cases involving the King in some way. The King's Bench had exclusive jurisdiction over these cases, with the exception of revenue matters, which were handled by the Exchequer of Pleas.

The Court of King's Bench did hear appeals from the Court of Common Pleas, eyre circuits, assize and local courts, but it was not a court of last resort; its own records were sent to Parliament for approval. The creation of the Court of Exchequer Chamber created a court to which King's Bench decisions could be appealed, and when the Exchequer Chamber's jurisdiction was expanded in 1830, the King's Bench ceased to be an appellate court. The King's Bench inherited much of the Common Pleas' jurisdiction as a result of the Bill of Westminster and other legal fictions, though the Common Pleas remained the only place where real property claims could be brought.

It therefore goes without saying that the aspect of justice was a creation of the king with the

formation of the King's bench. This can be argued to be the origin of modern-day sovereignty which exonerates the king (sovereign) from any proceedings against him in his own court. In an ancient sense, sovereign immunity was the forerunner of state immunity, based on the classical notion of sovereignty, which said that a sovereign could not be subjected to the jurisdiction of another without his or her consent.

Sovereign immunity, also known as crown immunity, is a legal doctrine that states that a sovereign or state cannot commit a legal wrong and is immune from civil or criminal prosecution in its own courts, strictly speaking in modern texts. State immunity is a similar, stronger rule that applies to foreign courts.

In the United Kingdom, the general rule has always been that the Crown cannot be prosecuted or sued in either criminal or civil cases. Civil actions could only be brought by way of a petition of right, which required the grant of the royal fiat (i.e. permission); suits against the Attorney General for a declaration; or actions against ministers or government departments where immunity had been specifically waived by an Act of Parliament.[1169]

The Crown Cases Act of 1947, which made the Crown (when acting as the government) liable as of right in proceedings where it was previously only liable by virtue of a grant of a fiat, changed the situation dramatically. With a few exclusions, this effectively allowed tort and contract actions against the Crown to be brought. Because ministers' activities are based on the royal prerogative, proceedings to seek writs of mandamus and prohibition were always possible against them.

Criminal proceedings against Her Majesty's Government are still illegal unless the Crown Proceedings Act expressly permits it.[1170]

Because the Crown Proceedings Act only applied to activities taken out by or on behalf of the British government, the monarch is still free from criminal and civil liability. Civil actions can still be brought in theory through the two fundamental processes indicated above: a petition of right or a suit against the Attorney General for a declaration.[1171]

This therefore begs a serious question on the independence of the judicial system. As we shall see later on in this book, it has increasingly become futile to declare a complete independence of the judiciary arm of government in most of the countries that were colonised by Britain.

The Origins of the High Court of England

The Kabaka's unwillingness to appear before his own local court can be compared to the King's or Queen's Bench theory of the High Court of England. In England and Wales, the Queen's Bench

[1169] Halsbury's Laws of England, volume 12(1): "Crown Proceedings and Crown Practice", paragraph 101
[1170] Sunkin, Maurice (2003). "Crown immunity from criminal liability in English law". Public Law (Winter 2003): 716–729.
[1171] Halsbury's Laws of England, volume 12(1): "Crown and Royal Family", paragraph 47, 56

Division, formerly known as the King's Bench Division (during a kingdom) and the Court of Queen's Bench, is one of three divisions of the High Court of Justice, the others being the Chancery Division (previously the Court of Chancery) and the Family.

Queen's or (during a kingship) King's Bench was once one of England's higher common law courts. It was so named because it descended from the English court held coram rege ("before the monarch") and hence traveled wherever the king went. The King's Bench heard trials involving the sovereign or cases involving eminent people who were privileged to be tried before him alone. It could also repair the errors and omissions of the other courts, and it mostly tried criminal or quasi-criminal cases after Henry III's civil wars ended (1216–72). It got its own chief justice in 1268, but it took a long time to lose its strong ties with the monarch and become an independent court of common law.

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[1175] Manchester, A. H. (1980). Modern Legal History. Butterworths. ISBN 0-406-62264-7, p. 130

investigate reform of the courts, the law, and the legal profession. From March 25, 1869, until July 10, 1874, five reports were released, with the first (on the construction of a single Supreme Court of Judicature) being the most consequential. The report disposed of the previous idea of merging the common law and equity, and instead suggested a single Supreme Court capable of using both. In 1870 the Lord Chancellor, Lord Hatherly, attempted to bring the recommendations into law through an Act of Parliament, but did not go to the trouble of consulting the judiciary or the leader of the Conservatives, who controlled the House of Lords. Lawyers and judges, particularly Alexander Cockburn, were vocal in their opposition to the bill. Following Hatherly's replacement by Lord Selborne in September 1872, a second bill was introduced after consultation with the judiciary; while it followed the same lines as the first, it was far more detailed.

The Supreme Court of Judicature Act 1873 consolidated the Common Pleas, Exchequer, Queen's Bench, and Court of Chancery into a single body, the High Court of Justice, but maintaining the differences between the courts. The Queen's Bench ceased to exist on July 6, 1875, with the exception of the Queen's Bench Division of the High Court. The existence of the same courts as divisions of one undivided body was a constitutional oddity that prohibited Chief Justices from being forced to retire or be demoted. As a result, all three Chief Justices remained in office (Lord Chief Justice Sir Alexander Cockburn, Chief Justice of the Common Pleas Lord Coleridge, and Chief Baron of the Exchequer Sir Fitzroy Kelly). Kelly and Cockburn died in 1880, allowing the Common Pleas and Exchequer Divisions to be abolished by Order in Council on December 16, 1880. The High Court was reorganized into three divisions: Chancery, Queen's Bench, and Probate, Divorce, and Admiralty.

Academics believed for a long time that the King's Bench was primarily a criminal court due to a misunderstanding by Sir Edward Coke in his Institutes of the Lawes of England. This was false; no indictment was tried by the King's Bench until January 1323, and no record of the court ordering the death penalty was discovered until halfway through Edward II's reign. With a royal ordinance in 1293 directing conspiracy cases to be brought to the King's Bench and the court's judges acting in trailbaston commissions across the country, the court did have some criminal jurisdiction. The early King's Bench jurisdiction was defined by A. T. Carter in his History of English Legal Institutions as "to correct all crimes and misdemeanours that amounted to a breach of the peace, the King being then plaintiff, for such were in derogation of the Jura regalia; and to take cognizance of everything not parcelled out to the other courts."

By the end of the 14th century, much of the criminal jurisdiction had waned, though the court retained criminal jurisdiction over all cases in Middlesex, the county in which Westminster Hall was located. The King's Bench had primary jurisdiction over "pleas of the crown," or cases

involving the King in some way. The King's Bench had exclusive jurisdiction over these cases, with the exception of revenue matters, which were handled by the Exchequer of Pleas.

The Court of King's Bench did hear appeals from the Court of Common Pleas, eyre circuits, assize and local courts, but it was not a court of last resort; its own records were sent to Parliament for approval. The creation of the Court of Exchequer Chamber created a court to which King's Bench decisions could be appealed, and when the Exchequer Chamber's jurisdiction was expanded in 1830, the King's Bench ceased to be an appellate court. The King's Bench inherited much of the Common Pleas' jurisdiction as a result of the Bill of Westminster and other legal fictions, though the Common Pleas remained the only place where real property claims could be brought.

It therefore goes without saying that the aspect of justice was a creation of the king with the formation of the King's bench. This can be argued to be the origin of modern-day sovereignty which exonerates the king (sovereign) from any proceedings against him in his own court. In an ancient sense, sovereign immunity was the forerunner of state immunity, based on the classical notion of sovereignty, which said that a sovereign could not be subjected to the jurisdiction of another without his or her consent.

Sovereign immunity, also known as crown immunity, is a legal doctrine that states that a sovereign or state cannot commit a legal wrong and is immune from civil or criminal prosecution in its own courts, strictly speaking in modern texts. State immunity is a similar, stronger rule that applies to foreign courts.

In the United Kingdom, the general rule has always been that the Crown cannot be prosecuted or sued in either criminal or civil cases. Civil actions could only be brought by way of a petition of right, which required the grant of the royal fiat (i.e. permission); suits against the Attorney General for a declaration; or actions against ministers or government departments where immunity had been specifically waived by an Act of Parliament.[1176]

The Crown Cases Act of 1947, which made the Crown (when acting as the government) liable as of right in proceedings where it was previously only liable by virtue of a grant of a fiat, changed the situation dramatically. With a few exclusions, this effectively allowed tort and contract actions against the Crown to be brought. Because ministers' activities are based on the royal prerogative, proceedings to seek writs of mandamus and prohibition were always possible against them.

Criminal proceedings against Her Majesty's Government are still illegal unless the Crown Proceedings Act expressly permits it.[1177]

[1176] Halsbury's Laws of England, volume 12(1): "Crown Proceedings and Crown Practice", paragraph 101
[1177] Sunkin, Maurice (2003). "Crown immunity from criminal liability in English law". Public Law (Winter 2003): 716–729.

Because the Crown Proceedings Act only applied to activities taken out by or on behalf of the British government, the monarch is still free from criminal and civil liability. Civil actions can still be brought in theory through the two fundamental processes indicated above: a petition of right or a suit against the Attorney General for a declaration.[1178]

This therefore begs a serious question on the independence of the judicial system. As we shall see later on in this book, it has increasingly become futile to declare a complete independence of the judiciary arm of government in most of the countries that were colonised by Britain.

SUING ROYALTY TODAY

I have laid out the history and consequences that have happened before when there has been an attempt to sue a king. It has proven futile in history, but it seems to have had a slight change in the recent developments.

Male Mabirizi Hassan Kiwanuka sued the Kabaka of Buganda Ronald Muwenda Mutebi II in 2016 after the Buganda Land Board, which controls the Kingdom's land, ordered all bibanja holders to be registered in order to receive lease land titles.

The Kabaka is venerated by the Baganda. Ssabasajja, Magulu Nyondo, and Bbaffe, which mean Man among Men, Legs of Steel, and Our Husband, respectively, all allude to the king of Buganda's invincibility.

Despite this, one man, a Muganda, dared to sue the Kabaka. Male Mabirizi Kiwanuka, who accused the Kabaka of illegally collecting land fees (obusulu) through the Buganda Land Board, met with lawyers representing the king in the High Court deputy registrar Alex Ajiji's chambers on August 29, 2016.

Anyone attempting to sue the Kabaka was unprecedented. Many people were taken aback by this maneuver, but it was all too familiar to Mengo officials. Mabirizi had also sued the Kabaka in 2015 for refusing to follow a traditional court judgement [Kkooti ya Kisekwa] that said the Kkobe clan's head was occupying the seat illegally.

Mabirizi's father was the leader of one of Kkobe's sub-clans. Mutebi allowed the enforcement of Kisekwa's judgement, which replaced the clan leaders of Ngeye Nakinsige, KKobe, in order to avoid a court decision.

These events lifted the veil on the long known and set norm that the Kabaka was untouchable. It struck intimidation to the heart of the executive of the kingdom and therefore made people realise that the king is not by anyway above the law.

[1178] Halsbury's Laws of England, volume 12(1): "Crown and Royal Family", paragraph 47, 56

This is particularly important in the national politics because it spurs confidence in the citizens to sue the executive of the state if and when they have grievances. The head of the executive has majorly been sued in election petitions and nothing more. Such incidences might open the people's eyes to possibilities of severing an individual from the person of the president.

1953-55 CRISIS BUGANDA AGREEMENT

For more than half a century, the Uganda Agreement, 1900; formed the basis of the relationship between Buganda on the one hand, and the British colonial administrators of the Uganda Protectorate on the other hand. The agreement was ostensibly made between willing equal partners - the British having first given 'protection' to Buganda at Buganda's own invitation. A key element of the agreement was the allocation of land to Baganda in a type of freehold tenure that came to be known as 'mailo land'. This effectively excluded European settlers from acquiring land in Buganda. Consequently, there were no white settlers to speak of in Uganda unlike what had happened in neighboring Kenya. The agreement also called for Buganda to be on an equal footing with any future provinces that might be incorporated into the Uganda Protectorate. Because of these provisions, Buganda was able to maintain an unprecedented degree of internal autonomy within the Uganda Protectorate.

During the 1920s and 1930s, the British floated the idea of closer union between their colonies in East Africa, namely: Kenya, Uganda and Tanganyika. This idea was resisted strongly in Uganda and especially Buganda. There were two closely related reasons for the strong opposition. First, it was feared that an East African Federation would open the doors for European settlers in Uganda. The example of how settlers treated the indigenous Africans in next door Kenya, or further afield in Rhodesia and South Africa, left the Baganda under no illusions about what would happen to their society if this came to pass. Second, the Baganda feared that their ancient kingdom, with its cherished customs and culture would be swallowed up in the much larger polity of an East African federation and this they were determined to resist. However reluctantly, the British were forced to abandon the idea of an East African federation.

In January 1952, Andrew Cohen took the reigns as the new Governor of Uganda. He had major reforms in mind including measures such as expanding African representation in Uganda's Legislative Council and the Governor's Executive Council. After negotiations with Muteesa II, the Kabaka; several constitutional reforms were proposed for Buganda itself in March 1953 including having a majority of elected members in the Lukiiko, as well as transferring a number of services such as education, health, and agriculture from the Protectorate Government to the Buganda Government.

It was at this same time however that the British colonies of Northern and Southern Rhodesia as well as Nyasaland were being formed into a federation. This federation was opposed by the Africans concerned but this did not stop the British, under pressure from the settlers in those territories, from forcing through the federation. When the Secretary of State for the Colonies floated anew the idea of a federation for East Africa in a speech he gave in London in June 1953; alarm bells went off in Buganda. There were strong protests from both the Lukiiko and the Kabaka. Indeed, the Baganda begun to mistrust the direction that British rule was now taking their kingdom and strong calls started emerging for Buganda to be separated from the rest of Uganda. Since Buganda had willingly entered into what she considered an agreement of protection in 1900, she now wanted to have her independence and separate identity restored and honored by the British who however resisted. This led to a political impasse.

A series of negotiations between the Kabaka and the Governor failed to break the stalemate. Although the Governor gave assurances that an East African federation would not be pursued without consulting Buganda, Buganda was now more anxious to protect her position by separating from the rest of Uganda. The Governor then proceeded to invoke the 1900 Agreement and demanded that the Kabaka accept specifically the British policy of developing Uganda as a unitary state. This would of course be a betrayal of the aspirations of the vast majority of the Baganda who wanted to maintain a Buganda identity and the Kabaka would not do it. On November 30, 1953; the Governor signed a declaration withdrawing British recognition from Muteesa as the Native Ruler of Buganda under clause 6 of the 1900 Agreement. The Kabaka was immediately deported and by the time the news broke in Buganda, Muteesa was already under custody in Britain. This was an unimaginable shock to all the Baganda and it led to a full-blown constitutional crisis. The Baganda refused to elect a replacement king and instead started a vigorous and effective campaign to have Muteesa restored to his throne.

Eventually a Constitutional Committee was selected by the Lukiiko which with the help of Sir Keith Hancock as mediator, undertook negotiations with Governor. Negotiations were carried out in 1954 at the premises of the Anglican cathedral at Namirembe. The final results of the negotiations are contained in the Agreed Recommendations of the Namirembe Conference. These formed the basis of a new agreement between Buganda and the British which was signed in 1955, on the Kabaka's triumphal return from exile.

THE KABAKA CRISIS OF 1966

The history of Uganda is widely known and has been taught over the years. The most important books of the country were built upon this history[1179] and most of the decisions made today are inspired by the same. This history holds ever close to the hearts of the Ugandans and defines who they are. It has been intimated before; for one to know where he is going, he must know where he is coming from. In the status quo of this country, its history has never played a greater role in informing its course than it can now.

Uganda's independence in 1962 was a symbol of hope and freedom, but it also represented an opportunity for this East African country to become a sovereign nation and for all Ugandans to compete on an equal footing with their former political opponents both within the country and in the changing global arena. Beyond that, self-determination promised peace, stability, and a united nation; nevertheless, these dreams were destroyed four years later.

The year 1966 was a particularly difficult one in Uganda's history. In that year, there was a violent attack on the palace that had a long-term consequence, as well as the overturning of the 1962 Independence Constitution. A series of disasters struck the country, disrupting not just the calm and security it had experienced during its first four years of independence, but also resulting in the loss of lives. This time had repercussions for the country, whose roots are shrouded in mystery and have resulted in conflicting historical accounts.

The Political upheaval of 1966.

Uganda was declared independent in the year 1962. The government that took over power then bestowed the then king of Buganda; Mutesa II as the first president of the independent republic. The president of the Uganda People’s Congress; Dr. Milton Obote was the Prime Minister at the time. In 1966, the two leaders were muddled in a political conflict in Buganda that led to the president’s exile. This political turmoil is what is famously known as the 1966 Buganda Crisis in Uganda’s History today.

Milton Obote aided in the formation of the Uganda People's Congress, a political party in Uganda, in 1960. (UPC). The UPC's goal was to weaken the "Mengo Establishment," a group of orthodox Baganda who ruled the Buganda sub-national kingdom. The Mengo establishment was riven by rivalries and infighting, but most of its members, who were Protestant Christians, were united by their loathing of the Catholic-dominated Democratic Party (DP).

In Uganda's first democratic national elections in 1961, the DP earned a majority and formed a government. Both the UPC and the conservative Baganda despised the DP's Catholicism, but their

[1179] The preamble of the Constitution of Uganda, 1995, as amended

principles were fundamentally opposed. Despite this, the UPC tasked Grace Ibingira, a conservative member of its ranks, with contacting the Baganda in order to form an alliance to depose the DP. He was chosen for the post by the UPC because he was personally acquainted with Mutesa II, the Kabaka (King) of Buganda. Following numerous rounds of negotiations, the UPC and Baganda leaders met for a summit and struck an accord. The Kabaka Yekka (KY), a traditionalist party that allied with the UPC, was formed soon after by the Baganda.

Obote was tasked with creating a government after the UPC won the national elections in April 1962. He was named Prime Minister of a coalition government led by the UPC-KY. Obote took control of the security services and armed forces, while the KY held mostly minor positions. Ibingira was appointed to the position of Minister of Justice. On October 9, 1962, Uganda gained independence from the United Kingdom. Mutesa was elected President of Uganda in 1963, a mostly ceremonial position. Obote backed him in the election in order to appease the Baganda people.

In 1964, Ibingira began a battle for control of the UPC, with the eventual goal of deposing Obote as party president. He ran for the UPC secretariat-general against the John Kakonge at a party conference in April. He persuaded Obote that Kakonge was a threat to the UPC's leadership. Ibingira defeated Kakonge by two votes with Obote's help. He utilized his new position to expel a lot of lefties from the party. Meanwhile, Mutesa grew increasingly concerned that the UPC would strip his kingdom of its traditional autonomy, and he realized that in order to keep power, he would need to gain clout in national politics. He then proceeded to encourage Baganda members of the legislature to join the UPC in order to strengthen Ibingira's position and unseat Obote, allowing for a reorientation of the UPC-KY alliance that would be more beneficial to Buganda. Ibingira gathered a coalition of non-Baganda southerners known as the "Bantu Group" as his working relationship with Mutesa developed. Meanwhile, Obote began pleading with DP MPs to defect to his party and join him in Parliament. He was able to persuade several people to do so, including the DP floor leader. With the UPC securing a majority in Parliament, Obote proclaimed the alliance with KY disbanded on August 24, 1964.

In December 1964, Ibingira came to the United States under the guise of checking on his ranch in Ankole and raising cash for anti-socialist groups. When he returned, he successfully used the funds to grow his fan base. By 1965, it was clear that the UPC had split into two wings, one commanded by Ibingira and the other by Obote. The police prevented Ibingira from convening a UPC conference in his capacity as party secretary general.

The 1962 constitution provided Buganda federal autonomy, but it did not resolve a territorial issue between the Buyaga and Bugangaizi counties. With the permission of the United Kingdom,

Buganda seized the two districts from the Kingdom of Bunyoro around the turn of the twentieth century. Before independence, Bunyoro had sought the restitution of the "lost counties," but this did not happen. On August 25, 1964, Obote introduced a bill in Parliament that called for a referendum to be held on the issue. Mutesa and Obote took conflicting positions on the matter, with the former wanting the areas to remain in Buganda and the latter wanting them returned to Bunyoro. Mutesa organized for huge numbers of his subjects to settle in the counties in an attempt to manipulate the vote. Obote thwarted his idea by stipulating that only those who had registered for the 1962 elections in the area could vote in the referendum. Mutesa then tried unsuccessfully to bribe the electorate. The referendum was held on November 4, 1964, and the voters decided to return to Bunyoro by a large margin.

The vote's outcome reinforced Obote's support in Bunyoro while infuriating Buganda. Baganda rioted and attacked government politicians in their kingdom. Michael Kintu, Buganda's Kattikiro (Prime Minister), resigned on November 9 and was succeeded by Jehoash Mayanja Nkangi. Mutesa was progressively pushed to resist Obote by conservative Ganda leaders like as Amos Sempa. Mutesa declined to sign the requisite forms for the transfer of authority when Obote brought them to him as President, saying, "I can never give away Buganda land." The ordeal strained relations between the two men, so Obote signed in his stead. The transfer became effective on January 1, 1965.

On February 24, 1966, Obote declared Mutesa's removal from office as President, citing his reaction to the referendum on the lost counties, his ordering of troop movements without ministerial input, and his request for foreign military help (Mutesa later admitted to "sounding out" an ambassador for assistance). Mutesa condemned Obote's actions, ordering him to leave Buganda territory and pleading with UN Secretary-General U Thant to intervene.

On the 22nd of May, Obote called a conference in the presidential lodge in Kampala with the Ministers of Defense, Interior, and the Inspector General of Police. Following a consideration of the crisis, Obote declared that military intervention was required. After the conference, Obote called Amin and asked him to report to the lodge. When Amin arrived, Obote told him to attack Mutesa's palace first thing the next morning.

Thousands of monarchists attempted to build up blockades to hamper Amin's forces and engaged in ongoing street fights after the Kabaka called for his subjects to defend him. However, in comparison to army units, the Kabaka's bodyguards were poorly equipped with hunting rifles, and the palace was overrun and burned ablaze two days after it was encircled. During a cloudburst in the middle of the conflict, Kabaka Mutesa II managed to flee the compound.

The King was caught off guard when Obote instructed his men to deliver Mutesa to him "death or

alive." It was a lost battle, with only 120 guards confronting the Uganda Army's Lee–Enfield rifles, three carbines, six Sterling machine guns, and six automatic rifles. The [royal] guards recognized that the only way to safeguard the King was for him to depart. Rain aided the royals because it hindered the assailants' progress. Mutesa and 20 royal soldiers jumped over bodies as they escaped, hauling each other over the palace's six-foot-high masonry walls. Kabaka Mutesa, however, landed in a perilous position, injuring his back bone. But the King was free, and that was most important.

Mutesa then flagged down a passing taxi. The driver led him to the Rubaga Cathedral, where the priests were enjoying breakfast (including Emmanuel Wamala and Emmanuel Nsubuga). They gave him clerical robes and arranged for a car to transport him to Busiro County after he described what had happened. Over 200 bodies of slain Baganda were taken to the morgue by volunteers, while the military buried untold thousands in mass graves. Tanzanian President Julius Nyerere, who backed Obote and despised Mutesa, stationed a sizable force along the border to prevent the Baganda from reorganizing and launching a counter-offensive.

The Kabaka and two of his bodyguards were able to flee to Burundi and exile within a few days. He was granted asylum in the United Kingdom after brief spells in Nairobi and Addis Ababa, where he remained until his death in 1969, amid unknown circumstances. Various Baganda leaders, royal family members, and others believed to be devoted to the Kabaka were imprisoned.

During the fighting and looting that followed, the Lubiri Palace was nearly completely destroyed. The Mujaguzo drums were among the historic items and royal regalia seized and destroyed. For many Baganda, the desecration was viewed as an apocalypse, and they suffered greatly as a result. Kabaka Mutesa II died in exile, but a new ruler, Idi Amin, allowed him to be buried in Buganda. Amin pushed the story of a Muslim child from the country's poor periphery against Uganda's ruling tribe's Christian chief. At least in some sub-populations, the mystique surrounding this event gave him more legitimacy.

Suits were filed against Obote's government as a result of the crisis. Members of the Mengo establishment who had been imprisoned by the new regime filed a lawsuit seeking their freedom. In his decision for Uganda v Commissioner of Prisons, Ex Parte Matovu, Chief Justice of the Supreme Court, Sir Egbert Udo Udoma, gave it to them. When the Buganda administration asked the court to declare Obote's actions illegal, Udoma concluded that Obote had staged a coup, which was a legal manner of gaining power under international law. As a result, he pronounced Obote's government to be valid and the new constitution to be in effect.

Former cabinet ministers were deported to Karamoja under a colonial ordinance known as the Deportation Ordinance, which allowed for the imprisonment and expulsion of "undesirable" individuals. They then requested a warrant of habeas corpus from the courts. A Ugandan High

Court judge considered the detention legal and refused the petition in Grace Ibingira & Others v Uganda, but the East African Court of Appeal decided that the ordinance infringed a Ugandan citizen's fundamental right to freedom of movement and ordered a writ of habeas corpus to be issued. Under the colonial Emergency Regulations, the ministers were released and then promptly re-arrested outside the Buganda courts, and the administration passed the Deportation Act to cover its conduct. The ministers filed a fresh lawsuit, but the court upheld the new law's validity after a hearing. The cabinet ministers were imprisoned until Amin's takeover of power in 1971, when he released them.

Following the crisis, Obote sought to consolidate his authority by expanding his military appeal through patronage, including increased defence spending in the 1966 budget. Soldiers who had remained faithful throughout the crisis were awarded for their dedication.

A. Criticisms to the Origins of the Crisis.

i. The indirect rule system

Although it is true that Obote's strong approach toward Buganda and Buganda's regionalism had a part in the emergence of the 1966 Ugandan Constitutional crisis, several academics have questioned whether it was mostly due to the foregoing. They re-examine the underlying social and political forces that contributed to the pandemic, as there is clear evidence that colonialism's residual impacts played a part. The 1966 constitutional coup is engrained in Ugandans' memories and history, and is thus frequently mentioned; nonetheless, the lack of an official commission of inquiry into the triggering circumstances that led to the crisis means that the basic causes are unclear.

While some political participants, such as Mayanja-Nkanji, a former Katiikiro (prime minister) of Buganda, blame the crisis on Milton Obote's hostile approach against the kingdom of Buganda, others, such as Akena Adoko, blame the problem on Buganda's regionalism. In this book, I argue that, with or without the above, the crisis was bound to happen due to the existence of permanent impacts brought about by the colonial legacy, which played a larger role than has previously been acknowledged.

The effects of the 68-year British rule and their impact on Uganda's post-colonial internal dynamics are at the root of the 1966 constitutional issue. The 1966 crisis was principally the result of a simmering colonial legacy that ultimately erupted into physical violence as the struggle for power came to a head.

The dispute over colonialism's legacy as a source of strife across the African continent is never-ending. Several academics claim that colonialism wreaked havoc on Africa, and that most of the

continent's ongoing crises have their roots in colonial history.[1180] This line of thought is supported by Muddoola, 1996, and Karugire, 1980, who argue that due to preferential treatment of the Kingdom of Buganda, redrawing of borders, and the indirect rule system, the Ugandan state had not been emancipated from the impact of such colonial policies by 1966.

The employment of the indirect rule method was one of the most common features of British authority in Uganda. The British preferred built indigenous government structures to run colonies on Britain's behalf under this arrangement.[1181] The Baganda became Uganda's primary source of colonial agents. They were used to carry out the colonial agenda while executing the indirect rule system, which benefited both the British colonialists and the Baganda. As a result, according to Lonsdale (1983), the British were given a strong foundation from which to expand throughout the remainder of Uganda, and the Baganda were also used as first administrators in various sections of the protectorate outside of the Kingdom of Buganda. The Kingdom of Buganda rose to prominence as a result of this approach, frequently at the expense of the protectorate's other provinces. Baganda subjects were employed in the Kingdoms of Bunyoro and Toro, as well as in the province of Kigezi, in the west of the country. Baganda administrators oversaw the areas of Teso, Budama, Bukedi, Busoga, and Bugishu in the east, and the territory of Lango in the north.[1182]

As beneficial as the British-Baganda collaboration was to the Buganda, it also marked the start of anti-Baganda attitudes in many sections of the country outside of the Kingdom of Buganda, where the Baganda were employed at the expense of locals. The Baganda imposed their centuries-old political system and administrative institutions in newly colonized areas as the British favored administrators in the process of spreading colonial power, causing animosity among other ethnic groups.[1183]

The chiefs nominated to fill the newly imported Buganda structures, as well as Baganda or residents of the area, were instructed to use the Buganda titles in these newly colonised areas, causing animosity against Buganda. This became a source of discontent, and the 1903 Badama revolts in eastern Uganda against British colonial control illustrate the frustration with the Baganda, who were perceived as British henchmen.[1184]

Anti-Buganda sentiments spread throughout the protectorate as a result of what colonized people outside Buganda Kingdom saw as cultural imperialism. The Baganda colonial agents, for example, had insisted on the adoption of the Luganda language as the official language in many of these

[1180] Musisi F., Herbst R.O., & Mahajubu A., 2018, Unlocking The Mysteries Of The Origins Of The 1966 Ugandan Constitutional Crisis, Global Journal of Arts, Humanities and Social Sciences Vol.6, No.3, pp.14-25.
[1181] Ibid
[1182] "Uganda Protectorate, Secretariat Minute Paper No 322", Eastern Province, Entebbe National Archives, A46/133,
[1183] "Uganda Protectorate, Secretariat Minute Paper No 2", the Kakungulu Estate Entebbe National Archives, C2588
[1184] Ibid

districts. The use of Luganda became one of the most infuriating features of Buganda's governance for these people. When Buganda entrenchment through Baganda bureaucrats began to affect other local customs, these feelings were exacerbated.[1185]

Furthermore, Baganda agents are accused of being involved in corruption, which has resulted in individuals acquiring riches in the areas under their control. The letter from the Provincial Commissioner, Eastern Uganda, to the Hon Chief Secretary finest exemplifies this personal aggrandizement.[1186] He reminds out that Kakungulu and his associates seized control of Mbale County, which covers 80 square kilometers. In addition to land expropriation, Kakangulu and his followers made a significant profit by levying an annual fee of 11 shillings on individuals who lived on the land. The Bagishu, who made up the majority of the population in the area, saw paying rent for what they saw as communal tribal territory as a grave injustice. The Bagishu were enraged even more by the fact that the taxes they had paid had not been used for their advantage.

The Baganda took use of the Protectorate's indirect control structure to dominate and exploit others, but this, too, would have bad consequences for them in post-colonial Uganda.

ii. The Kingdom of Buganda received special treatment.

Another feature of British colonial control in Africa was the preferential treatment of one ethnic group over another. In the case of Uganda as a protectorate, the British gave this preferential status on the Kingdom of Buganda at the expense of the neighbouring kingdoms and chiefdoms throughout the colonial period. This preference for the Monarchy of Buganda is understandable, given that Buganda had been an autonomous kingdom for about 500 years prior to the arrival of the British. As a result of the lengthy British history of favouring existing monarchy, kingdom states like Buganda would be given preference, which, combined with its size and central location in the protectorate, explains why Buganda was chosen.[1187]

Unlike many other sections of the Uganda protectorate, the Kingdom of Buganda was controlled by legal agreements with the colonial overlord throughout the colonial period as a result of this cooperation. Notably, treaty rights that prioritized Buganda interests over those of other ethnic groups in the country were included in these agreements.[1188] The kingdom received special treatment in the colonial era which positioned the region above the others and revealed a special relationship between Buganda and the British that lasted 68 years.

The foregoing relationship paved the way for an adversarial relationship between Buganda and the rest of Uganda's ethnic groups. Notably, the Kingdom of Buganda maintained a degree of autonomy in the administration of its affairs, allowing its kings and chiefs to govern while also

[1185] "Uganda Protectorate, Secretariat Minute Paper no 898", Buganda, Entebbe National Archives, A46/16.
[1186] "Letter to Hon Chief Secretary from the Provincial Commissioner", Eastern Entebbe National Archives, C2577
[1187] Gingyera-Pinchwa. (1978), Apollo Milton and his Times. Nok.
[1188] Supra note 14

preserving Buganda's political institutions. According to Johannessen[1189], this gave Buganda a distinct and privileged position in both the colonial and post-colonial eras in comparison to other Ugandan kingdoms and tribal areas. In essence, the other kingdoms were administered more directly as districts, similar to how the protectorate's tribal lands were governed. This was clearly preferential treatment for Buganda, which engendered resentment in the other territories. After the British left, opportunistic politicians took advantage of this resentment to rally other ethnic populations against Buganda, resulting in the political chaos of 1966.

iii. The adjustment of colonial lines

Uganda, like many other African countries, was clearly created during the colonial period, with its physical borders mostly established by administrative convenience and economic concerns, as well as natural boundaries such as mountain ranges and river beds, rather than by people. When it came to the establishment of internal boundaries, British colonial interests did not align with Ugandan ethnic trends. As a result, numerous different ethnic groups were grouped together in territories that did not reflect their ethnic diversity, resulting in increased ethnic tensions. The transfer of the counties of Buyaga and Bugagainzi from the kingdom of Bunyoro to the kingdom of Buganda, subsequently known as the lost counties, was one such incident in Uganda. The majority of the people in this area were Banyoro, who had been enslaved by their traditional adversaries, the Baganda.[1190]

According to Bunyoro's telegram to the Resident, Buganda, the loss of territory to Buganda was viewed as a punishment for fighting British colonialism.[1191] Furthermore, they were enraged that this lost area was a prize for the Buganda collaborators, whom they perceived to be their traditional foe. As a result, tensions between the two prominent Ugandan ethnic communities grew even stronger. This was a clear testimony that the redrawing of boundaries had not only irrevocably altered ethnic realities in Uganda but also strengthened ethnic rivalry in Uganda. J.R.P. Postlethaite, the British District Commissioner of Bunyoro in 1927 and 1928 noted that "the inclusion of this area in the Kingdom of Buganda is considered to be one of the greatest blunders we committed."[1192] According to Kenneth[1193], indeed the attempt to solve this problem in postcolonial Uganda unleashed one of the most fervent political struggles Uganda has known.

The alteration of the borders of colonial rule were not only interior. Uganda as a country was also shaped as a trade between colonial powers. Originally, Uganda as it is defined today, had bigger

[1189] Johannessen, C. The Restoration of Kingship in Uganda: A comparative study of Buganda and Ankole, p.18
[1190] Supra note 22
[1191] "Bunyoro Lost counties, Preliminary correspondence between the Mubende-Banyoro Committee and the Resident", "Buganda early in the 1920's" Entebbe National archives, REL/s/121
[1192] Lwanga-Lunyiigo, S. (2007). The Struggle for Land in Buganda: 1888-2005. Wavah Books.
[1193] Ingham, K. (1994). Obote: a political biography. Psychology Press.

outreaches into modern Kenyan territory. The eventual shaping of Ugandan borders was by an agreement between the colonial masters.

As with the lands being colonized by Rhodes at this same period in southern Africa, the British government is unwilling to take direct responsibility for the region of east Africa which is now its acknowledged sphere of interest. Instead, it delegates to a commercial company the right to administer and develop the land. In 1888, the Imperial British East Africa Company was founded, a year before Rhodes' British South Africa Company.

The corporation is responsible for a territory that runs from the east coast to the kingdom of Buganda on Lake Victoria's northwest bank.

Everyone recognizes that the prosperity of this region hinges on the construction of a railway from the coast to Lake Victoria, but circumstances conspire to place this undertaking much beyond the East Africa Company's capabilities. Buganda is a recurring ache that drains their energy and finances.

Because Germany lies in a sense beyond Lake Victoria, it can argue that this region, Uganda's most powerful kingdom, is not protected by the territorial agreement with Britain. Furthermore, the unstoppable Karl Peters has forced the issue. He arrives in Kampala in 1890 and convinces the kabaka to sign a contract admitting German protectorate over his country.

When the British prime minister, Lord Salisbury, presents a solution that Berlin, surprisingly, approves, a potentially dangerous confrontation between the imperial powers is averted. In exchange for German recognition of British protectorates in Zanzibar, Uganda, and Equatoria, Salisbury offers the tiny and seemingly useless island of Heligoland (in British ownership since 1814). (the southern province of Sudan). Germany, on the other hand, benefits from the agreement. Heligoland goes on to serve as a vital naval station during two world wars.

Meanwhile, in Buganda, a civil war breaks out between factions commanded by British Protestant missionaries and their French Catholic opponents.

Heavy gunfire erupts between and among the four hills that make up Kampala in January 1892. The kabaka's palace sits atop one of the hills. The French have finished a Catholic cathedral made of wooden poles and reeds on another. Protestants are constructing their church on one-third of the land. On the fourth is Frederick Lugard's fort, which he built for the company because he is the only warrior with a Maxim machine gun.

Lugard is victorious. However, the loss of life and property in this unseemly European quarrel demonstrates that the East Africa Company is incapable of carrying out its responsibilities.

In 1894, the British government makes Buganda a protectorate. Two years later, British control is extended to the western kingdoms of Ankole, Toro, and Bunyoro, becoming the Uganda

Protectorate with Buganda.

In the meantime, the much bigger region of Kenya has remained reasonably tranquil, despite the East Africa Company's lack of success there. However, before taking over Uganda, the British authorities must ensure that the new protectorate has access to the sea. As a result, the company's charter is revoked in 1895 (with a £250,000 compensation). As the East Africa Protectorate, Kenya becomes yet another additional obligation for the British government.

iv. The flaws in the independence constitution of 1962

The 1962 Constitution was the culmination of a lengthy and perilous constitutional route that began during the colonial period, and its promulgation in 1962 is considered part of the colonial heritage. The independence constitution had various flaws that contributed significantly to post-colonial Uganda's political troubles. In the first case, the 1962 Constitution failed to rein in Buganda's power: under Article 74 (1), (2), and schedule 7 of the Constitution, Buganda's federal powers and responsibilities were vast.[1194]

Buganda was also allocated independent and important sources of revenue, including money from progressive tax and entertainment tax, in order to enable it to effectively implement its federal autonomy. In addition, Buganda was entitled to 50% of the annual statutory contribution from general revenue and 50% of assigned revenue from the Kingdom of Buganda. In addition, the report of the London Constitutional Conference to further strengthen this autonomy, Buganda was granted its own police force, legislature and judiciary which had the same status as other institutions in the rest of Uganda.

In other words, the 1962 Constitution devolved power to the Kingdom of Buganda, leaving it as a strong unit inside Uganda with nearly the same status that it had during the colonial era. As Nsibambi[1195] points out, the 1962 Constitution contributed to Uganda's political challenges by failing to redistribute power evenly among the country's minor ethnic groups. It had endorsed the historical inequality in treatment between Buganda and the rest of Uganda, a fact that enraged Ugandans in other parts of the country. As a result, anti-Buganda attitudes from the colonial period were carried over into the post-colonial period, which was a prescription for catastrophe, as opportunist politicians took advantage of the situation to foment the 1966 upheaval.

Buganda's federal powers, as stated in the Independence Constitution, had also hampered the National Assembly's ability to function. The National Assembly lacked the jurisdiction to legislate on the Kabaka's powers, responsibilities, and obligations. Furthermore, Article 73 gave the Lukiiko the supreme authority to make laws for the kingdom of Buganda's peace, order, and good

[1194] "Independence Constitution, Schedule 7", pp.10-13 Entebbe National Archives, C10736/ DGc 230 III.
[1195] Nsibambi, A. R. (2014). National integration in Uganda 1962-2013. Fountain Publishers.

government. The Independence Constitution, by prioritizing regional interests over national ones and elevating regional leaders above national leaders, stressed divisiveness rather than unity, and the system was doomed to fail. Indeed, Kanyeimba[1196] correctly points out that no administration, no matter how capable, could have controlled the country's development without infringing on the component states' reserved and residual rights.

Furthermore, state authority had been eroded by the establishment of other centers of power, and it was these seeds of conflict sown in the constitution that sowed the seeds of the subsequent years' crises. Land ownership, education, and administrative personnel issues were all delegated to regional assemblies like the Lukiiko.[1197] This would render the central government nearly powerless in areas where it would have needed to reform and modernize in order to achieve national unity. In other words, while the central government was charged with planning efficiently for the country, the instruments to do so were out of reach.

v. The government's weak coalition

Uganda's first post-independence government was a coalition formed by an agreement between the Kabaka Yekka (KY) and the Uganda People's Congress (UPC) (UPC). Prior to 1962, such an alliance had never been envisaged because each of these parties held opposing viewpoints and political objectives on practically every topic imaginable, aside from their ethnic differences.[1198] The UPC was founded to challenge Buganda's regionalism, and it served as a vehicle to gather opposition to Buganda's power before independence. It was predominantly a northern-dominated party. On the other hand, the Baganda's isolationist attitudes were embodied by the KY, which was launched on June 10, 1961. It was established to safeguard the Kabaka's and Mengo's Protestant establishment's threatened positions.[1199]

The British and the Mengo Establishment formed the coalition in order to prevent Catholic Ben Kiwanuka, the head of the Democratic Party (DP) and Uganda's first Chief Minister, from succeeding them. As a result, the British persuaded Obote and Muteesa, the Kabaka of Buganda, who had been bitter enemies, to put their differences aside and work together. This helps to explain Obote's rapid shift from an ardent anti-Buganda stance to a pro-Buganda stance.[1200]

The construction of this coalition administration, on the other hand, has been regarded as one of the most dishonest political enterprises ever attempted by Ugandan officials. Because Obote and Muteesa had opposing agendas, neither the KY nor the UPC had any illusions about the alliance's

[1196] Kanyeheimba, G.W. (2002). Constitutional and Political History of Uganda from 1894 to present. Centenary Publishing House.
[1197] Supra note 28
[1198] Jorgensen, J. J. (1981) Uganda: A Modern History. Croom Helm Limited.
[1199] Mutibwa, P. M. (1992). Uganda since independence: a story of unfulfilled hopes. Africa World Press.
[1200] Supra note 14

long-term viability.[1201] The main goal of UPC was to use the alliance to gain power by denying the DP of support in Buganda, but the Mengo establishment wanted to keep their privileges. As a result, disparities between the two returned as soon as the DP was defeated.[1202] Although Muteesa's status was mostly ceremonial, the new post provided him with dual loyalty as Kabaka of Buganda and Head of State.[1203] As a result, he would have conflicting functions as a head of state and Obote as Prime Minister, and Obote's objectives would be at odds with those of Buganda.

vi. The Consequences of the Uganda People's Congress Control Battle in Buganda

Uganda's political stability was dependent on the UPC's strong united leadership as the ruling party; nevertheless, the UPC was formed by a loose coalition of ethnic groups who came together to transform their marginalized status and eliminate Buganda's dominance.[1204] As a result, the organization's leadership became factionalized, with each faction leader representing a local constituency that was often ethnically distinct from the others. For example, Obote's power base was among the Langi in the north of the country, George Magezi's was among the Bunyoro in the west, and John Babiha's was among the Tooro in the mid-west. W.W. Rwetsiba's support base was in the southwestern Ugandan district of Ankole, whereas William Nadiope's was in the eastern Ugandan region of Busoga. Felix Onama hails from Uganda's west Nile area, whereas Cuthbert Obwangamoi hails from the country's far east.[1205]

Each of these regional leaders was an independent leader who did not need the party's or president's backing to be elected in their areas. These factions, along with John Kakonge, the UPC secretary general, were fighting for control of the party. By 1964, considerable realignment of political forces along regional and racial lines in the North and South had begun to take shape. Grace Ibingira commanded the southern monarchist Bantu group, while Obote led the northern Nilotic republican group. Control of UPC was critical because whomever had it would eventually have control of the country. The Bantu faction accused Obote of betraying his own aim of promoting national unity by demonstrating favouritism toward northern Uganda's ethnic groups.

As a result of the growing ethnic rift within the party, a number of Bantu ministers and prominent Baganda figures began preparing to depose Obote in mid- 1965 in order to reverse the cabinet's perceived northern dominance.[1206] The battle for control of the UPC had reached a breaking point.

[1201] Kasozi, A. B. K. (2013). The Bitter Bread of Exile. The Financial Problems of Sir Edward Mutesa II during his final exile, 1966-1969: The Financial Problems of Sir Edward Mutesa II during his final exile, 1966-1969. Progressive Publishing House.
[1202] Supra note 32
[1203] Mittelman, J. H. (1975). Ideology and politics in Uganda: from Obote to Amin. Ithaca, NY: Cornell University Press.
[1204] Ssemwanga Kivumbi. (2013). Ssekabaka Muteesa II Eyeerabirwa. Grapet Traders.
[1205] Karugire, S.R. (1980). A political History of Uganda. Heinemann Educational Books
[1206] Ingham, K. (1994). Obote: a political biography. Psychology Press.

The competition between Obote and Ibingira for the party's leadership, and, by extension, the leadership of Uganda, raged on, with the outcome determining who would dominate Uganda's political progress.

The infighting in the UPC and the threat from Buganda, which had stayed solid in its opposition to Obote's reign, were now the two greatest threats to his power as the country's prime minister. He used violence against his opponents, and rather than containing the problem, his actions just pushed it to a critical level, culminating in a crisis in May 1966. If he was to survive as both the leader of UPC and the Prime Minister, Obote knew he had to stay one step ahead of his political opponents. The existence of these dangers established in Obote a deep-seated fear of both his opponents in the party and in Buganda, which meant that he had to block any dissent for the sake of his own political life.

vii. The Dictatorial Tendencies of Obote

Obote's dictatorial behavior originated from the colonial legacy's structural flaw, which was already mentioned. While forming the new superstructure of independent Uganda's political administration, the British did not abandon the oppressive colonial system; rather, they emphasized autocracy by transferring the autocratic executive and political powers that had previously been vested in the British Governor and his British Chief Secretary to the office of the Prime Minister of an independent Uganda. As a result of inheriting the colonial instruments of authority, like as the police and the King's African Rifles, Obote accumulated enormous influence (viz. the Uganda Army). This did not imply that he had to abuse his position; rather, he chose to be an authoritarian and dictatorial leader because he couldn't deal with criticism and disagreement.[1207]

Obote treated individuals who resisted him with contempt and blatant disregard for human rights and the rule of law, using the northern dominated army and a spy service under the innocent name of the General Service Department, headed by his first cousin Adoko Nekyon.[1208] Five cabinet officials, including Ben Kiwanuka, the first Chief Minister, and Brigadier Shaban Opolot, the leader of the armed forces, were all held indefinitely, while five members of parliament who refused to acknowledge and accept the 1966 constitution lost their seats.

Between 1962 and 1966, Obote imposed his Ugandan principles on the Buganda by taking a hostile position toward the monarchy, claiming that this was part of the process of forging a national identity in the newly formed Uganda.[1209] Obote's outbursts appear to arise from his dissatisfaction with the fact that regional governments had become a microcosm of the national government rather

[1207] Supra note 14
[1208] Supra note 33
[1209] "Speech by the Prime Minister the Hon DR.AM Obote, MP," on Thursday 3rd March 1966, Uganda National Assembly Archives.

than its local outpost.[1210] Obote gradually suffocated the kingdom's institutions and weakened its status within the country. In 1964, for example, he established legislation limiting the KY's activities to Buganda alone. In this sense, Obote's concerted and ultimately futile efforts to destabilize Buganda had made the Baganda into the most vociferous opponents, heightening tensions between Buganda and Obote.[1211] In 1966, Obote launched a violent attack on the kingdom of Buganda with the help of northern troops and ministers.

viii. The 1960s avaricious political system

Uganda was also plagued by extensive corruption at many levels of government in the 1960s, owing to the lack of strong institutions that should have acted as checks and balances for the administration. As a result, leaders like Obote were able to take advantage of these flaws in order to stage a constitutional coup in 1966.

To begin with, bribing of members of the national assembly severely weakened the institution's independence and its ability to control central government excesses. Within the ruling UPC, the Obote government used patronage and the promise of future rewards to carry out schemes that would strengthen his dictatorial powers. Similarly, opposition members of the national assembly from both the DP and KY who crossed the floor to join the UPC on the offer of government posts and salary were similarly affected. Following his conversion to UPC, opposition leader Basil Bataringaya was appointed Minister of Internal Affairs. James Ochola, Vincent Rwamwaro, and Stanslaus Okurut were among the DP members who followed him. Several DP members of the national legislature from the Kingdom of Bunyoro opted to join the UPC after Obote promised to hold a referendum to return to Bunyoro the lost counties that had previously belonged to Buganda.[1212] Minister of Finance William Kalema, who led a group from Kentucky, was appointed. Ironically, the UPC was a member of the coalition government, but it bribed members of the KY, its coalition partner, to switch sides. Furthermore, all of the aforementioned persons joined the UPC without informing their electorates, which amounted to treason and a loss of democratic values, thereby producing a dictator, namely Obote.

Furthermore, those who joined the government allowed the UPC to acquire an artificial majority with dire consequences. By 1966 the National Assembly had 74, 9, 8 and 1 member(s) of the UPC, the DP, the KY and the Independents respectively. This was not a reflection of the true strength of UPC in the country. Without this artificial majority, it is unlikely that Obote could have achieved what he did in 1966; the abrogation of the 1962 constitution, acting decisively against Muteesa and

[1210] Sathyamurthy, T. V. (1986). The Political Development of Uganda, 1900-1985 (Vol. 1). Gower.
[1211] Hansen, H. B. (1977). Ethnicity and military rule in Uganda: A study of ethnicity as a political factor in Uganda, based on a discussion of political anthropology and the application of its results. Nordiska Afrikainstitutet.
[1212] "Parliament Hansards", 3rd Session 1966, Vol. 67, Uganda National Assembly Archives.

Buganda.

Those who joined the government also helped the UPC gain a false majority, which had disastrous implications. The UPC, the DP, the KY, and the Independents each had 74, 9, 8, and 1 members in the National Assembly by 1966.[1213] This was not a genuine picture of UPC's overall strength across the country. Without this fictitious majority, Obote would not have been able to accomplish what he did in 1966: abrogating the 1962 constitution and striking decisively against Muteesa and Buganda.

He also disregarded resolutions passed by the legislature. When parliament passed a resolution ordering Idi Amin's suspension and an investigation into his bank account, which contained 17,000 pounds sterling in cash in the form of gold bars stamped with the Belgian Congo government's stamp, Obote ignored it and later promoted Amin to the rank of Major General and Army Commander. On February 24, 1966, he would arrest five cabinet ministers: Grace Ibingira, the Party Secretary General at the time, Balaki Kirya, George Magezi, Dr.S.B Lumu, and Mathias Ngobi, who had urged a probe into the gold issue. This provides strong proof that Obote was a benefit of the gold affair rather than an innocent bystander, and that his actions exacerbated political tensions in the country.

Additionally, venal politicians also existed at Mengo, which was one of the power centres in the newly independent nation. For instance, although Buganda had GBP 1 million in its coffers by 1958, by 1960 this had dwindled to a mere GBP 465,000 and 1963, it was in the red by GBP 226,863.

By 1965, the Kabaka's government was on the verge of collapse; unfortunately, the Kabaka's ministers were the biggest offenders, with nepotism and insensitivity reaching new heights. Despite the fact that they were operating a deficit budget in 1965, these officials took out a personal loan of GBP 200,000.

The above acts by Mengo's leadership resulted in a significant political impasse between the central government and Mengo. Obote was concerned about the Mengo establishment's financial misdeeds, which resulted in protracted wranglings between the central government and Buganda, exacerbated already strained relations between the two parties, and inevitably contributed to the explosive atmosphere that culminated in the attack on the Kabaka's palace on May 24, 1966.

[1213] “Parliamentary Hansards”, 3rd Session 1965 to 1966, Uganda National Assembly Archives.

CRITICISMS TO THE ORIGINS OF THE CRISIS.

i) The indirect rule system

Although it is true that Obote's strong approach toward Buganda and Buganda's regionalism had a part in the emergence of the 1966 Ugandan Constitutional crisis, several academics have questioned whether it was mostly due to the foregoing. They re-examine the underlying social and political forces that contributed to the pandemic, as there is clear evidence that colonialism's residual impacts played a part. The 1966 constitutional coup is engrained in Ugandans' memories and history, and is thus frequently mentioned; nonetheless, the lack of an official commission of inquiry into the triggering circumstances that led to the crisis means that the basic causes are unclear.

While some political participants, such as Mayanja-Nkanji, a former Katiikiro (prime minister) of Buganda, blame the crisis on Milton Obote's hostile approach against the kingdom of Buganda, others, such as Akena Adoko, blame the problem on Buganda's regionalism. In this book, I argue that, with or without the above, the crisis was bound to happen due to the existence of permanent impacts brought about by the colonial legacy, which played a larger role than has previously been acknowledged.

The effects of the 68-year British rule and their impact on Uganda's post-colonial internal dynamics are at the root of the 1966 constitutional issue. The 1966 crisis was principally the result of a simmering colonial legacy that ultimately erupted into physical violence as the struggle for power came to a head.

The dispute over colonialism's legacy as a source of strife across the African continent is never-ending. Several academics claim that colonialism wreaked havoc on Africa, and that most of the continent's ongoing crises have their roots in colonial history.[1214] This line of thought is supported by Muddoola, 1996, and Karugire, 1980, who argue that due to preferential treatment of the Kingdom of Buganda, redrawing of borders, and the indirect rule system, the Ugandan state had not been emancipated from the impact of such colonial policies by 1966.

The employment of the indirect rule method was one of the most common features of British authority in Uganda. The British preferred built indigenous government structures to run colonies on Britain's behalf under this arrangement.[1215] The Baganda became Uganda's primary source of colonial agents. They were used to carry out the colonial agenda while executing the indirect rule system, which benefited both the British colonialists and the Baganda. As a result, according to

[1214] Musisi F., Herbst R.O., & Mahajubu A., 2018, Unlocking The Mysteries Of The Origins Of The 1966 Ugandan Constitutional Crisis, Global Journal of Arts, Humanities and Social Sciences Vol.6, No.3, pp.14-25.
[1215] Ibid

Lonsdale (1983), the British were given a strong foundation from which to expand throughout the remainder of Uganda, and the Baganda were also used as first administrators in various sections of the protectorate outside of the Kingdom of Buganda. The Kingdom of Buganda rose to prominence as a result of this approach, frequently at the expense of the protectorate's other provinces. Baganda subjects were employed in the Kingdoms of Bunyoro and Toro, as well as in the province of Kigezi, in the west of the country. Baganda administrators oversaw the areas of Teso, Budama, Bukedi, Busoga, and Bugishu in the east, and the territory of Lango in the north.[1216]

As beneficial as the British-Baganda collaboration was to the Buganda, it also marked the start of anti-Baganda attitudes in many sections of the country outside of the Kingdom of Buganda, where the Baganda were employed at the expense of locals. The Baganda imposed their centuries-old political system and administrative institutions in newly colonized areas as the British favored administrators in the process of spreading colonial power, causing animosity among other ethnic groups.[1217]

The chiefs nominated to fill the newly imported Buganda structures, as well as Baganda or residents of the area, were instructed to use the Buganda titles in these newly colonised areas, causing animosity against Buganda. This became a source of discontent, and the 1903 Badama revolts in eastern Uganda against British colonial control illustrate the frustration with the Baganda, who were perceived as British henchmen.[1218]

Anti-Buganda sentiments spread throughout the protectorate as a result of what colonized people outside Buganda Kingdom saw as cultural imperialism. The Baganda colonial agents, for example, had insisted on the adoption of the Luganda language as the official language in many of these districts. The use of Luganda became one of the most infuriating features of Buganda's governance for these people. When Buganda entrenchment through Baganda bureaucrats began to affect other local customs, these feelings were exacerbated.[1219]

Furthermore, Baganda agents are accused of being involved in corruption, which has resulted in individuals acquiring riches in the areas under their control. The letter from the Provincial Commissioner, Eastern Uganda, to the Hon Chief Secretary finest exemplifies this personal aggrandizement.[1220] He reminds out that Kakungulu and his associates seized control of Mbale County, which covers 80 square kilometers. In addition to land expropriation, Kakangulu and his followers made a significant profit by levying an annual fee of 11 shillings on individuals who

[1216] "Uganda Protectorate, Secretariat Minute Paper No 322", Eastern Province, Entebbe National Archives, A46/133,
[1217] "Uganda Protectorate, Secretariat Minute Paper No 2", the Kakungulu Estate Entebbe National Archives, C2588
[1218] Ibid
[1219] "Uganda Protectorate, Secretariat Minute Paper no 898", Buganda, Entebbe National Archives, A46/16.
[1220] "Letter to Hon Chief Secretary from the Provincial Commissioner", Eastern Entebbe National Archives, C2577

lived on the land. The Bagishu, who made up the majority of the population in the area, saw paying rent for what they saw as communal tribal territory as a grave injustice. The Bagishu were enraged even more by the fact that the taxes they had paid had not been used for their advantage.

The Baganda took use of the Protectorate's indirect control structure to dominate and exploit others, but this, too, would have bad consequences for them in post-colonial Uganda.

ii) The Kingdom of Buganda received special treatment.

Another feature of British colonial control in Africa was the preferential treatment of one ethnic group over another. In the case of Uganda as a protectorate, the British gave this preferential status on the Kingdom of Buganda at the expense of the neighbouring kingdoms and chiefdoms throughout the colonial period. This preference for the Monarchy of Buganda is understandable, given that Buganda had been an autonomous kingdom for about 500 years prior to the arrival of the British. As a result of the lengthy British history of favouring existing monarchy, kingdom states like Buganda would be given preference, which, combined with its size and central location in the protectorate, explains why Buganda was chosen.[1221]

Unlike many other sections of the Uganda protectorate, the Kingdom of Buganda was controlled by legal agreements with the colonial overlord throughout the colonial period as a result of this cooperation. Notably, treaty rights that prioritized Buganda interests over those of other ethnic groups in the country were included in these agreements.[1222] The kingdom received special treatment in the colonial era which positioned the region above the others and revealed a special relationship between Buganda and the British that lasted 68 years.

The foregoing relationship paved the way for an adversarial relationship between Buganda and the rest of Uganda's ethnic groups. Notably, the Kingdom of Buganda maintained a degree of autonomy in the administration of its affairs, allowing its kings and chiefs to govern while also preserving Buganda's political institutions. According to Johannessen[1223], this gave Buganda a distinct and privileged position in both the colonial and post-colonial eras in comparison to other Ugandan kingdoms and tribal areas. In essence, the other kingdoms were administered more directly as districts, similar to how the protectorate's tribal lands were governed. This was clearly preferential treatment for Buganda, which engendered resentment in the other territories. After the British left, opportunistic politicians took advantage of this resentment to rally other ethnic populations against Buganda, resulting in the political chaos of 1966.

[1221] Gingyera-Pinchwa. (1978), Apollo Milton and his Times. Nok.
[1222] Supra note 14
[1223] Johannessen, C. The Restoration of Kingship in Uganda: A comparative study of Buganda and Ankole, p.18

iii) The adjustment of colonial lines

Uganda, like many other African countries, was clearly created during the colonial period, with its physical borders mostly established by administrative convenience and economic concerns, as well as natural boundaries such as mountain ranges and river beds, rather than by people. When it came to the establishment of internal boundaries, British colonial interests did not align with Ugandan ethnic trends. As a result, numerous different ethnic groups were grouped together in territories that did not reflect their ethnic diversity, resulting in increased ethnic tensions. The transfer of the counties of Buyaga and Bugagainzi from the kingdom of Bunyoro to the kingdom of Buganda, subsequently known as the lost counties, was one such incident in Uganda. The majority of the people in this area were Banyoro, who had been enslaved by their traditional adversaries, the Baganda.[1224]

According to Bunyoro's telegram to the Resident, Buganda, the loss of territory to Buganda was viewed as a punishment for fighting British colonialism.[1225] Furthermore, they were enraged that this lost area was a prize for the Buganda collaborators, whom they perceived to be their traditional foe. As a result, tensions between the two prominent Ugandan ethnic communities grew even stronger. This was a clear testimony that the redrawing of boundaries had not only irrevocably altered ethnic realities in Uganda but also strengthened ethnic rivalry in Uganda. J.R.P. Postlethaite, the British District Commissioner of Bunyoro in 1927 and 1928 noted that “the inclusion of this area in the Kingdom of Buganda is considered to be one of the greatest blunders we committed.”[1226] According to Kenneth[1227], indeed the attempt to solve this problem in postcolonial Uganda unleashed one of the most fervent political struggles Uganda has known.

The alteration of the borders of colonial rule were not only interior. Uganda as a country was also shaped as a trade between colonial powers. Originally, Uganda as it is defined today, had bigger outreaches into modern Kenyan territory. The eventual shaping of Ugandan borders was by an agreement between the colonial masters.

As with the lands being colonized by Rhodes at this same period in southern Africa, the British government is unwilling to take direct responsibility for the region of east Africa which is now its acknowledged sphere of interest. Instead, it delegates to a commercial company the right to administer and develop the land. In 1888, the Imperial British East Africa Company was founded, a year before Rhodes' British South Africa Company.

[1224] Supra note 22
[1225] “Bunyoro Lost counties, Preliminary correspondence between the Mubende-Banyoro Committee and the Resident”, “Buganda early in the 1920’s” Entebbe National archives, REL/s/121
[1226] Lwanga-Lunyiigo, S. (2007). The Struggle for Land in Buganda: 1888-2005. Wavah Books.
[1227] Ingham, K. (1994). Obote: a political biography. Psychology Press.

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Everyone recognizes that the prosperity of this region hinges on the construction of a railway from the coast to Lake Victoria, but circumstances conspire to place this undertaking much beyond the East Africa Company's capabilities. Buganda is a recurring ache that drains their energy and finances.

Because Germany lies in a sense beyond Lake Victoria, it can argue that this region, Uganda's most powerful kingdom, is not protected by the territorial agreement with Britain. Furthermore, the unstoppable Karl Peters has forced the issue. He arrives in Kampala in 1890 and convinces the kabaka to sign a contract admitting German protectorate over his country.

When the British prime minister, Lord Salisbury, presents a solution that Berlin, surprisingly, approves, a potentially dangerous confrontation between the imperial powers is averted. In exchange for German recognition of British protectorates in Zanzibar, Uganda, and Equatoria, Salisbury offers the tiny and seemingly useless island of Heligoland (in British ownership since 1814). (the southern province of Sudan). Germany, on the other hand, benefits from the agreement. Heligoland goes on to serve as a vital naval station during two world wars.

Meanwhile, in Buganda, a civil war breaks out between factions commanded by British Protestant missionaries and their French Catholic opponents.

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Lugard is victorious. However, the loss of life and property in this unseemly European quarrel demonstrates that the East Africa Company is incapable of carrying out its responsibilities.

In 1894, the British government makes Buganda a protectorate. Two years later, British control is extended to the western kingdoms of Ankole, Toro, and Bunyoro, becoming the Uganda Protectorate with Buganda.

In the meantime, the much bigger region of Kenya has remained reasonably tranquil, despite the East Africa Company's lack of success there. However, before taking over Uganda, the British authorities must ensure that the new protectorate has access to the sea. As a result, the company's charter is revoked in 1895 (with a £250,000 compensation). As the East Africa Protectorate, Kenya becomes yet another additional obligation for the British government.

iv) The flaws in the independence constitution of 1962

The 1962 Constitution was the culmination of a lengthy and perilous constitutional route that began during the colonial period, and its promulgation in 1962 is considered part of the colonial heritage. The independence constitution had various flaws that contributed significantly to post-colonial Uganda's political troubles. In the first case, the 1962 Constitution failed to rein in Buganda's power: under Article 74 (1), (2), and schedule 7 of the Constitution, Buganda's federal powers and responsibilities were vast.[1228]

Buganda was also allocated independent and important sources of revenue, including money from progressive tax and entertainment tax, in order to enable it to effectively implement its federal autonomy. In addition, Buganda was entitled to 50% of the annual statutory contribution from general revenue and 50% of assigned revenue from the Kingdom of Buganda. In addition, the report of the London Constitutional Conference to further strengthen this autonomy, Buganda was granted its own police force, legislature and judiciary which had the same status as other institutions in the rest of Uganda.

In other words, the 1962 Constitution devolved power to the Kingdom of Buganda, leaving it as a strong unit inside Uganda with nearly the same status that it had during the colonial era. As Nsibambi[1229] points out, the 1962 Constitution contributed to Uganda's political challenges by failing to redistribute power evenly among the country's minor ethnic groups. It had endorsed the historical inequality in treatment between Buganda and the rest of Uganda, a fact that enraged Ugandans in other parts of the country. As a result, anti-Buganda attitudes from the colonial period were carried over into the post-colonial period, which was a prescription for catastrophe, as opportunist politicians took advantage of the situation to foment the 1966 upheaval.

Buganda's federal powers, as stated in the Independence Constitution, had also hampered the National Assembly's ability to function. The National Assembly lacked the jurisdiction to legislate on the Kabaka's powers, responsibilities, and obligations. Furthermore, Article 73 gave the Lukiiko the supreme authority to make laws for the kingdom of Buganda's peace, order, and good government. The Independence Constitution, by prioritizing regional interests over national ones and elevating regional leaders above national leaders, stressed divisiveness rather than unity, and the system was doomed to fail. Indeed, Kanyeimba[1230] correctly points out that no administration, no matter how capable, could have controlled the country's development without infringing on the component states' reserved and residual rights.

[1228] "Independence Constitution, Schedule 7", pp.10-13 Entebbe National Archives, C10736/ DGc 230 III.
[1229] Nsibambi, A. R. (2014). National integration in Uganda 1962-2013. Fountain Publishers.
[1230] Kanyeheimba, G.W. (2002). Constitutional and Political History of Uganda from 1894 to present. Centenary Publishing House.

Furthermore, state authority had been eroded by the establishment of other centers of power, and it was these seeds of conflict sown in the constitution that sowed the seeds of the subsequent years' crises. Land ownership, education, and administrative personnel issues were all delegated to regional assemblies like the Lukiiko.[1231] This would render the central government nearly powerless in areas where it would have needed to reform and modernize in order to achieve national unity. In other words, while the central government was charged with planning efficiently for the country, the instruments to do so were out of reach.

v) The government's weak coalition

Uganda's first post-independence government was a coalition formed by an agreement between the Kabaka Yekka (KY) and the Uganda People's Congress (UPC) (UPC). Prior to 1962, such an alliance had never been envisaged because each of these parties held opposing viewpoints and political objectives on practically every topic imaginable, aside from their ethnic differences.[1232] The UPC was founded to challenge Buganda's regionalism, and it served as a vehicle to gather opposition to Buganda's power before independence. It was predominantly a northern-dominated party. On the other hand, the Baganda's isolationist attitudes were embodied by the KY, which was launched on June 10, 1961. It was established to safeguard the Kabaka's and Mengo's Protestant establishment's threatened positions.[1233]

The British and the Mengo Establishment formed the coalition in order to prevent Catholic Ben Kiwanuka, the head of the Democratic Party (DP) and Uganda's first Chief Minister, from succeeding them. As a result, the British persuaded Obote and Muteesa, the Kabaka of Buganda, who had been bitter enemies, to put their differences aside and work together. This helps to explain Obote's rapid shift from an ardent anti-Buganda stance to a pro-Buganda stance.[1234]

The construction of this coalition administration, on the other hand, has been regarded as one of the most dishonest political enterprises ever attempted by Ugandan officials. Because Obote and Muteesa had opposing agendas, neither the KY nor the UPC had any illusions about the alliance's long-term viability.[1235] The main goal of UPC was to use the alliance to gain power by denying the DP of support in Buganda, but the Mengo establishment wanted to keep their privileges. As a result, disparities between the two returned as soon as the DP was defeated.[1236] Although Muteesa's status was mostly ceremonial, the new post provided him with dual loyalty as Kabaka of Buganda

[1231] Supra note 28
[1232] Jorgensen, J. J. (1981) Uganda: A Modern History. Croom Helm Limited.
[1233] Mutibwa, P. M. (1992). Uganda since independence: a story of unfulfilled hopes. Africa World Press.
[1234] Supra note 14
[1235] Kasozi, A. B. K. (2013). The Bitter Bread of Exile. The Financial Problems of Sir Edward Mutesa II during his final exile, 1966-1969: The Financial Problems of Sir Edward Mutesa II during his final exile, 1966-1969. Progressive Publishing House.
[1236] Supra note 32

and Head of State.[1237] As a result, he would have conflicting functions as a head of state and Obote as Prime Minister, and Obote's objectives would be at odds with those of Buganda.

vi) The Consequences of the Uganda People's Congress Control Battle in Buganda

Uganda's political stability was dependent on the UPC's strong united leadership as the ruling party; nevertheless, the UPC was formed by a loose coalition of ethnic groups who came together to transform their marginalized status and eliminate Buganda's dominance.[1238] As a result, the organization's leadership became factionalized, with each faction leader representing a local constituency that was often ethnically distinct from the others. For example, Obote's power base was among the Langi in the north of the country, George Magezi's was among the Bunyoro in the west, and John Babiha's was among the Tooro in the mid-west. W.W. Rwetsiba's support base was in the southwestern Ugandan district of Ankole, whereas William Nadiope's was in the eastern Ugandan region of Busoga. Felix Onama hails from Uganda's west Nile area, whereas Cuthbert Obwangamoi hails from the country's far east.[1239]

Each of these regional leaders was an independent leader who did not need the party's or president's backing to be elected in their areas. These factions, along with John Kakonge, the UPC secretary general, were fighting for control of the party. By 1964, considerable realignment of political forces along regional and racial lines in the North and South had begun to take shape. Grace Ibingira commanded the southern monarchist Bantu group, while Obote led the northern Nilotic republican group. Control of UPC was critical because whomever had it would eventually have control of the country. The Bantu faction accused Obote of betraying his own aim of promoting national unity by demonstrating favouritism toward northern Uganda's ethnic groups.

As a result of the growing ethnic rift within the party, a number of Bantu ministers and prominent Baganda figures began preparing to depose Obote in mid- 1965 in order to reverse the cabinet's perceived northern dominance.[1240] The battle for control of the UPC had reached a breaking point. The competition between Obote and Ibingira for the party's leadership, and, by extension, the leadership of Uganda, raged on, with the outcome determining who would dominate Uganda's political progress.

The infighting in the UPC and the threat from Buganda, which had stayed solid in its opposition to Obote's reign, were now the two greatest threats to his power as the country's prime minister. He used violence against his opponents, and rather than containing the problem, his actions just pushed

[1237] Mittelman, J. H. (1975). Ideology and politics in Uganda: from Obote to Amin. Ithaca, NY: Cornell University Press.
[1238] Ssemwanga Kivumbi. (2013). Ssekabaka Muteesa II Eyeerabirwa. Grapet Traders.
[1239] Karugire, S.R. (1980). A political History of Uganda. Heinemann Educational Books
[1240] Ingham, K. (1994). Obote: a political biography. Psychology Press.

it to a critical level, culminating in a crisis in May 1966. If he was to survive as both the leader of UPC and the Prime Minister, Obote knew he had to stay one step ahead of his political opponents. The existence of these dangers established in Obote a deep-seated fear of both his opponents in the party and in Buganda, which meant that he had to block any dissent for the sake of his own political life.

vii) The Dictatorial Tendencies of Obote

Obote's dictatorial behavior originated from the colonial legacy's structural flaw, which was already mentioned. While forming the new superstructure of independent Uganda's political administration, the British did not abandon the oppressive colonial system; rather, they emphasized autocracy by transferring the autocratic executive and political powers that had previously been vested in the British Governor and his British Chief Secretary to the office of the Prime Minister of an independent Uganda. As a result of inheriting the colonial instruments of authority, like as the police and the King's African Rifles, Obote accumulated enormous influence (viz. the Uganda Army). This did not imply that he had to abuse his position; rather, he chose to be an authoritarian and dictatorial leader because he couldn't deal with criticism and disagreement.[1241]

Obote treated individuals who resisted him with contempt and blatant disregard for human rights and the rule of law, using the northern dominated army and a spy service under the innocent name of the General Service Department, headed by his first cousin Adoko Nekyon.[1242] Five cabinet officials, including Ben Kiwanuka, the first Chief Minister, and Brigadier Shaban Opolot, the leader of the armed forces, were all held indefinitely, while five members of parliament who refused to acknowledge and accept the 1966 constitution lost their seats.

Between 1962 and 1966, Obote imposed his Ugandan principles on the Buganda by taking a hostile position toward the monarchy, claiming that this was part of the process of forging a national identity in the newly formed Uganda.[1243] Obote's outbursts appear to arise from his dissatisfaction with the fact that regional governments had become a microcosm of the national government rather than its local outpost.[1244] Obote gradually suffocated the kingdom's institutions and weakened its status within the country. In 1964, for example, he established legislation limiting the KY's activities to Buganda alone. In this sense, Obote's concerted and ultimately futile efforts to destabilize Buganda had made the Baganda into the most vociferous opponents, heightening

[1241] Supra note 14
[1242] Supra note 33
[1243] "Speech by the Prime Minister the Hon DR.AM Obote, MP," on Thursday 3rd March 1966, Uganda National Assembly Archives.
[1244] Sathyamurthy, T. V. (1986). The Political Development of Uganda, 1900-1985 (Vol. 1). Gower.

tensions between Buganda and Obote.[1245] In 1966, Obote launched a violent attack on the kingdom of Buganda with the help of northern troops and ministers.

viii) The 1960s avaricious political system

Uganda was also plagued by extensive corruption at many levels of government in the 1960s, owing to the lack of strong institutions that should have acted as checks and balances for the administration. As a result, leaders like Obote were able to take advantage of these flaws in order to stage a constitutional coup in 1966.

To begin with, bribing of members of the national assembly severely weakened the institution's independence and its ability to control central government excesses. Within the ruling UPC, the Obote government used patronage and the promise of future rewards to carry out schemes that would strengthen his dictatorial powers. Similarly, opposition members of the national assembly from both the DP and KY who crossed the floor to join the UPC on the offer of government posts and salary were similarly affected. Following his conversion to UPC, opposition leader Basil Bataringaya was appointed Minister of Internal Affairs. James Ochola, Vincent Rwamwaro, and Stanslaus Okurut were among the DP members who followed him. Several DP members of the national legislature from the Kingdom of Bunyoro opted to join the UPC after Obote promised to hold a referendum to return to Bunyoro the lost counties that had previously belonged to Buganda.[1246] Minister of Finance William Kalema, who led a group from Kentucky, was appointed. Ironically, the UPC was a member of the coalition government, but it bribed members of the KY, its coalition partner, to switch sides. Furthermore, all of the aforementioned persons joined the UPC without informing their electorates, which amounted to treason and a loss of democratic values, thereby producing a dictator, namely Obote.

Furthermore, those who joined the government allowed the UPC to acquire an artificial majority with dire consequences. By 1966 the National Assembly had 74, 9, 8 and 1 member(s) of the UPC, the DP, the KY and the Independents respectively. This was not a reflection of the true strength of UPC in the country. Without this artificial majority, it is unlikely that Obote could have achieved what he did in 1966; the abrogation of the 1962 constitution, acting decisively against Muteesa and Buganda.

Those who joined the government also helped the UPC gain a false majority, which had disastrous implications. The UPC, the DP, the KY, and the Independents each had 74, 9, 8, and 1 members in the National Assembly by 1966.[1247] This was not a genuine picture of UPC's overall strength across

[1245] Hansen, H. B. (1977). Ethnicity and military rule in Uganda: A study of ethnicity as a political factor in Uganda, based on a discussion of political anthropology and the application of its results. Nordiska Afrikainstitutet.
[1246] "Parliament Hansards", 3rd Session 1966, Vol. 67, Uganda National Assembly Archives.
[1247] "Parliamentary Hansards", 3rd Session 1965 to 1966, Uganda National Assembly Archives.

the country. Without this fictitious majority, Obote would not have been able to accomplish what he did in 1966: abrogating the 1962 constitution and striking decisively against Muteesa and Buganda.

He also disregarded resolutions passed by the legislature. When parliament passed a resolution ordering Idi Amin's suspension and an investigation into his bank account, which contained 17,000 pounds sterling in cash in the form of gold bars stamped with the Belgian Congo government's stamp, Obote ignored it and later promoted Amin to the rank of Major General and Army Commander. On February 24, 1966, he would arrest five cabinet ministers: Grace Ibingira, the Party Secretary General at the time, Balaki Kirya, George Magezi, Dr.S.B Lumu, and Mathias Ngobi, who had urged a probe into the gold issue. This provides strong proof that Obote was a benefit of the gold affair rather than an innocent bystander, and that his actions exacerbated political tensions in the country.

Additionally, venal politicians also existed at Mengo, which was one of the power centres in the newly independent nation. For instance, although Buganda had GBP 1 million in its coffers by 1958, by 1960 this had dwindled to a mere GBP 465,000 and 1963, it was in the red by GBP 226,863.

By 1965, the Kabaka's government was on the verge of collapse; unfortunately, the Kabaka's ministers were the biggest offenders, with nepotism and insensitivity reaching new heights. Despite the fact that they were operating a deficit budget in 1965, these officials took out a personal loan of GBP 200,000.

The above acts by Mengo's leadership resulted in a significant political impasse between the central government and Mengo. Obote was concerned about the Mengo establishment's financial misdeeds, which resulted in protracted wranglings between the central government and Buganda, exacerbated already strained relations between the two parties, and inevitably contributed to the explosive atmosphere that culminated in the attack on the Kabaka's palace on May 24, 1966.

GONORRHEA " ENDWADDE YA BAZIRRA" UNTOLD KABAKA SAGA

Several unjustified assertions by Baganda since time in memorial behind Buganda kings are logically estimated to have continuously led their historical kings and subsequent kings into trauma, i.e., all wives in Buganda belong to the Kabaka alone germinated enough havoc. in an article in history in Africa about the Ganda Monarch, Richard Reid argued that Mutesa likely suffered from Syphilis (painful sexually transmitted disease). John Rowe in one of his Articles concluded that the disease from which Mutesa suffered was Gonorrhea (painful sexually transmitted disease). While on the surface similar both sexually transmitted, neither particularly describe the diseases are

actually different. Popular biographies often offer gossip about individuals' medical histories, but there can be legitimate reasons to investigate the medical history of past leaders, two of which are pertinent here. First the medical conditions from which they suffered may have affected their lives and their decisions as leaders. Reid's addressees this point, speculating that Mutesa's Syphilis may have progressed to an extent that it affected him mentally. Reid suggests that this might help explain Mutesa's erratic behavior towards the later years within his reign, as he shifted his favor from one court group and foreign delegation to another. Rowe raises a similar point about Mutesa's health and competing groups, though in a different way, Rowe shows how Mutesa's health illness became a point of competition between foreign missionaries and indigenous religious specialists as each sought to win his favor by curing is illness. The Baganda also equated the health and well being of the Kabaka with the health of the kingdom, and Mutesa's extended illness and bedridden state would not have been a positive attribute.

In fact, so erratic was the kabaka's behavior that he persuaded his subjects to willingly engage in potential sexually I'll gornoreah infected women so as to prove their "braveness" he having suffered the same and felt the pain willingly encouraged his subjects to go through the same fate, hence the disease acquiring the name "endwadde ya baziira" disease of the brave.

THE NNAMASOLE CRISIS

"…Muteesa II narrates that her mother remained young and requested him to get married against the culture of Buganda which is saying Nnamasole do not get married. The Kabaka of Buganda is the one that implements the norms and is the one who removes them. Let my mother get married and she got married to common Kigozi this led to a one Ssenkatuka to gun Katikkiro Nsibirwa…"

This was the Nnamasole crisis in Buganda. Irene Namaganda (Nnamasole) was a baptized Christian and a daughter to a clergyman in Buganda. She studied from Gayaza a church missionary society's prestigious girl's school before her 1914 Christian marriage at the age of eighteen to Kabaka Daudi Chwa.[1248]

At that time of the marriage, Kabaka Daudi Chwa had and recognized children that he had from other women. Their marriage proved neither monogamous nor companionate. In 1924, Irene Namaganda gave birth to Muteesa and Daudi Chwa recognized him as his son. Important to note is that Muteesa did not become his first recognized son nor his favorite.[1249] Daudi Chwa accepted

[1248] Nakanyike Musisi. "A Personal Journey into custom. Identity. Power and Politics: Researching and Writing the Life and Times of Bugandas Queen Mother Irene Namaganda (1896-1957)." History in Africa 23 (1996). 369-85.
[1249] Provincial Commissioner to Governor, 25-2-37. CO536/194/40080.NAGB. A Copy of Daudi Chwas will. Dated3 March 1935.Lists at least 34 Children. "Excerpts from Daudi Chwas will." Initiated WY2, Lloyd Fallers Paper Box 32 folder 2, University of Chicago Special Collections.Chicago USA.

Mutesa as his son at the time of his birth. Mutesa, on the other hand, was neither his first nor his favorite son. George Mawanda, Chwa's older son, was widely viewed as a logical successor even at the time of his death. By the 1950s, top Ganda men had publicly said that Daudi Chwa had named George Mawanda as his heir before his death, and denied Mutesa's paternity.

When Kabaka Daudi Chwa died, most of the Ganda regarded his son George Mawanda as a logical successor. One of the traditional men presented an argument that Daudi Chwa had designated George Mawanda as his heir and declared to accept paternity of Muteesa. Martin Luther Nsibirwa, the katikkiro of Buganda presented Muteesas name before the Lukiiko and it was debated and accepted that Muteesa was the next king of Buganda. He was therefore presented to the Ganda people as the new Kabaka. Many were surprised and wondered how it could happen. They all knew George Mawanda to be the next heir.

As Muteesa succeeded Daudi Chwa, Irene Namaganda was sworn in as the Nnamasole (Queen mother) on January 1940. But remarkable is the fact that at that time she was a mulokole (born again Christian) awkwardly suited to her ritual and ceremonial roles.[1250] Her life could later cause her problems. In Buganda, the Nnamasole is the second big office in the leadership of the kingdom compared to that of Lubuga (the queen sister who took a coronation oath alongside the Kabaka). Nnamasole was an important mother. She was a powerful symbol and had historically been important to the stability of Buganda. Being the biological mother of the king; she was the center of morality and good government for the kingdom.[1251]

The Nnamasole was considered the mother of the country being the fact that she gave birth to a king. She was supposed to offer guidance to the king, espionage and personal defence of the king. She was the highest ranking commoner in the kingdom, Estates and subordinate office holders, as well as the clan of her birth, supported and benefitted from her official position.[1252]

The Nnamasole was respected and treasured. During the reign of Kimera, the Nnamasole was regarded the Kabaka in absence of the king. She could make orders at various angles. For instance, if a man was arrested the Nnamasole had the power to order his release. Another thing is that in the absence of the, for a person to become chief, she had to be consulted. The Nnamasoles complementary status as the Kabaka's equal and guardian was enough to make her potentially the

[1250] Juliet Kiguli. "Gender, Ebyaffe, and Power Relations in the Buganda Kingdom: A study of Cultural Revivalism." (Ph.D, Thesis, Cologne University, 2001) 179-81.

[1251]"Transformation of Buganda Women: From the Earliest Times to the Demise of the Kingdom in1966." (Ph. D. Thesis, University of Toronto 1991) 81-83, and especially the concise discussion of the role of Nnamasole BY Holly Hanson, "Queen Mothers and Good Government in Buganda: The Less of Women's Political Power in Nineteenth century East Africa." In J.Allman. S Geiger and N. Musis, eds. Women in Africa Colonial Histories (Bloomington: Indiana University Press 2002), 219-32.

[1252]Hanson, "Queen Mothers and Good Government, 219-32.

single most significant check on the reckless Kabaka's actions.[1253] . She could moderate the monarch's excesses without losing her job due to insufficient displays of loyalty because she was perceived as structurally devoted to the king, without whom she would be without any office. The kabaka's function could be described as that of Buganda's principal patron and owner.

She was the mother of the country, as Holly Hanson has argued, with the concept that motherhood came with power, independence, and a responsibility to discipline and advise her son, the kabaka. Her job was not one of secrecy. She was the kingdom's highest-ranking commoner. Her formal status was supported and benefited by estates and subordinate officeholders, as well as the clan of her birth.

That and many more, were the duties to be faced by Namaganda a young mulokole Nnamasole. Truth be told, the duties could over weigh her age. She was still young and a lot of events taking place in her understanding. Under Christian marriage, becoming a widow or widower could make her qualify for another marriage. But this was not permissible in the Ganda culture. The Nnamasole is not allowed to get married again.[1254]

In February of 1941, the born again Nnamasole Irene Namaganda informed the Katikkiro (Prime minister) of Buganda, Uganda Bishop and eventually British administrators of the protectorate that she was six months pregnant and intended to marry her lover. There is no doubt that the father of the baby was Simon Kigozi a young commoner and former school teacher.[1255] Simon Kigozi was only slightly older than Muteesa II her teenage son who had been made the king of Buganda in 1939.

Despite their doubts, the kingdom's prime minister and his allies in Buganda's protestant elite collaborated with Ugandan officials to make the marriage possible. Namaganda's Christian marriage, on the other hand, was a huge controversy, as it went against all the expectations that come with marriage and royal authority. The controversy sparked a political crisis that saw Buganda's prime minister removed, his senior friends pushed out of office, the queen mother deposed, her husband exiled, and the country's political landscape transformed. The incident ushered in a new age of popular mobilization and protest in Buganda, taking the country's politics beyond the sphere of oligarchy-British elite dealings and into the realms of public gossip, newspapers, and, finally, the streets.[1256]

[1253] Rhiannon Stephens, A History of African Motherhood: The case of Uganda. 700-1900. (New York: Cambridge University Press, 2013), 169-72.
[1254]Tamale Mirundi during a television interview.
[1255] Bishop Stuart to Archbishop 16-6-41, Lang Volume 184; 327-38, Archbishop of Canterburys Papers LambethPalce Archives, London, UK.
[1256] Carol Summers, 2018. Scandal and Mass Politics: Buganda's 1941Nnamasole Crisis, International Journal of African Historical Studies 51, no. 1 (2018): 63-83.

The Nnamasoles belated acknowledgement of pregnancy suggests that she knew this. Besides, the Ganda official's consultation with the Bishop before informing the British Resident or Lukiiko and the Bishop Stuarts defensive letter of explanation to the Archbishop of Canterbury indicates that the situation was sensitive.[1257]

Having announced her pregnancy, the British advised her to conceal it with a trip to South Africa but she was not willing. Her demand was to marry Kigozi a commoner and father of her child. This was confirmed by Kigozi's declaration and affirmation that he was the father and loved Namaganda and was willing to marry her. This left the British challenged. It forced them to get a license from the Uganda British governor to allow the couple to avoid any public banns. At the time, Kigozi was fifteen to twenty year's young than Namaganda. The Bishop counseled Kigozi that marrying to legitimize the child was a bad idea. Even the Liturgical calendar created problems as it discouraged marriage during lent.[1258]

Indeed, the marriage took place at Nnamasoles residence with the two sleeping together as husband and wife. The marriage was to be kept a secret and the pro-government newspaper carried no coverage at all of the small wedding. Later, rumors about the marriage circulated. The immediate popular reaction was throwing stones and shouting "Kivve" (abomination) that hit the couple as they left the ceremony. This was followed by the Lukiiko's formal prosecution and banishment of the couple for breaking the customs and of Buganda. Irene Namaganda was stripped off her title of Nnamasole, ashamed and deprived of her property and office of Nnamasole.

Thrown stones and screams of "kivve" [translated as "abomination" in contemporary accounts] were hurled at the couple as they exited the ritual. Following the Lukiiko's formal trial and banishment of the pair for breaking Buganda's conventions, Namaganda was stripped of her position as nnamasole, as well as its rank and belongings. The problem resulted in Katikkiro Martin Luther Nsibirwa's forced departure, which the Lukiiko blamed on him for enabling the marriage and so fostering the kingdom's degeneracy. The Lukiiko appointed Namaganda's sister Perpetua Nnaabawesi, a woman Bishop Stuart considered immoral (and nominally Catholic), as the new nnamasole. Her subsequent influence, either on the young kabaka or on the kingdom, was apparently negligible. The British Governor supported the Lukiiko's decision and signed the letter of expulsion, which barred Kigozi from entering Buganda and restricted Namaganda's movements. The protectorate's Judicial Advisor and High Court declined to intervene in the Lukiiko's actions, establishing a precedent that "where a Native Court has held that a certain act is contrary to custom,

[1257] Summers, Carol. " Scandel and Mass Politics: Bugandas 1941 Nnamasole Crisis." International Journal of Africa Historical Studies 51,no 1 (2018) 63-83.

[1258] While it is not clear that this was a factor for British officials, it was later mentioned as an indication of church hypocrisy and violation of its own rules by Christian activists.

an appellate Court should, I think, be reluctant to hold otherwise," even in the absence of any evidence of said custom.

The crisis saw the resignation of katikkiro Martin Luther Nsibirwa and the Lukiiko denounces him for facilitating the marriage and thus sponsoring the degeneracy of the kingdom. Namaganda's sister Perpetua Nnaabawesi was appointed by the Lukiiko as the new Nnamasole.[1259]The British Governor accepted the Lukiiko's decision and signed a letter of banishment of Kigozi from Buganda and restricted Namaganda's movements. The kingdom's bigger issues, on the other hand, were generational and factional. During Daudi Chwa's rule, Buganda's political institutions were frozen by the 1900 Uganda Agreement and the alliance it cemented between Britain and Buganda's oligarchs. The oncoming war had distracted Britain by 1939. The colonial elite was undercut by age and the rise of ambitious junior men trained under colonial control. As the governing elite began to falter, older discontents enlisted the help of educated and unemployed young. During the first big Bataka movement in the 1920s, petitions by clan leaders permitted certain elders to regain territory. Following that achievement, the kingdom's critics tried even more. By September 1939, a group of men calling themselves the "Descendents of Kintu" had filed a petition against the leaders they described as egotistical and unscrupulous abusers of the people.

Despite these tensions, a smooth and seemingly uncomplicated transition from one kabaka to his successor was possible because by 1939, the kingdom's rulers saw succession as almost a private matter—from Daudi Chwa to the sole son of his Christian marriage—rather than something that everyone in the kingdom had the right to agitate about as clans sought to enthrone their own candidates. As people remembered the expenses of the civil war, paid lip respect to imported concepts of Christian marriage, and acknowledged that the kingdom's status as a British protectorate meant that armed conflict was unlikely to succeed, the old fractious politics of party and clan had vanished.

Despite this stifling of kingdom politics, the tensions that had been suppressed by Mutesa's quick enthronement were very real, and they were expressed in subsequent years as activists criticized kingdom leaders' behaviour, making private practices public and political. Activists used a variety of tools to criticize leaders, including rumour, threat, character assassination, and slander prosecutions, as well as newer media, organizing, and lobbying. Mutesa II's reign became a time for the emergence of a new hybrid politics that drew on a system of political thinking rooted in real and metaphorical family life and relationships, but deployed ideas of inheritance, relationships, stewardships, inheritance, and loyalty in thoroughly modern, public ways, despite his quick and

[1259] Bishop Stuart to Archbishop of Canterbury, 3-11-41, Lang V. 184: 327-38. See also Stephens. A History of African Motherhood, 175-80.

sedate inauguration. Buganda's elite politics were transformed from private negotiations over royal succession and patronage to a public realm open to new political actors using new methods.

According to veterans of the process, the Nnamasole affair of 1941 marked the beginning of the shift from private factions to public debate. Tensions that had been hidden in the 1939 succession became apparent as a result of the controversy, which led to the rejection of Irene Namaganda as nnamasole and Martin Luther Nsibirwa as katikkiro.

The 1941 Nnamasole crisis was a fiasco. Contemporary accounts, on the other hand, stressed politics. Salacious details became a tactic for involving a larger audience in ethical and political morality debates. In a ground breaking analysis of scandals, British historian Anna Clark claimed that one of their most crucial characteristics is that scandal blurs the lines between private and public life, potentially inciting widespread political mobilization around moral issues.

The Nnamasole issue in Buganda provided an opportunity for Baganda—from a besieged katikkiro to stone-throwing youth—to experiment with views about the country's future and voice and act on moral judgements of the country's leadership. Public discontent that had been suppressed during the interregnum, when it should have been open and violent in accordance with historical patterns, simmered until the crisis offered a story and an audience.

According to E.M.K. Mulira, a young political analyst, and his father-in-law, Hamu Mukasa, an elder statesman, the controversy surrounding the Nnamasole affair and marriage both launched a decade of tumultuous politics in Buganda and demonstrated to the country's young and discontented that they could bring down governments and make demands on the country's institutions by the end of the crisis. Buganda's late colonial politics were initially clearly oriented around abstractions of social order, loyalty, and connection, rather than the issues of autonomy from Britain, land, labor, cotton prices, and business prospects that would become significant concerns over the next two decades. The structure of the Nnamasole crisis mapped out social order, loyalty, and connection, partly through violations and inversions.

Pregnancy and marriage for Irene Namaganda are less intriguing as isolated events than as the catalyst for a public outcry that destroyed a government and reshaped Buganda's politics. However, it is critical to investigate the connection between the events and the uproar. Why did people react in such a spectacular way? Extramarital sex and pregnancy in the royal family were not novel occurrences. They were so common that Church officials sympathized with Namaganda, whom they characterized as a pious and Christian wife and widow who had been ignored for a long time. Despite the ramifications of a Christian queen's out-of-wedlock conception and her designation of a man only slightly older than her son as her lover, the controversy was not about sex.

The first British response to the problem sparked by Namaganda's pregnancy concluded that the

situation was a simple sex scandal—a pregnancy that unmistakably showed a female official's sexual behavior outside of matrimony. As a result, Namaganda's reaction of concealing her pregnancy was understandable.

The Lukiiko criticized Irene Namaganda and removed her from office, not for sex or even for the pregnancy that made her sexual behavior public, but for her answer to the situation: a Christian marriage that violated Ganda norms for private and public partnerships. The marriage supplied direct proof for the trespass allegation that resulted in Kigozi's exile. Locals accepted the idea that a powerful nnamasole might have sex, and in the past, sexual connections could have been one of the options accessible to a nnamasole trying to convince officials or attract Buganda's factions to support her son.

The Lukiiko and Ganda people were outraged, and they condemned Namaganda and her spouse for the treachery and treasonous nature of a marriage that turned a private relationship into a public one, so opening an official royal area to an outsider. In doing so, the marriage transgressed local notions of suitable partnerships, providing Baganda with a model for misaffiliation and disorder rather than appropriate family life. The Nnamasole's deceased husband's standing was further harmed by sex, pregnancy, and marriage to a commoner.

Ssegwanga (cock) was one of the kabaka's praise titles, a specific celebration of his sexual status and dominion over the kingdom. Namaganda was unable to remain in sadness. She accepted another sexual partner who was capable of having a child and chose to marry that new partner. As a result, she clearly prioritized commoners over kings. Furthermore, by abandoning her authority, Namaganda exposed her son to risk and left her people vulnerable to a young kabaka who was expected to "devour" the kingdom as part of acquiring power.

The marriage had a different connotation in Buganda than it might have looked to British spectators on the surface. It did not restore order by binding a wayward widow to a new husband, providing a stepfather for the young monarch, and a family for the unborn baby. Instead, it inverted the key assumptions of Ganda relationships in a chaotic way. Critical observers warned that this would jeopardize Ganda society's structure.

KING HENRY'S SCANDAL

We have already seen the impact the scandal of the Nnamasole had on the status of the kingdom and the aspect of Christianity in Buganda. Interestingly, almost similar circumstances had transpired in the Kingdom of England in the time of King Henry VIII.

Henry VIII was raised in a strict Catholic household. He had a prayer scroll with illuminations of the Trinity, the crucified Christ, the Instruments of the Passion, and various martyred saints in his

possession before he became king. On each side of the images, there were Latin prayers and English rubrics (instructions) explaining how the prayers could provide protection from earthly threats or a reprieve from Purgatory time. Sacred texts of this type were common in late-medieval England's devotional rituals. Owners of the scrolls said the prayers, gazed at the images, and touched the physical thing in order to draw closer to the divine and win a celestial reward in the afterlife. Henry's inscription on the prayer scroll indicates that he utilized it for these sacred reasons and embraced the theological teachings that accompanied it.

Henry's devotion to the Catholic Church was typical of the time. He also believed, along with the prayer scroll, that buying papal indulgences might forgive sins and decrease time in Purgatory, which was a popular practice at the time. In 1521, Pope Clement VII granted him and Katherine of Aragon a 'plenary indulgence,' which was conditional on them making an annual trip to a prominent shrine. In his rejoinder, ‘Defense of the Seven Sacraments,' Henry defended the practice when Martin Luther's protest against the sale of indulgences ignited the German Reformation.

When Protestant Reformation leader Martin Luther expressed dissatisfaction with the Catholic Church in 1517, King Henry VIII took it upon himself to personally refute Luther's ideas. Henry was given the title of *Fidei Defensor*, or Defender of the Faith, by the Pope. Only a decade later, Henry VIII would declare war on the Catholic Church, accept the post of Supreme Head of the Church of England, and abolish the country's monasteries, absorbing and dividing their vast fortune as he saw fit.

Despite the fact that anticlericalism had begun to emerge in England by the 1520s, Catholicism continued to enjoy widespread public support. According to Andrew Pettegree, history professor at the University of St. Andrews, Henry VIII "had no wish and no need to break with the church" (U.K.). “He didn't need it because he already had significant control over the English church and its finances... And he had no desire because he was a devout Christian.”

By 1527, however, Henry faced a major challenge: his first marriage to Catherine of Aragon had failed to produce a son and male heir to the crown. Henry was also smitten with Anne Boleyn, one of his wife's ladies-in-waiting, whose sister Mary had been his lover previously. Anne encouraged the king's interest in her, but she wisely declined to become his mistress, preferring to focus on a greater aim.

Today, there is a Book of Hours with secret notes scrawled in the margins between Henry VIII and Anne Boleyn. The use of Books of Hours was prevalent among laypeople. The ‘Office of the Virgin Mary,' a sequence of prayers addressed to the Mother of Christ and chanted daily at eight regular hours, was at the heart of the volumes as compendia of prayers and devotional literature. It was anticipated that Mary would function as a mediator between the owner and God. The best

artists of the day often brilliantly decorated the pages. Those for the elite were lavishly embellished with lapis lazuli and costly gold leaf. However, Anne and Henry used his work for non-spiritual purposes around the year 1528. Henry penned a lover's letter for Anne in French at the foot of the folio depicting the Man of Sorrows: 'If you recall my love in your prayers as fiercely as I adore you, I shall rarely be forgotten, for I am yours.' Forever, Henry R.' Anne opted to write her response on a sheet depicting the Annunciation, implying her desire and authority to give the king a son. ‘Be daly proof you shalle me fynde to be to you bothe lovynge and kynde,' she wrote in English.

As a result, Henry petitioned Pope Clement VII for a divorce from Catherine. He said that the marriage was against God's will because she had married Henry's late brother, Arthur, for a short time.

It would not have been difficult for England's king to obtain a papal dispensation to divorce his first wife and marry another in order to create a male heir in other conditions. According to Pettegree, “there was a clear understanding among the royal houses of Europe that the ruler's number one objective was the continuation of the dynasty.”

Henry's timing, however, was not on his side. The Holy Roman Empire's imperial forces stormed and devastated Rome the same year, forcing Pope Clement VII to evacuate the Vatican through a secret tunnel and seek refuge in the Castel Sant'Angelo. King Charles V of Spain, Catherine of Aragon's loving nephew, held the title of Holy Roman Emperor at the time.

Clement VII was hesitant to give Henry a divorce from the emperor's aunt because the pope was nearly fully under imperial control. But he didn't want to entirely reject Henry, so he dragged out negotiations with the king's minister, Cardinal Thomas Wolsey, for several years, despite Henry's growing frustration.

Thomas Cranmer, a Protestant cleric, and Thomas Cromwell, the king's powerful adviser, established a compelling argument that England's king should not be subject to the pope's jurisdiction. Henry appointed Cranmer as Archbishop of Canterbury in order to marry Anne, and Cranmer immediately granted Henry's divorce from Catherine. Anne Boleyn, who was significantly pregnant at the time, was crowned queen of England in a spectacular ceremony in June 1533.

The Act of Supremacy, passed by Parliament in 1534, formalized the break from the Catholic Church and established the king as the Church of England's Supreme Head. With Cranmer and Cromwell in power and a Protestant queen by Henry's side, England began to accept "some of the teachings of the continental Reformation," including a Bible translation into English, according to Pettegree.

From 1536 to 1540, the Crown attempted to dismantle England's monasteries and seize the Church's huge property holdings, in what Pettegree describes as "the greatest redistribution of

property in England since the Norman Conquest in 1066." All of the land was returned to the Crown, and Henry used the money to reward his loyal advisors, both Protestant and conservative. “Even Catholics are enticed by the prospect of expanding their land holdings with this former monastic property,” Pettegree explains.

Of course, Anne Boleyn would not bear Henry the anticipated boy (though she did give birth to a daughter who would become Elizabeth I), and by 1536, Henry had fallen for Jane Seymour, another lady-in-waiting. Anne was executed in May of that year, after her erstwhile ally Cromwell assisted in her conviction for adultery, incest, and conspiracy against the king.

Jane Seymour gave birth to Henry's first male heir, the future King Edward VI, in October 1537, but died two weeks later from problems related to childbirth. Evangelical and conservative forces fought for power for the rest of Henry's life, even to the point of murder, but after Henry's death in 1547, his son's brief reign would be dominated by evangelical Protestant advisors, who were able to bring a much more radical Reformation to England.

However, Edward died young in 1553, and during his reign, his Catholic half-sister, Queen Mary I, reversed many of these measures. It would be up to Queen Elizabeth I, Anne Boleyn's daughter and England's ruler for over 50 years, to finish what her father had started.

Despite the revolutionary reforms made on his behalf, Henry VIII remained a staunch Catholic for the remainder of his life, with a personal dislike of Martin Luther.

Sacred things, such as saints' relics and shrines, were under attack during Henry VIII's Reformation. Some sacred books, particularly those honoring popes or St Thomas Becket, who had defied King Henry II, were also disfigured or burned. During the dissolutions, many manuscripts and volumes in monastic libraries were destroyed or dispersed, though antiquarian John Leland was able to collect and preserve a substantial amount for the king. Sacred texts, despite this, remained a significant element of English religious culture. As a result, more of them began to emerge in English, and multiple English Bibles were available. For evangelicals and Protestants, however, the writings did not reference purgatory and should not be treated as holy items in and of themselves. Archbishop Cranmer and Lord Protector Somerset were laying the groundwork for full-fledged Protestantism to be introduced after Henry's death.

Pettegree says, "The divorce is clearly at the heart of the matter." “I'm very positive there would have been no English Reformation if there had been no marital troubles, at least during Henry's lifetime.”

THE MYTH THAT THE KABAKA BELONGS TO HIS MOTHERS CLAN

"…the King belongs to the mother's clan because the Baganda wanted that let every clan produce the king…"

In the Ganda culture, the king does not belong to the mother's clan. This misconception that the Kabaka of Buganda takes his clan from his mother an extra mile that the royal family is matrilineal is not right. This is because the Kabaka has his own clan which is known as royal clan **"olulyo olulangira"**and the members of this clan are known as **"abalangira"** if they are male and **"abambejja"** when they are female.

The misconception rose because the royal clan had no totem which all other clans had. But a totem was just a symbol and a clan is a matter of genealogy. The royal clan has its genealogy traced way back from the patrilineal line of Kintu.

It is majorly traced from the fact that the king used to rotate around the different clans. The theory was that since the king took his mother's clan but could not take a wife from that same clan; his off springs would be by women of other clans. Each clan had a chance to present wives to the king and potentially get royal offsprings. Ostensibly, those offsprings would belong to their mother's clans and this ensured that the throne would go to another clan on the next succession.

This was intended to avail an opportunity to every clan to provide a king. Actually, this so called chance for all clans to be able to provide wives to the king, is in fact no different from the chance that any other clan may have of marrying into other clans[1260].

In Buganda, the Queen mother holds a very powerful place as does the king's sister. As an expression of their love for their mothers, new Kabaka's frequently took a name derived from their mother's name their official name. This became part of the pool of names in the royal clan. So Kabaka Ssuuna was the son of Nassuna of the mamba clan, Kabaka Jjemba was the son of Najjemba of the Ngonge clan and Kabaka Nakibinge was son of the Nababinge of Ngonge clan. What happened is that the mother would build her own palace and never met her son again. By the kings taking names related to their mothers, the Kabaka automatically gained an ally in their mother's clan.[1261]

Unfortunately, Kabaka Muteesa perpetuated the error. In his book "Desecration of my Kingdom" he claimed that he was of the Nte clan. But this was a mistake made by the king.

If Muteesa belonged to the Nte clan, this would mean that he had to be subordinate or answerable to Katongole the head of Nte clan or that he himself would have to become the head of the Nte

[1260] Bugandas Royal Clan available on https://www.buganda.com

[1261] Grace, Christine. Were Bugandas Kings really matrilineal? Ddembe musings 2011 available at https://www.dembe.wordpress.com

clan. In other words, in Buganda, no one is supposed to be above the Kabaka. He is the Ssabasajja, Ssebataka, and Ssegwanga and so on. This means that there is no way he could be subordinate or answerable to Katongole.

Guidance to this can be sought from the fact that when prince and princesses die, the funerary rites are not presided over by members of the deceased person's mother's clan which is a clan manifestation that they are not considered to be members or absorbed into the clans of their mothers unlike people whose funerary rites are conducted by people from their clan.

Generally, it must be noted that the genealogy of Buganda kings clearly traces ancestry of the kings through the paternal line not the maternal line in other words; becoming king depends on who your father is not who your mother is[1262]. The kings of Buganda have never been matrilineal, but their mothers and mother's clan hold very important positions in the kingdoms affairs.

BUGANDA AND AMIN'S REGIME.

The Baganda had developed hatred over Obote. Their desire was to see Obote out of Buganda soils. Many of them were willing to give financial, moral and social assistance to any one that could kill Obote or force him out of Buganda. This was seen as an opportunity to Amin whose relationship with Obote was souring every day.[1263]In 1971, Idi Amin Dada the then military commander overthrew Milton Obote. Indeed, as expected of him, he obtained the support of the Baganda. Jubilations were in every part of Buganda and congratulatory messages came in from every part of Buganda to Amin.

However, history has it that he retained the proscription of the kingdoms mandated by the 1967 Constitution hence Buganda remained simply one of the provinces of Uganda under the central administration. The Baganda still had hope in Amin's government of restoring their kingdom. In his efforts to appease them and win more of their support, Amin allowed the return of the dead body "enjole" of Sir Edward Muteesa II soon after taking over power in early 1971 to be given an official state burial in Buganda ancestral tombs. In a further development, Oloka Onyango asserts that Amin allowed the installation of Ronald Mutebi (the late Kabaka's heir) as Ssabataka (chief of all Baganda clan heads), but not as Kabaka (king)[1264]**.** This raised more hope among the Baganda. Ofcourse Amin knew that to be able to lead Uganda, all possible steps had to be taken to control and appease the Baganda by getting their support.

[1262] Michael B. Nsimbi. " Amannya Amaganda nennono Zaago." Nsimbis credentials regarding the clan histories and naming conventions.
[1263] See Henry Kyemba. A State of Blood.
[1264] J. Oloka –Onyango (1997) The question of Buganda in contemporary Ugandan politics, Journal of contemporary African studies 15:2, 173-189

Amin must have learnt from the history. He must have appreciated the effect of traditional institutions and political parties in the administration of Uganda. He passed the **political Parties decree number 14 of 1971** banning all the political parties in Uganda. The question that still challenged him was the restoration of kingdoms in Uganda. He understood that these parties could seek equal opportunities in the administration of Uganda following the semi-autonomous nature initially granted by the1962 Independence Constitution. The kingdoms remained in abeyance to throughout Amin's regime. Though they did not see the restoration come, the Baganda were convinced that one day Amin could completely restore their kingdom. Unfortunately, their wishes were not to be granted by the president. Amin's relationship with the Baganda was to become hostile soon due to land. Indeed, the long support of him by the natives reduced. The relationship became hostile when he made the land reform decree in 1975 that saw the nationalization of land by the government.[1265]

One can arguably say that from the time of independence in 1962, the central governments were always at loggerheads with the kingdom and basically the head of states due to the kingdoms interests that conflicted with the government interests. Naphtali Akena once stated that "no dead man has any right to rule over the living directly through this own ghost or indirectly through heirs…Justice, love of common men, rule by representatives were the ultimate values treasured most by Obote. Hence Milton and Sir Edward could not get along at all"[1266]But the questions among the natives were on the resurrection and restoration of their cultural institutions which were centers of unity among the natives. This answer was to be given later by a group of fighters under National Resistance Army (NRM) led by Yoweri Kaguta Museveni in the early 1990s.

THE RESTORATION OF BUGANDA (SECOND BIRTH OF THE KINGDOM)

From the late 1980s, there was a renewed internal disagreement in Buganda about how to conceive and articulate the relations between culture, politics and kingship. The group that emerged in the early 1990s as the prominent voice of the kingdom consisted of younger urban professionals who held more pragmatic views than their elder culture oriented, clan based competitors.[1267]But because political parties and traditional authorities were condemned for having contributed to sectarianism, political divisions along ethnic, regional and religious lines, Political parties were to remain banned but traditional authorities like kingdoms were to be restored in 1999 on the condition that they

[1265] The land reform decree of 1975 was to the effect that all the land belonged to the government and other most impotant institutions like Makerere University, ,ulao hospital owned land on99 year lease. Amins intention was to hasten on service delivery.
[1266] Naphtali AkenaAdoyo, 1969.
[1267] The Cultural Kingdom in Uganda: Popular royalism and restoration of th Buganda kingship. Jun 1999 by Mikacel Karlstorm.

would not engage in political activities.[1268]

Upon the completion of a five-year guerilla war fair staged by the former defense minister and presidential candidate; Yoweri Kaguta Museveni following his allegations that the 1980 election had been rigged by Uganda People's Congress. The war was ragged in the northern district of Buganda (Luwero) and it was highly supported by people in the area who had hope in Museveni of restoring their kingdom and besides he was getting rid of Obote Buganda's lasting enemy from the time of independence.[1269]Indeed the natives comprised signified proportion of the Peoples Resistance Army that he founded. Yusuf Kironde Lule, a prominent muganda with monarchist sympathies, became the political umbrella for the armed struggle by the NRA. The issue of Kabakaship became active and the revival of kiganda ethnicity became a song.

According to Tidemand "a song Agawalangana mu nkola [struggle in the wildness], became popular during the war among the Baganda. The song has been interpreted as evidence of a wide spread wish among the Baganda of reinvigorating their old cultural institutions at large. A number of older Baganda definitely saw the guerilla war in Luwero as a contribution of the hostilities between Obote and the Baganda which started in 1966." Many members of the royal family of Buganda got involved in the struggle. It's said that prince Jjuko (Mutebi's cousin) occupied a prominent administrative post and was an active combatant in the war and ended up rising to the rank of captain.

Further history puts it forward that Kabaka Ronald Muwenda Mutebi as well was seen visiting the NRA areas liberated from Obote's regime.[1270]There is nothing behind the alliance of Buganda with NRA than the restoration of the monarchy as Kasfir remarked, the restoration of the monarchy and the return of "ebyaffe" led to the unlikely tacit alliance between kingdom supporters and the NRM.[1271] Upon the completion of the war, Kabaka Ronald Mutebi returned to Uganda in1986. A lot of his Baganda strongmen like Samson Kisseka and Abu Mayanja had been inculcated into the central government as vice president and Attorney General. Oloka Onyango remarks that these were later to play a pivotal role in the politics of the eventual restoration of the Kabakaship.

However, the restoration of the monarchy was to be a challenge to Museveni. Drawing attention to the political history of the country, a lot of challenges were faced by him on how to restore the kingdom as well as controlling its activities in administration of Uganda. Attention had to be drawn on the exact nature of regime or system the restored Kabaka was to operate. It was Cleary not that

[1268] The restoration of the Buganda Kingdom Government 1986-2014: Culture, contingeacies, constraints. Nelson Kasfir. The Journal of Modern African Studies.
[1269] See Karugire 1988, pp76-77
[1270] Ibid
[1271] See Kasfir 1995 at p.154.

which had been created under the abrogated 1962 Constitution like under Article 20 which provide that at least 68 members of the Lukiiko would be directly elected[1272] and yet at that time the Lukiiko had been already restored performing its functions.

The other question that the government faced was on how the monarch would fit into the overall operation and governance of the country and how to raise funds to support its activities. But NRM was to stand its point that the kingdom was not to indulge in the political activities if it were to be restored but rather was to be a constitutional monarchy that would be purely cultural. This was a tactical move to ensure that political instabilities could not re occur in Uganda following the fact that the traditional institutions had been the major clash between the central government and them due to the fact that they had gone political. The restoration of the monarchy was to be by condition that it was not to indulge in political matters. Museveni once remarked that **"I have been emphasizing to them that it would be better if they confined their activities to culture without trying to get involved in politics or administration. Some have listened but others have not"**[1273]

Indeed, the restoration of the kingdom was to be a fulfillment of the promise by Museveni of the once abolished monarchies. Because of the history where they competed with the government for power, the restored monarchies were to be constitutional monarchies only concerned with cultural issues. However, Buganda being the largest of the four kingdoms appears to have become a major political force once again and the restoration prompted some people to wonder if Africa demonstrations, such as Uganda could successfully contain traditional institutions under modern political systems.[1274]

CORONATION OF THE KING (KABAKA RONALD MUWENDA MUTEBI II)

Abu Mayanja was appointed co-chair of the Kabaka's coronation and the coronation was announced. The process of restoration nevertheless did not pass without challenge. In in a bid to stop the coronation, a Kampala based lawyer sought an injunction arguing that the provisions of 1967 Constitution would be violated if it took place.[1275]It stated that when Museveni returned from the trip that he had made oversees, he requested the National Resistance Council to amend the coronation to allow the coronation. Because of the role played by the chief actors on both sides of the issues that is Abu Mayanja, vice president Samson Kisekka and foreign minister and DP Chief,

[1272] Schedule 1 of the 1962 Constitution of Uganda(the Constitution of Buganda)
[1273] Yoweri Museveni Kaguta 1993.
[1274] Stefan Lougren. Power of the Buganda: Ugandas Kings Return July 11 1996.
[1275] Miscellaneous Application No 74 of 1993.aslo See Mutebi Coronation Hit by Injunction New Vision 29th May 1993

Paul Ssemwogerere. The coronation was a success and the Kabaka Ronald Muwenda Mutebi was coroneted as king at Nnagalabi. However, the question that arose was on the relationship that could stand between Buganda and the central government. This was to remain a story to be narrated upon witnessing the events after.

The central government failed to understand that culture cannot easily be separated from politics given the status of Buganda in Uganda. Buganda was to continue influencing the politic of Uganda. As Oloka Onyango asserts, the issue of Buganda has clearly returned to a position of pre-eminence in the politics of the country and become deeply entrenched in the machinations for political power. Indeed the kingdom has continued to be a critical importance in the political evolution of the Pearl of Africa.[1276]Many events have been witnessed as a result of the silent political interests of the Baganda and the central government. Though the two continue to pretend, there actions can no longer be hidden. Buganda's continued demand for federation has challenged the central government. The two have been clashing in various ways.

TALES FROM AN EAGLE VIEW: THE SECOND AND THE THIRD KABAKA CRISIS: THE UN EXCORCIBLE BUGANDA GHOST QUESTION HAUTING UGANDA.

THE 2009 KABAKA CRISIS (THE KAYUNGA CRISIS)

Since the so-called "third wave"[1277] spread across Eastern Europe, Latin America, Asia and Africa, there has been a growing frustration over the slow pace of democratic progress within the sub-Saharan Africa. In spite of the growing struggles for democracy, the rule of law and independent political institutions, the region still faces a "crisis of governance". Most the sub-Saharan African countries remain under the dominance of personalized or neo-patrimonial political systems[1278]. The nature of governance structures under personalized regimes has become a concern attracting the attention of many scholars and developments experts. For instance, Daniel Compagnon observed that most governments under such a system tend to be characterized by "authoritarian rule, low levels of institutionalization of political processes (including decision making). Although a significant number of countries are affected by various degrees of personal rule, this system has particularly been so common and the debate particularly significant for Uganda where, throughout the 1990s, the donor community expected that President Yoweri Museveni, who had embraced the

[1276] supra
[1277] Huntington, S.p., The Third wave: Democratization in the late Twentieth Century, Norman, University of Oklahoma press, 1991
[1278] Bratton, M. Van De Walle, N., Democratic experiments in Africa, Cambridge, Cambridge University Press, 1997

neo-liberal economic reforms, would turn the country into Africa's Model of democratic success[1279]. Two decades later, the evidence suggests otherwise, as Museveni's leadership continues to evolve towards one-man rule. **Thursday 10th September 2009** that marked the beginning of three dark days of riots within Kampala city and other parts of Buganda brought back the memories of the 1953 and 1966 post-colonial Kabaka riots which followed a respective course and beginning in two different ambits, i.e., the 1953 Kabaka crisis had a historical cause following the tears of Ugandans that said their words to Sir Andrew Cohen in January 1952 as Governor of Uganda. Its Cohen's Constitutional reforms that became incidental and paramount to the on set of the 1953 Kabaka crisis. Cohen tremendously increased African representation within the Ugandan Legislative Council and the Governor's Executive Council followed by negotiations with Muteesa II, several constitutional reforms were proposed for Buganda itself in March 1953 having a majority of elected members in the Lukiiko as well as transferring a number of services from the protectorate government to Buganda government. It was at this point that the secretary of state for colonies floated a new idea of a federation for East Africa in a speech he made in London in June 1953. The speeches gave bells of alarm that went viral within Buganda and escalated into strong protests from both the Lukiiko and the Kingdom. This reactive decision by the Buganda kingdom caused the Governor on 30th November 1953 to sign a declaration withdrawing the British recognition from Muteesa as the native ruler of Buganda under clause6 of the 1900 agreement and this immediately came with the interim deportation of the Kabaka something that caused rapid and unstopped riots, protests and hatred of the British among the Buganda and consequently led to the signing of the 1953 Namirembe agreement as an estoppel to the 1953 Kabaka crisis. It should also be noted that dramatic years between 1962 with the unpracticable independence constitution and 1966 with an interim constitution greatly increased worry coupled with agony among the Baganda within Buganda Kingdom that eventually ushered in the 1966 Kabaka crisis. The 1966 crisis can therefore be traced way back to the growing animosity between Buganda government and the central Government in the aftermath of the 1964 referendum on the lost counties and this was also reflected in the disputes before the courts in 1964 and 1965, further the growing suspicions and conspiracies during the period of 1965 and 1966 (including the Kabaka's relations with the P.M, the power struggles in UPC between Ibingira and Obote and the crossing of the floor by opposition MPs ensured that the country had by 1966 become a powder keg ready to explode. That the 1966 crisis occurred was the inevitable consequence of a series of events commencing in early 1960s. In January 1966, during a session of the National Assembly, a KY member of Parliament Daudi Ocheng alleged that the PM, Obote and his ministers Adoko Nekyon and Felix Onama and Idi

[1279]Mwenda, A., "personalizing power in Uganda", Journal of democracy, Vol.18, N0.3, 2007. Page 23.

Amin were involved in illegal gold trading in the Congo (Zaire). This allegation was made while the PM was on tour in Northern Uganda and upon his return to Kampala, he caused the appointment of a judicial commission of inquiry into the matter. In February during a cabinet meeting in Entebbe, the P.M ordered the arrest of 5 ministers including Ibingira (resulting in the Ibingira and others case). In the same month of February 1966, the P.M suspended the 1962 independence constitution, citing that the country had lost stability and that certain individuals intended to overthrow the lawful government of Uganda. The role of cultural royalty such as the Kabaka in Uganda has been the source of debate historically. President Obote outlawed all cultural leaders in 1966, but Museveni permitted their return in 1995, under the constitution, cultural leaders are barred from politics, but they still wield influence over their communities. The Kabaka is the King of the Buganda Kingdom, the largest ethnic group in Uganda and a key constituency in the country to which many Buganda political leaders have argued that Buganda should a federal state within Uganda.

Ideally, it seems that both sides learnt nothing and forgot nothing from the history of the Pearl. The questions that emanate from the whole issue of the return of Buganda to prominence continue to haunt Uganda and Buganda partially. As usual, business was at a normal point in the country. Day for Buganda Youth Celebration was almost clocking. The Kabaka had portrayed interest in his ambition to celebrate the day from Bugerere a county of Buganda that settles in Kayunga District. Some members of the minority Banyara ethnic group led by a recently retired UPDF captain Kimezze declined the visit of the Kabaka alleging that he had to seek permission from them.[1280]

Their idea was that the Kabaka had no control over Bugerere and it seems quite clear that these people wanted to secede from Buganda. The history about the Banyara has it that they were as a result of intermarriages between the Baganda and the Banyoro supported by the British. Their history or origin is traced from the wars of Buganda against Banyoro before 1900. Namuyonjo late king Kamurasi's son rebelled against his father in 1800 and allied with the Kabaka of Buganda king Mwanga II. Because Buganda was at loggerheads with Banyoro, Mwanga welcomed him. As a token of appreciation, Kabaka gave Namuyonjo control over the captured county of Bugerere which had been previously occupied by Bunyoro. But due to the flies known as "embwa", he didn't occupy the region not until the British flushed out flies.

The Banyara had no kingship. They were organized into clan's system led by the head of a clan. It's the clan heads who chose among themselves one person to lead them who was known as the "Omugabe" who represented the Banyara in Bunyoro. These Banyara are in three types. The **"Bagele"** who were under Bunyoro in Bugerere. The **"Bagambayi"** who came to Bugerere with

[1280] Charles Juuko. Uganda : Banyara choose army officer as king. New Vision.

Namuyonjo when Bugerere became part of Buganda and the last are the **"Batumbugulu"** that came to Bugerere long after Namuyonjo had overthrown Mukongo.

The Baganda found no convincing reason why the king had to seek permission in order to visit his region. Indeed, the long hidden silent conflict between the kingdom and the NRM government was to explode into a high intensified riot that saw many lose their lives and others facing imprisonment. On the 10th of September 2009, the Katikiro of Buganda (the prime minister of Buganda) Owek. J.B. Walusimbi was blocked by security from proceeding to Kayunga district to organize a "bulungibwans" function where the Kabaka was to be the chief guest.[1281]

According to the central government, the Kabaka had not sought permission from the king of the Banyara, Major Baker Kimezze and this came at a time when the president complained that the Kabaka was not picking his calls and as well as NRM accusing Mengo of hosting mainly opposition politicians on CBS radio to undermine the government. The Baganda saw this as an attempt by the central government to undermine the institution of the Kabakaship by sponsoring breakaway kingdoms.[1282]

This simmering friction between the central government and the kingdom exploded into a bloody violence. The Kabaka's supporters took to the streets to protest the government action of undermining the kingship, they burned debris in the roads, blocking traffic and throwing rocks.[1283]The Mengo royalists opened battles with the military and it's said that a number of people around 40 of them lost lives. There were also targeted beatings by the loyalists to the people who looked like westerners because they could not sing the Buganda anthem or pronounce some Luganda words correctly like omufaliso (mattress).

Indeed, violence intensified in every part of Buganda. The government shut down the kingdoms radio station CBS and three others in a major clamp down. The riots spread to Kampala, Mukono, Mpigi, Kayunga and Masaka. On the night of September 12th 2009, the army occupied and surrounded the Kabaka's palace in Kireka upon information that the Kabaka was determined to visit Bugerere come what may. Ideally it was hard to believe how a mere army serving military personnel in Uganda National Army could raise a claim to be the king of the Banyara. Surpringly, his claim was complicated by the fact that his own family disowned him and re-asserted that they were Baganda Buganda refused to recognize him as the king since they had various channels through which it recognizes the Banyara.

An emergency report from Buganda portrayed the long hidden hatred between the two factions. In their report, the committee stated that the conflict was due to the government's intent to completely

[1281]AmonKatungulu. Restoration of Kingdoms was a mistake Ugandans are paying for. Feb.14th 2019
[1282]"Kampala Hit by Renewed violence BBC news" Retrieved 25t May 2021. Also see www.news.bbc.co.uk.
[1283] Uganda: Investigate 2009 Kampala Riots killings. Sept 10th 2010 find it on www.hrw.org

monopolise the oil and other mineral resources over the rights of the native communities that live on the ground. In their report, they claimed, they claimed that the Ugandan government strategy is to have complete political control over the land and minerals including weakening or usurpation of the claims made by native communities.[1284]In their report, they stated that the government has proceeded to create by ceremonious recognition, claims to chieftaincy by any person no matter how remote in the region of Buganda and that once the claim is recognized, the eternally grateful chiefdom will then be more than willing to allow government access to its resources. To them this was intended to weaken the strong kingdom by the government as well as taking over Buganda's land for the benefit of the big fish in government. The violence was not to end until the meeting was held between Kabaka and the president at state house Entebbe on condition that the Kabaka was to visit Bugerere upon complete end of the meeting.

Indeed, this was the first hostile test of the unachievable separation of culture from politics. Buganda was the centers for the independence of Uganda; its contribution is greatly recognized therefore its roots had been fixed in politics. It therefore seems hard to separate it from politics and a failure to maintain a balanced wheel was to escalate into increased misunderstandings between Buganda and the central government. The Baganda continued to demand for federal from the central government. But this has remained impossible since the central government is settled in the region of Buganda. No one can determine when the silent conflict may be culminated following other events then later occurred.

CAUSES & EFFECTS OF THE UNQUENCHEABLE BUGANDA QUESTION

In his press release as earlier on discussed and entitled 'Katikkiro's press release' by ENG.J. B Walusimbi, he clearly postulates the two major causes were the Banyalas' leader rejection of the Kabaka's authority, police blockage of a delegation representing the Buganda kingdom from visiting Kayunga District &effects of the 2009 Kabaka crisis were vividly made visible that President Museveni and his allies within the military played a key role in the suppression of the 2009 Buganda riots. On 10th September 10, 2009, the police blocked a delegation representing the Buganda king (Kabaka) from visiting Kayunga district, a contested land between the Buganda kingdom and the Banyala (a small minority tribe). Because of historical tensions between the tribes, the leaders of the Banyala vehemently opposed the Kabaka's visit, President Museveni whose government has for long been at loggerheads with the Buganda kingdom, issued a decree banning the kin from visiting the contested district. This provoked anger from the King's followers who took on the streets to protest, attracting a backlash from security forces. The president once more

[1284] Buganda Emergency Response Committee Friday, September 11th, 2009. Also find it at www.Buganda.com

deployed the special Forces under the command of his son **Lt.Col. Muhoozi Kainerugaba** and his cousin **Maj. Sabiiti Magyenyi.** During the two-day protest, the military frequently used unnecessary lethal force, killing 40 people indiscriminately, at times in areas where there were no signs of riot activities. The Central government's intervention to block the Buganda King from visiting his people consequently led to the violation of his fundamental right of liberty as enshrined under Article 23 that guarantees the right to personal liberty and illustrated within the case of **Ochieng Vs Uganda (1969) E.A.1**, in which the high court of Uganda that failure to give a substantial explanation for denial or detention amounts to infringement of a person's right to liberty.

The violation of the Kabaka's right to liberty was resultantly followed by an intense violation of people's right to life as envisaged under Article 22(1) of the 1995 Ugandan Constitution that no person shall be derived of life intentionally except by execution of a sentence passed by a fair trial by court of a competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been affirmed by the highest appellate court. This was a settled position of the law under the case of **Susan Kigula & 416 ors Vs AG Constitutional Petition N0.6 of 2003**, in which court affirmed that no other person or arm of government has the capacity except court with a conviction execution order. Its therefore evident from the course of the 2009 Kabaka crisis that during the two-day protest, the military frequently used unnecessary lethal force, killing 40 people indiscriminately, at times in areas where there were no signs of riot activities. This was a testimony within the words of then Inspector of Police, Kayihura who said that seven of the 27 reported killed during the riots weren't involved within the riots at the time of their deaths, and they hit by "stray bullets". He told the Human Rights Watch that the deaths were unfortunate and regrettable, but that the security forces had shown restraint in their response to the unrest. He that two Policemen had been arrested for shooting in the air in Kasubi (the arrests appear unrelated to the death of Kababsinguzi one of the victims).It's also evident from Articles written by different eye witnesses that when the Kabaka's determination to visit Kayunga no matter the odds got expressly manifested, the Army surrounded his palace in Kireka on the night of September 12 & over 500people were arrested I various parts of Buganda, a police station was burnt to ashes and a police officer got shot and injured in the leg while a female police officer got sexually assaulted. A journalist Kalungi Serumaga was abducted by state agents as he left WBS TV talk show where he had disclosed the riots. His host Kibaazo was consequently suspended from the station. Kyaddondo south MP Issa Kikungue was arrested on suspicion that he was a ring leader of the riots. During the 2009 Kayunga Crisis, most of the 88people injured and were admitted to Mulago Hospital had gunshot wounds. There were many more admitted to other hospitals. This is what sources talking to

Human Rights Watch (HRW) say masiro burning during the 2009 Kabaka crisis

The 2009 Kabaka crisis also exposed the incompetence of various government organs and agencies. Along with the promises by public officials in the days following the riots to investigate the deaths, on September 30, 2009 the deputy speaker of parliament ordered the parliamentary Committee on Defense and internal Affairs to investigate the unrests and issue a report within two weeks. Committee members scheduled visits to affected neighborhoods, but ultimately no such visits took place. Committee members interviewed by Human Rights Watch said that their efforts were deliberately frustrated by government officials who wanted to avoid further discussion of what had transpired. One year later, the committee hasn't summoned a single witness to give evidence and no report was issued. This consequently exposed the incompetence of investigating parliamentary committees and intensified the influence of the executive arm of government into other arms of government.

The military and Police blockage of the Kabaka from accessing his people in Kayunga provoked anger from the King's followers who took on the streets to protest, attracting a backlash from security forces. This in turn intensified the 2009 Kabaka crisis as it led to the massive destructive of property within Kampala and in other parts of Buganda. This included destruction of economic & administrative structures ranging from Petrol Stations to Police stations. This followed the suppression of the press within Buganda i.e., the closure of its radio station CBS FM, something that has heightened to the unnecessary chaos and tension was implication and clear infringement of the people's right to freedom of speech and expression as enshrined under Article 29 of the 1995 Uganda Constitution. Such fundamental human rights as enshrined under charter4 of the Constitution as inherent and not provided for by the state. This was anonymously emphasized and stressed by the Ugandan Courts under the case, **Charles Onyango Obbo & Andrew Mujjuni Mwenda Vs Attorney General Constitutional Appeal N0.2 of 2002,** in which the petitioners challenged the legality of Section 50 (1) of the Penal Code Act, which the appellants claimed in the petition as being unconstitutional, that provides that any person who publishes any false statement, rumor or report which is likely to cause fear and alarm to the public or disturb the public peace is guilty of a misdemeanor. The learned Justices recognized the Constitutional protection of that freedom under Article 29 (1) and the limitation placed on that freedom by Article 43 (1) but, again, with respect they were more concerned with the limitation under Article 43 (1) than with the provisions of Article 43 (2) (c). The learned Commissioner put it rightly that clauses (1) and (2) of Article 43 should be read together with Article 29 (1), but with respect, court was unable to accept his argument that the test of what is acceptable and demonstrably justifiable in free and democratic society must be a subjective one. And to their mind, the justices contended that the test must

conform with what is universally accepted to be a democratic society. Secondly, the preamble to the Constitution recalls the history of Uganda as characterized by political and constitutional instability; recognizes the people's struggle against the forces of tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing, through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. There is no slightest doubt that when the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails. Court therefore wasn't satisfied that the respondent established that the limitations placed on the enjoyment of the freedom of expression and the press, guaranteed by Article 29 (1) (a) of the Constitution by section 50 of the Penal Code Act is not beyond what is acceptable and demonstrably justified in a democratic society. Consequently S.50 of the PCA was at the level of its inconsistency struck down in promotion of people's expression of the right of speech and therefore the 2009 Kayunga that involved killings of rioters and blocking of the Kabaka to access his people was a prominent& incidental violence of fundamental Human rights enshrined under Charter4 of the 1955 Ugandan Constitution.

The historical fragile relationship between the central government and Buganda kingdom also greatly contributed the 2009 Kabaka crisis. Following former years of 1960- 1966, Buganda had had wanted federal position within Uganda and boasted over the privileged recognition by the colonialists. It was therefore not long when the British left the issues of Uganda to be governed by Ugandans, something that ushered in the independence constitution of 1962 in which Buganda celebrated a lot attachments and benefits causing the then prime minister Obote as the ruler to abolish the constitution, this caused anger among most Buganda and consequently led to the 1966 Kabaka crisis. Prior to 1966, in 1953, Buganda had protested over the federation arrangements with the central government that sought Uganda to combined with other East African countries, this was through a speech made by the governor of colonies within London. This consequently led to the withdraw of the Kabaka's recognition that was granted by the 1900 agreement with the British and result into the deportation of the Kabaka. This tigered anger among the Baganda and led the 1953 Kabaka crisis. Thus, Because of historical tensions between the central government the tribes, the leaders of the Banyala vehemently opposed the Kabaka's visit, President Museveni whose government has for long been at loggerheads with the Buganda kingdom, issued a decree banning the king from visiting the contested district. This provoked anger from the King's followers who took on the streets to protest, attracting a backlash from security forces. The president once more deployed the special Forces under the command of his son **Lt.Col. Muhoozi Kainerugaba** and his cousin **Maj. Sabiiti Magyenyi** thus intensifying the 2009 riots.

C O U R S E

President Museveni and his allies within the military played a key role in the suppression of the 2009 Buganda riots. On 10th September 10, 2009, the police blocked a delegation representing the Buganda king (Kabaka) from visiting Kayunga district, a contested land between the Buganda kingdom and the Banyala (a small minority tribe). Because of historical tensions between the tribes, the leaders of the Banyala vehemently opposed the Kabaka's visit, President Museveni whose government has for long been at loggerheads with the Buganda kingdom, issued a decree banning the king from visiting the contested district[1285]. This provoked anger from the King's followers who took on the streets to protest, attracting a backlash from security forces. The president once more deployed the special Forces under the command of his son **Lt.Col. Muhoozi Kainerugaba** and his cousin **Maj. Sabiiti Magyenyi**[1286]. During the two-day protest, the military frequently used unnecessary lethal force, killing 40 people indiscriminately, at times in areas where there were no signs of riot activities. Further examples of the above were statements of Lt. Col. Muhoozi, the President's son, regarding the 2011 presidential election, in which he warned the opposition through the government owned newspaper, the New Vision, "that he is ready to clash with any opposition groups that want to destabilize the country during the polls". His warning followed that of the then **chief Defense Forces Gen. Aronda Nyakairima** who had that the army isn't ready to accept "bad characters" to take over power from president Museveni and that the UPDF would "step in to crush opposition politicians" who engage in demonstrations[1287]Thursday 10th September 2009 that marked the beginning of three dark days of riots within Kampala city and other parts of Buganda is therefore one of the consequential uprisings within Buganda against the central government and thus, the fiction which had been simmering between the Kabaka of Buganda Ronald Mutebi, the central government and the leader of the Banyala in Kayunga who was trying to 'secede' from Buganda, exploded into a bloody violence when Buganda' Prime Minister John Baptist Walusimbi was blocked by armed police officers and the army from accessing Kayunga, the prime Minister's major objective within Kayunga seemed clear to the point of organizing and preparing for the Kabaka's scheduled visit to mark the kingdom's annual youth day. In his press release entitled 'Katikkiro's press release' by ENG.J. B Walusimbi, he clearly postulated that in the year 2008 the kingdom of Buganda decided to hold the annual Youth Day celebrations for 2009 in Bugerere County following the successful celebrations held in Kyaggwe County. The objective of the celebrations, which are presided over by SsaabasajjaKabaka, is to rally the youth to engage in

[1285]Ssekika.E., "Museveni to Mengo: I will cut off your", The Observer, Kampala, 14th June 2010
[1286] Ibid.
[1287]Byenkya. A "Army to work with police to quell poll violence- Muhoozi, New Vision, February 2011.

social and economically developmental activities as well as to promote cultural values. He also noted saying, "the kingdom regrets that this year's celebrations have been unduly politicized", he further claimed that Kabaka's visit to Bugerere is lawful and constitutional and the reasons being given for blocking the Kabaka and the Katikkiro from accessing Bugerere are completely unfounded. The kingdom recognizes the cultural and ethnic diversity of its people which is clearly demonstrated within the composition of its cabinet and Lukiiko, he added stating that the county of Bugerere comprises of several ethnic communities including the Bakenye, Basoga, Bagishu, Baluuli, Baganda, Japadhola, Iteso, Sudanese & the kuku to which all ethnicities have been living harmoniously until the recent creation of the institution of the "Sabanyala". The kingdom of Buganda deeply regrets the loss of life and destruction of property that followed the refusal of the Katikkiro to access Bugerere, abhors the closure of its radio station CBS FM, something that has heightened to the unnecessary chaos and tension. The Kingdom of Buganda remains committed to fostering peace, justice and the harmonious co-existence of all the people of Uganda, remaining very resolute in our peaceful and democratic quest for the realization of our legitimate aspirations for a federal system of governance for the whole of Uganda and the unconditional return of our expropriated properties. The Kingdom has always been willing to engage in principled, transparent and constructive dialogue with the government and all other communities of Uganda to ensure our peaceful co- existence for the future and to which dialogue ought to be structured, time bound, free of intimidation and based on mutual respect.

A lot has changed since the September 10, 2009, Buganda riots, yet the shadow of what led to the deadly incidents still looms large. The riots, exactly eight years ago, happened when state machinery was deployed to block a Buganda kingdom delegation led by the then Katikkiro (prime minister) JB Walusimbi from visiting Bugerere County (Kayunga district). Kabaka Muwenda Mutebi II was due to visit the area, a move that had been opposed by sections of the Banyala, the incident was the peak of a very bad relationship characterized by distrust between Buganda's Mengo based government the president Museveni-led government. While the 2009 events happened during his reign, Mr. Walusimbi's appointment had, observers opine that it was a try to calm down the flaring tempers on both ends. His predecessor Daniel Muliika had openly been anti Museveni to the point of backing Dr. Kizza Besigye's 2006 presidential bid.

Its therefore vividly clear from Katikirro Walusumbi's press release that the 2009 Kabaka crisis was a clash between the central government and the Buganda Kingdom that escalated and exploded into a bloody violence leading to a siege and shut down of the Kingdom's Radio Station CBS to which protests and riots spread to Kampala, Mukono, Mpigi, Kayunga and Masaka. It's also evident from Articles written by different eye witnesses that when the Kabaka's determination to

visit Kayunga no matter the odds got expressly manifested, the Army surrounded his palace in Kireka on the night of September 12& over 500 people were arrested I various parts of Buganda, a police station was burnt to ashes and a police officer got shot and injured in the leg while a female police officer got sexually assaulted. A journalist Kalungi Serumaga was abducted by state agents as he left WBS TV talk show where he had disclosed the riots. His host Kibaazo was consequently suspended from the station. Kyaddondo south MP Issa Kikungue was arrested on suspicion that he was a ring leader of the riots. During the 2009 Kayunga Crisis, most of the 88 people injured and were admitted to Mulago Hospital had gunshot wounds. There were many more admitted to other hospitals. This is what sources talking to **Human Rights Watch (HRW)** say. HRW complains in its September 10, 2014 report titled "Uganda: 5years on, No Justice for protest killings" that the Uganda government has failed to deliver justice for it victimized during the Kayunga crisis. Maria Burnette, Senior HRW Researcher, says that this a serious disregard for the rule of law and a government unconcerned about people's lives. HRW says it investigated 13cases in which Police and the military shot through closed doors with clear knowledge that there were occupants on the other side and killed the occupants. Ndeeba is one area where HRW documented repeated cases of such indiscriminate shootings. HRW interviewed many victims and relatives one of who was Magidu Kayizzi. Kayizzi's older son died of a gunshot wound and government forces beat his younger son to death to which Kayizzi filed a civil law suit against Kale Kayihura, Police Inspector General and Uganda's Attorney General. He sought compensation for the wrongful deaths of his sons. "Deplorable", said the judge regarding the Police actions, damages were awarded money to Kayizzi but the Uganda Government never paid to the victim.

In contrast, according to the HRW, the Police response to protesters alleged wrongdoing was overwhelming. Over 850 protestors were charged with such crimes as unlawful assembly, inciting violence and dramatically others were charged with terrorism. They were later acquitted, but not before spending three maximum security prison thus, while dismissing the terrorism charge, the judge labeled the Police investigation "incurably tainted, rendering the prosecution a nullity."

THE POLICE EXPLANATION:

The then Police Inspector General, Kayihura told Human Rights Watch that the Police lacked capacity to respond to the speed geographical breadth of the events of September 10. Unrests in previous years had centered on Kampala's Central Business District and hadn't extended into populous residential neighborhoods. He said that Uganda's military police, the presidential Guard Brigade and regular army units had both the equipment and the mobility to respond to the unrests. He said that the military Police like the civilian Police, have had training in riot control and that the

armored personnel carriers were deployed to help move units around the suburbs where riots were taking place. He said the Uganda military possesses four of these vehicles; two Gila and two mamba anti-riot vehicles, which can also be used for "fighting terrorism and insurgency".

Kayihura said that seven of the 27 reported killed during the riots weren't involved within the riots at the time of their deaths, and they hit by "stray bullets". He told the Human Rights Watch that the deaths were unfortunate and regrettable, but that the security forces had shown restraint in their response to the unrest. He that two Policemen had been arrested for shooting in the air in Kasubi (the arrests appear unrelated to the death of Kababsinguzi one of the victims). He said that investigations would be conducted into the circumstances of all the deaths during the riots, but also cited S.69 of the Penal Code Act which states that the police may use all such forces as is reasonably necessary for overcoming a riot and Police shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.

According to statements quoted in the New Vision newspaper by the army spokesman**, Lt. Col. Felix Kulayigye**, military units were deployed under **Article 209(b) of the constitution**, which states that the Uganda Peoples Defense Forces shall cooperate with the civilian authority in emergency situations and that once deployed, they act under orders of the Inspector General of Police. Kulayige contended that the situation was "a war" and that the riots had had genocidal tendencies. He placed the blame for the deaths on the alleged organizers of the riots but admitted that the moment the bullet leaves the barrel, anything could happen beyond there**. Human Rights Watch** also contended and deeply got concerned that Kulayige's statements could encourage members of the security forces to use unnecessary and unlawful lethal force during future encounters with demonstrators. Museveni told an emergency session of parliament on September 15 that the government will compensate those who lost their properties and vehicles and it will assist those who lost family members, however, the Human Rights Watch did recommend that the government of Uganda should publicly acknowledge and condemn recent shootings of unarmed people by members of the security forces, undertake an independent and impartial investigation into the actions of all soldiers and police alleged to have perpetrated human rights abuses during the September riots, prosecute those against whom there is sufficient evidence in accordance with international fair trial standards, issue clear public instructions to all government forces involved in policing to use lethal force only when strictly unavoidable to protect human life, seek out non-lethal options for police and military responding to demonstrations and protests, and ensure those options are standard issue for police stations.

PUBLIC OPINION:

In 2013, long before the Kasese clashes that left more than 100 people dead, Rona Peligal, then Africa Director at Human Rights Watch, had warned of future consequences if those who killed people weren't brought to justice. No member of the security forces that included Police, military Police, regular army and special Forces Command (then presidential Guard Brigade) who deployed on the streets during the three days of unrest has ever been prosecuted for their role in the killings. A parliamentary investigation too was scuttled or to say the least, never took off. Reflecting on the eight years since, he scoffs at an idea of the report on the killings saying the perpetrators are known. **"if you have a dishonest leader like [president] Museveni all you can do is to tread with caution and wait for him to go",** he said in an interview. Attempts have been made since the rots to mend fences between the central government and particularly President Museveni one hand, the Mengo establishment, and Kabaka Mutebi on the other. The appointment of Charles Peter Mayiga as Buganda Katikkiro in May 2013 was misread by many who thought he would take a radical stance that he had been perceived to take when he was the kingdom information minister, they were wrong. He has instead taken over from where his predecessor stopped and moved to further diminish the tensions between Mengo and the Central government, at least publicly. Shortly after Mr. Mayiga's appointment, a memorandum of understanding was signed between President Museveni and Kabaka Mutebi at state house, Entebbe. Several other initiatives between government and Mengo happened on the positive but not without any glitches. Katikkiro Mayiga says the issues that led to the 2009 conflict have been partially resolved. He cites the example of the Kabaka being able move freely in his kingdom without hindrance by the state. On the 2009 incident, specifically, he cites the thorny issue in Bugerere which he says the central government must take active steps to resolve. "Baker Kimeze purports to have a chiefdom in Bugerere, which whereas it is farcical, creates unnecessary acrimony. He occasionally lays claim to administrative headquarters and parcels of land", Mr. Mayiga says. "So far, the tragic events of September 2009 stand to symbolize entrenched impunity and the curtailment of free expression in Uganda" Peligal said as Uganda heads into elections in early 2011, the government needs to transparent investigations into official misconduct and to free speech. The demand for fundamental human rights is therefore an international drastic campaign as envisaged in The Supreme Court of Canada which upheld the view **in R vs. Zundel (1992) 10 C.C.R. (2rd) 193. McLachlan J**., as she then was, writing the majority judgment, had this to say,

"Tests of free expression frequently involve a contest between the (majority) view of what is true or right and an unpopular minority view. As Holmes J. stated over 60 years ago, the fact that the

particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively call for attachment than any other it is the principle of free thought not free thought for those who agree with us but freedom for the thought that we hate ". Thus, the guarantee of freedom of expression serves to preclude the majority's perception of truth or public interest from smothering the minority's perception."

And similarly, in **Rangarajan vs. Jagjivan Ram and Others; Union of India and Others vs. Jagvan Ram and Others (1990) LRC (Const.) 412**, the Supreme Court of India put the point this way, at page 427

"There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'. "

This was anonymously emphasized and stressed by the Ugandan Courts under the case, **Charles Onyango Obbo& Andrew Mujjuni Mwenda Vs Attorney General Constitutional Appeal N0.2 of 2002,** in which the petitioners challenged the legality of Section 50 (1) of the Penal Code Act, which the appellants claimed in the petition as being unconstitutional, that provides that any person who publishes any false statement, rumor or report which is likely to cause fear and alarm to the public or disturb the public peace is guilty of a misdemeanor. The learned Justices recognized the Constitutional protection of that freedom under Article 29 (1) and the limitation placed on that freedom by Article 43 (1) but, again, with respect they were more concerned with the limitation under Article 43 (1) than with the provisions of Article 43 (2) (c). The learned Commissioner put it rightly that clauses (1) and (2) of Article 43 should be read together with Article 29 (1), but with respect, court was unable to accept his argument that the test of what is acceptable and demonstrably justifiable in free and democratic society must be a subjective one. And to their mind, the justices contended that the test must conform with what is universally accepted to be a democratic society. Secondly, the preamble to the Constitution recalls the history of Uganda as characterized by political and constitutional instability; recognizes the people's struggle against the forces of tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing, through a popular and durable constitution based on the

principles of unity, peace, equality, democracy, freedom, social justice and progress. There is no slightest doubt that when the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails. Court therefore wasn't satisfied that the respondent established that the limitations placed on the enjoyment of the freedom of expression and the press, guaranteed by Article 29 (1) (a) of the Constitution by section 50 of the Penal Code Act is not beyond what is acceptable and demonstrably justified in a democratic society. Consequently S.50 of the PCA was at the level of its inconsistency struck down in promotion of people's expression of the right of speech and therefore the 2009 Kayunga that involved killings of rioters and blocking of the Kabaka to access his people was a prominent& incidental violence of fundamental Human rights enshrined under Charter4 of the 1955 Ugandan Constitution. Thus, the year 2009 wasn't all that gloomy for monarchists. The people of Rwenzori celebrated when the government allowed their king, Wesley Mumbere, to be crowned a traditional ruler of the Rwenzururu on October 19 after more than four decades of waiting.

However, it should be noted that the use of the army to suppress and control social dilemmas and fight political opponents is a common practice under the Museveni regime. 1999, President Museveni responded that the army will have no role to play once the country moves to embrace multiparty politics. In Museveni's view, army representatives in parliament were there as "listening posts for the army in the world of politics. He further argued that they aren't supposed to take part in "controversial issues, parliament being the center of controversies". Museveni then explained that this situation was only possible under the movement one party system of governance because I multiparty politics it would involve the army in partisan politics. The discussion covered in the previous section has already shown that this has not been the case. This is further developed below.

In Uganda, several incidents have shown that the military apparatus has been used to arrest opposition members and human rights activists. In some instances, military officers' carryout the "arrest wearing civilian clothes with no identifying insignia and do not inform suspects of the reasons for their arrest. The agents force suspects into unmarked cars, blindfolded and handcuffed, and take them to the Joint Anti-Terrorism Task Force(JATT) headquarters in Kololo, a rich suburb of Kampala. Many are taken to military intelligence headquarters in Kiante for further brutal interrogations", the use of the military to intimidate and harass those opposed to the president was captured by a select committee of parliament of the Republic of Uganda in 2002. The committee issued a report accusing the military of being the lead agent of poll violence.

One of the ways in which the president was able to implement a repressive electoral regime against the opposition was through family members serving in the security forces, which played a key role

in politicizing the military. For instance, on April 11, 2010, a group calling itself Activists for change (A4C) organized a demonstration, which was quickly joined by opposition politicians-keen to exploit it for their political motives. The demonstration was sparked off by concerns over rising motives. The demonstration was sparked off by concerns over rising commodity prices. With speculation circulating that it could turn into an Egypt-style kind of revolution, the president deployed the special Forces commanded by his son. This elite unit considered the engine of the Uganda military relied on extreme force to suppress the protest, resulting in the death of over ten people. Second, Museveni and his allies in the military also played a key role in the suppression of the 2009 Buganda riots. On September 10, 2009, the police blocked a delegation representing the Buganda king (Kabaka) from visiting Kayunga district, contested land between the Buganda kingdom and the Banyala (a small minority tribe). Because of historical tensions between the two tribes the leaders of the Banyala vehemently opposed the Kabaka's visit. President Museveni, whose government has for long been at loggerheads with the Buganda kingdom, issued a decree banning the king from visiting the contested district. This provoked anger from the king's followers who later took to the streets to protest, attracting a backlash from security forces. The president once more deployed the special Forces under the command of his son Lt.Col. Muhoozi Kainerugaba and his cousin Maj. Sabiiti Magyenyi. During the two-day protest, the military frequently used unnecessary lethal force, killing 40 people indiscriminately, at times in areas where there were no signs of riot activists.

Further examples of the above are the statements of Lt.Col. Muhoozi, the President's son, regarding the 2o11 presidential election, in which he warned the opposition through the government-owned newspaper, the New Vision, that he is ready to clash with any opposition groups "that want to destabilize the country during the polls" His warning followed that of the then Chief of Defense Forces Gen. Aronda Nyakairima who had had stated that the army isn't ready to accept "bad characters" to take over power from President Museveni and that UPDF would "step in to crush opposition politicians" who engage in demonstrations. Any serious discussion on the role of security agencies in perpetuating incumbency cannot go short of analyzing the role intelligence networks play for Museveni's political survival. Building on the categorization of surveillance under low-intensity coercion, I delve into how such surveillance acts and intelligence networks that are spread throughout the country monitor opposition party activities and utilize information for regime political survival. At the national level, such intelligence agencies include Internal Security Organization (ISO), External Security Organization (ESO), Chieftaincy of military Intelligence (CMI) among others. These three are counter-intelligence agencies established under an Act of parliament-The Security Organization Act 1987. Their functions include assessing internal and

external security threats, military intelligence gathering, espionage among others. These intelligence organizations have in the past been headed by army historical and regime loyalists like Gen. Elly Tumwine, Gen. David Sejusa, Lt. Gen. Henry Tumukunde, Maj. Gen. Jim Muhwezi and others that fought the guerrilla war. They are thus, crucial for regime protection and monitoring all actors that pose a threat to Museveni incumbency.

In the guise of national security, security agencies have been used to spy, obtain information and curtail activities of actors that challenge Museveni's incumbency. The mandate of obtaining information for national security can be used for regime political mileage. Human rights report in recent years have implicated these intelligence agencies in for example using treason to isolate political opponents. Even before the passing of the Regulation of Interception of Communications Bill 2010 (popularly known as the phone tapping law), the government admitted tapping phones of prominent Ugandans. Although the law was intended to enable intelligence and security officials access private communication for security purposes, it has been used for curtailing political space, personal and non-security purposes. At the district level, Resident District Commissioners (RDCs) and their deputies are appointed by the regime in each district to oversee security, gather intelligence and monitor other government programs. Some of these RDCs are ruling party cadres and war veterans some of whom former fighters in the struggle that brought Museveni to power. RDCs are assisted by District Internal Security Officers (DISOs), also appointed by the ruling party. RDCs & DISOs oversee security, gather information using informants and volunteers and are also on record of deliberate sabotage of opposition party activities like denying opposition figures access to local radio stations in the districts where they're posted.

Regime intelligence structures in Uganda are also spread to the lowest Parish and village levels. At sub county or Gombolola level, there are Gombolola Intelligence Security Officers (GISOs) who are local natives and therefore understand the dynamics their regions. At Parish level, there are Parish Internal Security Officers (PISOs) who assist the regime in security and intelligence gatherings. Final at the bottom of the local government structure is Local Councils (LCI and II). These maintain law and order, gather and disseminate security information. LCs also recommend to the army and police potential recruits. In discussing ways through which security forces in Uganda sustain the Museveni regime and consolidate power, I discuss three major events/ issues that have in the recent past threatened Museveni's incumbency and explain how high and low-intensity coercion has been used by the security forces to protect the regime. These events are first, elections, second walk-to-work protests of 2011 and third Buganda riot demonstrations of 2009. These events not only offer great insight on the security forces' willingness to clamp down on any opposition to incumbent rule but also, they help answer one central questions. I.e., How do security agencies in

Uganda sustain the Museveni regime and grip on power? Finally, I now discuss the 2009 Buganda riots which were sparked off by Police blockage of Buganda kingdom officials led by premier John Baptist Walusimbi. The Buganda kingdom officials planned to visit Kayunga. The Uganda riots in away re-opened an old rivalry of the central Government versus Buganda that dates back to the first post-independence government of executive prime minister Milton Obote and ceremonial president Edward Mutesa II. This culminated into the 1966 invasion of the king's palace by the military and his subsequent fleeing to exile in London. The state's reaction to the riots that took place in Buganda strongholds and Kampala specifically (the administrative and commercial heart of the country) fits into the description of high-intensity coercion were police, military police and the army worked jointly to suppress the rioters. State employed its repressive machinery including Special Forces using lethal and indiscriminate force. The riots promoted a violent crackdown by the government, leaving at least 27 dead, 100 injured and 560 arrested. Drawing on the literature of incumbency advantages, other institutions in Uganda have aided security agencies in the regime protection agenda. For example, the passing of the controversial Public Management Act 2013 is a good example. Law making in Uganda, as some scholars have shown is used for regime survival purposes depending on the political climate of the time. The Public Order Management law empowers the police to regulate public meetings and in fact, several opposition party activities throughout the country have been blocked using the law. From the three illustrations above, my argument is that the regime has combined high and low intensity coercive measures to deal with actions that threaten Museveni's incumbency. In so doing, Ugandan elections since 2001 have recycled Museveni in power and even opposition protests have been dealt with using the regime's coercive capacity.

THE POLICE EXPLANATION

The then Police Inspector General, Kayihura told Human Rights Watch that the Police lacked capacity to respond to the speed geographical breadth of the events of September 10. Unrests in previous years had centered on Kampala's Central Business District and hadn't extended into populous residential neighborhoods. He said that Uganda's military police, the presidential Guard Brigade and regular army units had both the equipment and the mobility to respond to the unrests. He said that the military Police like the civilian Police, have had training in riot control and that the armored personnel carriers were deployed to help move units around the suburbs where riots were taking place. He said the Uganda military possesses four of these vehicles; two Gila and two mamba anti-riot vehicles, which can also be used for "fighting terrorism and insurgency".

Kayihura said that seven of the 27 reported killed during the riots weren't involved within the riots

at the time of their deaths, and they hit by "stray bullets". He told the Human Rights Watch that the deaths were unfortunate and regrettable, but that the security forces had shown restraint in their response to the unrest. He that two Policemen had been arrested for shooting in the air in Kasubi (the arrests appear unrelated to the death of Kababsinguzi one of the victims). He said that investigations would be conducted into the circumstances of all the deaths during the riots, but also cited S.69 of the Penal Code Act which states that the police may use all such forces as is reasonably necessary for overcoming a riot and Police shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.

According to statements quoted in the New Vision newspaper by the army spokesman**, Lt. Col. Felix Kulayigye**, military units were deployed under **Article209(b) of the constitution**, which states that the Uganda Peoples Defense Forces shall cooperate with the civilian authority in emergency situations and that once deployed, they act under orders of the Inspector General of Police. Kulayige contended that the situation was "a war" and that the riots had had genocidal tendencies. He placed the blame for the deaths on the alleged organizers of the riots but admitted that the moment the bullet leaves the barrel, anything could happen beyond there**. Human Rights Watch** also contended and deeply got concerned that Kulayige's statements could encourage members of the security forces to use unnecessary and unlawful lethal force during future encounters with demonstrators. Museveni told an emergency session of parliament on September 15 that the government will compensate those who lost their properties and vehicles and it will assist those who lost family members, however, the Human Rights Watch did recommend that the government of Uganda should publicly acknowledge and condemn recent shootings of unarmed people by members of the security forces, undertake an independent and impartial investigation into the actions of all soldiers and police alleged to have perpetrated human rights abuses during the September riots, prosecute those against whom there is sufficient evidence in accordance with international fair trial standards, issue clear public instructions to all government forces involved in policing to use lethal force only when strictly unavoidable to protect human life, seek out non-lethal options for police and military responding to demonstrations and protests, and ensure those options are standard issue for police stations.

THE KASUBI TOMBS CRISIS

In the aftermath of the 2009 Bugerere crisis, another shocking event that weakened the Baganda was witnessed. On March 16th 2010 at around 8:30pm, the Kasubi tombs were destroyed by

fire.[1288]As already noted, the event occurred during the awkward relationship between the central government of Uganda and the kingdom particularly in light of the September 2009 riots. These tombs have deep spiritual political and religious significances for the Baganda. They hold or act as the burial grounds for the kings of Buganda.

The burning of 128-year-old tombs was a crisis for the Baganda. Immediately, following the unfortunate fire at the tombs, Kampala city was abound with questionable versions of the cause of the fire and some circles went on to speculate on the motive that the tombs had been set on fire by the government in a way of revenge following the 2009 riots. [1289]President Museveni hurried to make a move on a national television and issued a stern warning to those maligning his government and accusing it of being behind the fire at the tombs. But this seems to have confused the natives the more as to who actually torched the tombs. Most of them started to object the president's submissions.

On the 17th of March 2010, when the president visited the tombs, riots sprung in Kampala and in Kasubi. The rioters were expressing their dissatisfaction with the fact that the president was behind the whole issue. Two people were shot dead by the security forces in trying to end the riot. Majority sustained injuries others were arrested.[1290] In order to settle the matter, the kingdom called upon the masses to end the demonstrations. A commission of inquiry was set to investigate the fire outbreak which made a report that was handed over to the government in March 2011 but as of April 2012 it had not been released to the public[1291]. The government promised funds to finance the reconstruction but it is not clear whether they were delivered following Buganda construction of the tombs basing on the funds raised through the famous "Ttofaali" a fund rising mission created by the kingdoms prime minister.

Buganda's relationship with the central government has been rising into soures though it is silent, it remains in words among the natives. It can be justified as to whether everything that occurs to Buganda is as a result of the move by the central government but that has remained the saying due to the conflict between the two majorly upheld by the natives of Buganda.

THE THIRD KABAKA CRISIS

The third Kabaka crisis was an arousement of the masses in Buganda in reference to Uganda and was characterized with notions of both political, social and economically in nature but the all

[1288] "UgandasKasubi Royal Tombs gutted by fire" BBC News 17th March 2020 . Retrieved 25th March 2021.
[1289]Katende. R.B. Kasubiburning:The untold story: The Independent March 30, 2010.
[1290] Fire burns Kasubi Royal Tombs again. Thursday July 25 2013. Daily Monitor.
[1291]Lubwama, Siraje.(15th April 2012) "Lawyers sue government over Kasubi Tombs Fire." The Observer (Uganda) Retrieved 25th May 2021.

situations was sparked off following the attributed presentation of the king of Buganda Kabaka Ronald MuwendaMutebi ii to the public is the vegetative state at his 66th birthday celebrations of Tuesday 13th April, 2021 at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly and also the noting in the cutting of his cake that made round on various social media platforms all seemed the fact that called for public attentions both in Uganda and the outside world but most especially Ugandans in the diaspora thus periods of anger among many Ugandans but most especially his subjects the Baganda.

But the lighting flames starting from way back of the indifferences between the kingdom of Buganda and the central government which was characterized with the demands of worth shs.20 billion but however living in a devastating state between the two, the attribute abs ensure of the king on the Masaza tournament cup finals and this for over a period of 28 years reign the king of Buganda Kabaka Ronald MuwendaMutebi ii had never missed presiding over at any premier kingdom's event that was the first time missing the ending of the Buganda sports tournament that's being referred to as the Masaza cup which finals were celebrated at St. Mary's Stadium Kitende, his absence at the kingdom's function portrayed the aspect that all was not well for this served the first time for the king himself to miss presiding over the ceremony an aspect which called upon public attention thus creating challenging periods within Buganda in reference to Uganda.

However, the third Kabaka crisis not to be confused with the earlier Kabaka crisis these including the 1953 and 1955 in which a period evolved and developed into a political and constitutional crisis in the Uganda protectorate where the king of Buganda pressed for Buganda secession from Uganda as a protectorate and therefore his attributes were subsequently deposed and exiled by the British governor Andrew Cohen. That was therefore followed by the Kabaka crisis, the 1966 Kabaka crisis that was stormed by the political differences and grievances that existed between the then king of Buganda Kabaka Mutessa II and the then prime minister of Uganda Dr. Milton Obote. The 1966 Kabaka crisis is also known by a number of attributes the including the 1966 Buganda crisis, the Mengo crisis of 1966 or the battle of Mengo hill and its actual root cause was the recognized falling out between Kabaka Mutesa and Obote the prime minister following the issue of the return of the lost counties these including Buyaga and Bugangaizi back to Bunyoro from Buganda thus situations leading to the culmination in the military assault.

Within the same aspect that history need be proved, by 1960 Milton Obote established political

party named the Uganda people's congress which was aimed to enrich the powers and influence of the 'Mengo establishment' thus a group of well-organized and strong nationalists with Buganda that eventually led to the sub-nation kingdom of Buganda. The Mengo establishment was plugged by rivalries and infightings, but most of its members were proved to be the recognized protestant Christians and thus they were united by their approved dislike of the democratic party which was a broad based dominated by the recognized catholic society thus living in a political difference between the political parties with their different motives, aims and party goals.

As an astonishing political party, the **Democratic Party** (DP) worn a majority seats in Uganda's first free national elections in 1961 and thus formed the first recognized government. However, living in a discontent with the democratic party, the Uganda people's congress UPC together with the national traditional both living in state not to like the DP due to their catholic orientation measures, but were diametrically opposed to each other's ideas but quite an aspect that despite their different attributes politically, the (UPC) gave grace Ibingira, a believed conservative member of its ranks the responsibility of making contact with the Buganda for an alliance to so as to possibly unseat the DP political party. Being personally acquainted with the king of Buganda Kabaka mutes ii for both lived a respectable and friendly life thus favoring the attributed aspects to grace Ibingira.

However, following the astonishing misconceptions among political parties, following the several negotiations UPC and Buganda leaders agreed and held a conference were upon an agreement was reached and this afterwards created the known challenging party of **Kabaka YEKKA** a traditional party that entered an alliance with the UPC.

Its thus also worth noting that following the Uganda people's congress's UPC victory in the april 1962 general elections, Obote was tasked with forming the government and with this seeing him becoming the prime minister of the UPC-KY coalition government. The Kabaka YEKKA (KY) held mostly insignificant portfolios, while Obote as prime minister obtained control of security services and the armed forces too. Then one grace Ibingira became the recognized minister of justice and the prevailing aspects was followed by the attainment of the independence of Uganda from the colonial masters the United Kingdom dated on 9th October, 1962. In achieving the party success, by 1963 Kabaka Mutesa II was elected president of Uganda thus gained attributes of a legally ceremonial post and then Milton Obote was in support of his election with the back intentions of appeasing the Baganda population of which he scored luckily enough. This therefore put to light the attributes of Obote the prime minister and john Kakonge the then recognized leader of the Uganda people's congress UPC party.

Living in support by 1964, grace Ibingira initiated a struggle to gain control of the Uganda people's party (UPC) with the goal of deposing Obote from the party presidency and this was followed by

the party conference in April in which he challenged john Kakonge for the secretarial general of the Uganda people's congress and convinced Obote that the one John Kakonge passed a threat to his leadership of the UPC and thus Grace Ibingira being sided by Milton Obote he succeeded with the majority votes **(2 votes)** thus out sitting John Kakonge and used his position to purge. However not forgetting the fact that politics was at its booming time, Kabaka Mutesa II feared that the DPC would deny his kingdom its traditional autonomy and concluded that to retain power he would have to retain the influence in national politics and hence proceeded to instruct Buganda members of parliament to join the UPC party so as to boast Ibingira's position and thus unseating Obote hence the re-orientation of the UPC-KY alliance thus improving his working relationship with KabakaMutesa II. This led Ibingira to a coalition of non-Baganda thus the southerners, **dubbed the bantu group** and within the same aspect Obote began appealing to DP members of parliament to defect and join his party in parliament of which he successfully did and by 24th august 1964 Obote together with upc having consolidated majority seats in parliament and declared that the coalition with the Kabaka YEKKA (KY) was dissolved.

By December 1964, grace Ibingira under the cover checking on his reach in Ankole, traveled to the united states so as to raise funds for his support in the **Anti-socialist** causes and upon his realm he expanded his opinions and by 1965 the apparent UPC had divided into an Ibingira-led wing and the other was the Obote-led wing and when Ibingira attempted to convince a UPC conference to his capacity as party society general, the aspect was shut down by the police.

It's also worth noting that Buganda kingdom was granted a federal autonym by the 1962 constitution but however not resolving the territorial disputes among the counties of both Buyaga and Bugangaizi both having annexed by Buganda kingdom from Bunyoro and that's around the 20th century with the attributed consent of the United Kingdom. However, Bunyoro aimed back her lost glories of the two lost counties thus Buyaga and Bugangaizi which were unfortunately had never been granted which was followed by the sparkling politics within Uganda in which Obote sought for support from the Bunyoro and his attributes were supported by his submitting of his bill on 25th august 1964 that was scheduled calling for the matter of lost counties to be settled through an organized referendum. Both Mutesa II and Obote having opposing attributes to each other in which the former held the two counties to be held by Buganda kingdom and the latter urged for taking back of the two counties back to Bunyoro kingdom and in order to sway the matter, Kabaka Mutesa ii organized his subjects to settle in the two counties and this was responded by Obote through decreeing that only persons registered for the 1962 elections could participate in the referendum.

The referendum was organized dated on 4th November, 1964 and the said county members chose by

wide margin to return back to Bunyoro. However, the results of votes bolstered Obote's support in Bunyoro and even created an outrage in Buganda which was followed by Buganda's riot and attack of minister of their kingdom's government. In the same aspect on 9th November the one **Michael Kintu, the then Katikiro** the prime minister of Buganda resigned from his duties and was therefore replaced by the one Jehoash Mayanja Nkangi. Being a steady kingdom in all aspects one **Amos Sempa** a **conservative Ganda chief** increasingly advised Kabaka Mutesa II to resist Obote in all his different attributes towards the political move within the state and this is seen when Obote presented the necessary documents officiating transfer of jurisdiction for Mutesa to sign as president, of which the latter refused declaring that;

'I can never give away Buganda land'

And Obote signed in his place but the relationship between the two thus Kabaka Mutesa II and Milton Obote was strained by the ordeal but latter transfer of the two lost counties thus Buyaga and Bugangaizi took its effect back to Bunyoro kingdom on 1st January 1965.

Within the same aspect, recruiting back the instance of the gold scandal of the late 1964 in which the Uganda government aid to **Christopher Gbenye** leading a rebellion in the establishing portion of Democratic Republic of Congo sharing a boarder with Uganda and assistance also included the Uganda army and this sparked off the political motives within Uganda cabinet and thus divisions in cabinet following the policy taken towards rebels as it restrained relations with the Congolese government together with the ..United States…

As per Daudi Ochieng KY Member of Parliament, in February 1965 Colonel Idi Amin a high ranking officer in the army appeared on count with, Ottoman Bank and within a period of 24 days it's noted that worth 340,000 East African Shillings had been deposited in the ottoman bank account. This within a meantime, Ochieng accused Amin during a parliament session of having received money illegally obtained gold, ivory and coffee from Congo a matter in which government promised to make investigations about and latter in September Ochieng seeing no effect introduced a motion urging government to act on the accusations and with this Obote assured legislature that progress was being made on the same but by January 1966 Ochieng was frustrated by the wait in the publishing of a report on the investigation but however he reintroduced his motion urging government to take effect on the matter.

Following Obote's leave for a tour far to the north, shortly on 4th February parliament session was convened, cabinet hurriedly met without him and most members present were sympathetic to Ibingira following the decision that all upc members of parliament should live in support with the resolution. However, following the out growing political differences, according to lawyer and intelligence officer **Akena Adoko**, the meeting and decision was taken by Ibingira's initiative on

advice from one Mutesa who reportedly told him;

'Let us join forces right now'. Obote and ministers royal to him are all out, you are cabinet boss, let cabinet meet now and reverse the decision not to support my motion. This has given me much pains. You and I can do wonders working together and therefore Ochieng's motion was seen thereafter tabled in parliament and debated by its members and it read';

'That this house does urge government to suspend from duty colonel Idi Amin of the Uganda army forth with pending conclusion of police investigations into allegations regarding his bank account which should then be passed on to the appropriate public authority whose final decision on the matter shall be made public'.

During the speech in which the motion was presented, Ochieng accused Obote, Onama together with minister of planning and community development **Adoko Nekyon** being complicit in administration's alleged activities and this was followed by the intense debate of foreign minister Sam Odaka. Referencing previous dubious corruption allegations made by Ochieng and accused Ochieng of abusing his. Parliamentary immunity, attack the standing of government minister and failing to reinforce his claims with adequate evidence. This only one dissenting vote from Kakonge because the rest of the upc members of parliament were correctly informed of the cabinet's decision to accept the motion only when the debate opened.

However on Obote's return around 15th February, was unable to disregard his ministers from proceeding with all investigations following the appointment of minister of internal affairs **Basil Bataringaya** to investigate on the matter and within the same aspect cabinet attempting for new appointments that on 22nd may Obote swiftly placed five members under arrest these including **Grace Ibingira, Emmanuel Lumu, Balaki.K.Kirya, George Magezi and Mathius Ngobi** but all were detained by men of special forces and taken to separate locations, the latter four all parties to Ibingira's wing as far as cabinet is concerned and all had attended the 4th February meeting and upon noting of the eventual arrests of the political lads the vice president **William Nadiope** for his survival fled to Kenya where he remained for a period of 3 weeks and following the attribute Obote decided to consolidate Ibingira's position by deprecating his ex-rival's allies specifically Mutesa thus announced that Mutesa was involved in a military coup which aided to overthrow his government and on 23rd February moved Opolot to chief of defense staff and Amin chief of army and air force staff and also investigating on the gold scandal Obote appointed three judges to his own commission.

On 24th February 1966, Milton Obote announced his suspension of Mutesa from his official duties as president citing his attributed reaction to the aspect of the lost counties referendum, his ordering of troops movements without ministerial consultations and his seeking of foreign military support,

Mutesa however protested Obote's actions, ordering Obote to leave Buganda land and proceeded by appealing to the **United Nations secretary general U-Thunt to intervene in the matter.**

On 22nd may, Obote convened a meeting at the presidential lodge in Kampala of which attendance was only for the recognized and respected high ministers these including the minister of defense, minister of interior, and the inspector general of police and after the discussion of the crisis Obote declared situation necessitated military intervention or involvement and thus proceeded by telephoning Amin to report to the lodge and on his arrival Obote instructed him to prepare and launch an attack on Kabaka Mutesa's palace the following morning.

The aspect was followed by Kabaka Mutesa's call for protection from his subjects to defend him a call which was responded to by many natives the Baganda and thus acts of sabotage throughout Buganda, while thousands of monarchists attempted to set up blockades with role to hinder Amin's troops and engage in running streets skirmishes. But despite the case, Kabaka's royal body guards only armed with hunting rifles, especially as compared to the heavy blooded and intelligent army units and after the 2 days' palace was already surrounded, overrun and set a light but luckily enough the Kabaka Mutesa II managed to escape the compound during the cloud burst in the middle of the battle;

'that was seen when Milton Obote sent his troops to fetch him dead or alive, the king was unprepared, and outnumbered with only 120 guards hence could not defeat the well organized and well trained and equipped Uganda army with its lee-Enfield rifles, three carbines, six steering machine guns and six automatic rifles thus losing battle by Buganda together with the king Kabaka Mutesa ii and thus the royals in determining to protect the kingdom knew the only way for the king could survive was to flee him outside Uganda, rain connived with the royals, set it slowed the attacker's advancements, jumping over dead bodies as they fled, Mutesa and 20 body guards hauled each other over the six feet high brick walls of the palace but unfortunately the Kabaka landed in a precarious angle which left his back bone injured but flee and that's all what mattered by then hence escaping to Rubaga Cathedral using a passing taxi cab where priests gave him clerical robes and arranged for the drive to take him into Busiro county. Leaving a mark as to people's lives, situations left over 200 dead bodies of fallen Baganda while he military buried uncounted members in mass graves'.

However within a few days the Kabaka and two of his body guards were able to cross the boarders to Burundi and exile where he stayed in Addis Ababa and latter given an asylum in the united kingdom where he stayed until his eventual death, under mysterious circumstances in 1969bvarious Buganda chiefs, members of the royal family who thought royal to the Kabaka, were imprisoned and the **Lubiri Palace** was almost completely destroyed in the course of the fighting and the

rooting which resulted into **stealing of the historical artifacts and royal regalia were also stolen and others destroyed including the Mujaguzo Drums**. This discretion caused immerse psychological sufferings and miseries for the Baganda who regarded the event as an apocalypse. Latter the king died in exile, but was allowed to be buried in Buganda by the new then president Idi Amin thus giving the king a state burial and this action granted him greater legitimacy at least in some sub-population in Buganda in reference to Uganda.

The crisis led to the emerging of law suits brought against Obote's government and also members of Mengo establishment that were failed sued for release and Sir Egbert Udo Udoma Chief Justice of the Supreme Court granted it to them in that in his decision for Uganda v Commissioner of Prisons, Ex parte Matovu when Buganda government petitioned court to declare Obote's actions invalid, Udoma ruled that Obote had orchestrated the coup, which according to international law was a legitimate means of assuming power. He thus urged that 0bote's government was legal and that the new constitution was in force. The other former cabinet ministers that had been arrested were transferred to Karamoja as a colonial law.., the deportation ordinance, which allowed for the detention and revival of 'undesirable person' thus they subsequently petitioned to court for a writ of habeas corpus however following Case of Grace Ibingira and others v Uganda, Uganda high court judge found detention legal and detained the petition but then the East African court of appeal Ruled that the ordinances violated a Uganda citizen's constitutional rights to freedoms of movement and ordered the writ of habeas corpus be granted and released them and then immediately re-arrested outside court house in Buganda under the colonial emergence regulations, and government passed the deportation act to cover its actions but the ministers filed new suit but in a hearing court affirmed the legitimacy of new law and thus cabinet ministers remained incarcerated until Amin released them following his seizure of power in 1971.

However despite the first Kabaka crisis, there also existed the second Kabaka crisis which was also termed the Kayunga saga and this was sparked off by the eventual riots in the capital, Kampala dated 10th September, 2009 when the delegate representing Buganda kingdom was blocked from visiting (Esaza) Kayunga of Buganda kingdom. This was ousted out by an aspect of which the Kabaka of Buganda Ronald MuwendaMutebi II planned to have a visit upon his subjects in Kayunga on National Youth Day, however two days later, his subject's visit was challenged by the leader of the Banyala Ethnic group in Kayunga who rejected Kabaka's authority and this ousted out Kabaka's subjects and supporters who went and sprung on streets protesting the police action, and violence began from afterwards.

The period was characterized by massive killings of innocent and unarmed civilians within the Buganda region in reference to Uganda that's during and after riots on the streets dated 10th and

11th September, 2009. However, research was proved by the Human Rights Watch Investigation which found out that at least 13 people were short by government forces in situations where lethal forces was unnecessary. This was aligned with the reports from the minister of internal affairs who reported to parliament that 27 had died during the riots and 7 were un involved in riot activity an aspect that was proved by an aspect 'shooting in self-defense is one thing, but it was also found that some armed soldiers shot at bystanders and others shot through locked doors'.

With reference to the outcomes of the Kayunga saga, sources at Kampala's main hospital, Mulago indicated that 88 victims of the violence were admitted during the period and most were suffering from gunshot wounds. However, victims were also taken to other hospitals as well and also minister on internal affairs proved the fact that around 846 protesters were arrested during the riot of which among these 24 of the alleged rioters were charged with terrorism for destroying government property and many others were charged with unlawful assembly and inciting violence.

It's also worth noting that within the same attribute, several outbursts were recognized in the areas including the **destruction of economic facilities for example the burning of petrol station in Nateete, and other riots sprung over the Buganda kingdom in reference to Uganda but more especially on the streets of Kasubi, Busega, Ndeeba, Bwaise, Bunga, the Salaama Road at Nakinyuguzi zone and Mpigi town** and following the eventual riots some rioters do appear to have employed parallel tactics such as burning of tires to block roads in several areas of the city of Kampala that was more registered on the afternoons of 10th September,2009.

Living the challenging life attributes, despite the riots, several serious questions were raised following several fatal and non-fatal shootings by security forces on 10th and 11th September, 2009 which was followed by the heavy deployments in which more forces were deployed in response to the riots following the fact research proved it that these officers went on shooting even innocent civilians who were not threatening and not inciting violence an aspect which left the whole public challenged to the view that live ammunition was only fired into the air to clear streets off protesters.

History thus proves it right that **10th September.2009** marked the beginning of the three dark nights and days on the streets of Kampala and other parts in Buganda an aspect which called the old memories of the lost glories of 1966 in Which eventual death, under mysterious circumstances in 1969bvarious Buganda chiefs, members of the royal family who thought royal to the Kabaka, were imprisoned and the **Lubiri Palace** was almost completely destroyed in the course of the fighting and the rooting which resulted into **stealing of the historical artifacts and royal regalia were also stolen and others destroyed including the Mujaguzo drums as a result of the fictions that had been simmering between Kabaka of Buganda Mutesa II and the then prime minister Milton Obote**. Within the same instance the central government in relation with the leader of the Banyala

in Kayunga who tried to secede from Buganda an aspect in which the **Buganda prime minister John Baptist Walusimbi who** was blocked an attribute aimed his accustomed tours of the kingdom in line to prevent him from proceeding to Kayunga to take royal duty organizations in which the King Kabaka Ronald MuwendaMutebi II was to preside as the guest of honor on the recognized national youth day hence in storm to prevent the king's visit upon his subjects in Kayunga on the kingdom's annual youth day celebration.

Throwing more lights as to the effects that saw the kingdom of Buganda following the Kabaka crisis of Kayunga 2009, following the outgoing aspects in Buganda the government shut-down the kingdom's broadcasting medial channels radio thus radio CBS and three others in a major clump-down riots but conditions were aroused when it appeared that Kabaka was more determined to visit Kayunga in such a challenging time an aspect which also invited public notices and that was responded by central government by letting the army surround his palace in Kireka on the night of 12th September,2009 an aspect which aroused masses within Uganda but more especially his subjects the Buganda people and thus around 500 people were arrested in various parts of Buganda in which a police station was burnt to ashes and several officers injured within the aggrieved protests of the angry and uncontrollable protesters of Buganda.

Another aspect in reference to historical facts that raised the masses in Buganda was the third Kabaka crisis in which it also being referred to as the 66th birth day which took its effect dated on Tuesday 13th April, 2021 in which his highness the Kabaka of Buganda Ronald MuwendaMutebi sewed up upon the demand of the masses in Buganda in reference to Uganda but research proves it right that the masses more in demand of the Kabaka was the most recognized group of the angry Baganda by tribe who lived to uplift all the standards of Buganda thus living in their beliefs both in terms of political, social and economic in nature but all these aimed for basing on Kiganda cultures, customs and beliefs of Buganda. This was hampered by the Kabaka's ill health which spilled up into a public view when he arrived at Bulange Mengo palace in company of his beloved wife the queen Mama Nabagereka Silvier Nagginda but the king/s lighting from his car became an obvious marking point to many in the crowd attendance and others that were streaming online live on televisions these included BBS TV that all with the Kabaka of Buganda was not well an attribute which left more questions on both the public and the outside world thus describing the situation worse for the king of Buganda Ronald MuwendaMutebi II thus many attributed audience and those watching busting into tears and conditions acted as a cold blood aspect that the situation raised tension thus leading to more fears and tension within Buganda in reference to Uganda.

The Kabaka's birthday saga was also named the third Kabaka crisis with view that it created periods of strong deployments of well-armed and combatted both police and army brocades thus

leading to periods of tension, fear, public outcry within the whole Uganda but more especially among the Buganda Being a challenging time of the astonishing, wide spreading, and mass killings registered due to the attack of covid-19 disease which has led to massive deaths in both more developed countries like the united kingdom, united states of America, Russia, India and all other countries on the African continent, this left the situation quite challenging that the king's 66th birthday Ronald MuwendaMutebi II an acronym that left the birthday celebrations only being celebrated in the scientific kind of way to an aspect that only a recognized group of people were allowed to attend the function but more tensions was sparked off by the health challenges of the king on his appearance for his birthday celebrations at Bulange Mengo palace.

Many on sight of their glory that's the king of Buganda Kabaka Ronald MuwendaMutebi II at his 66th birthday celebrations at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly and also the noting in the cutting of his cake that made round on various social media platforms all seemed the fact that called for public attentions thus periods of anger among the Baganda tribes men and women who claimed to know the king's health conditions to the fact that he had missed serious culture functions within Buganda and were he appeared still left masses in a devastating state hence worried for the health of the health of the king of Buganda and this serious made an arousement in Buganda in reference to Uganda but more especially the accustomed Baganda who together claimed for what had really happened to their beloved king.

The king's 66th birthday celebrations of Tuesday 13th April, 2021 at Bulange Mengo sparked the questions among the public in Uganda but more especially from the staunched angry Baganda to they saw no reasons as to why the king Ronald MuwendaMutebi II was allowed to attend the birthday event with an aspect that his health condition did not favor anything like public exposure for his face looked frail and intense prove that the debate emerged as to whether he should come out to the face of his subjects following his conditional health in such a state to the fact that even the recognized and attributed Buganda officials were still worried about the fallout from his appearance and this note also raised tensions within Buganda in reference to Uganda and the condition bitterly aroused masses in Buganda followed by their demand to know the king's health statistics of which his representative in his abs ensure the prime minister Katikiro Charles peter Mayiga quoted saying;

"The rumors that the Kabaka was poisoned are totally false….they are baseless and they should totally be disregarded. The Kabaka's condition is being managed by requisite expertise and we

hope and pray that he will achieve soon''.

And as he was asked why a frail Kabaka was allowed to attend a public event, Mayiga said they were in a catch-22 situation where he mentioned:

'If he doesn't appear, they say you are hiding him; if he appears, they say, why did you bring him while how is sick? But I want to tell you that the Kabaka is not very sick as he properly got out of his car without being supported by anyone or using a walking stick and therefore there was no reason for him to remain at the palace and also added that the Kabaka's coming out in public is one of the ways in which we celebrate him. There was nothing to stop him from coming to the public especially when we are celebrating such an important function like his birthday. We cannot go into the specifics of his health complications because those are private matters that should be left to him and his doctors".

With the storm ranging online and offline rumors about the king's health which aroused masses in Uganda most especially the Baganda for the fear that the kingdom might lose its king and following the measured political attributes that ranged between Buganda kingdom and the central government to the fact that even government never bothered in flying out the king for some improved medical attention an aspect which paved way for the notion in demand from many Ugandans most especially the Baganda, following the mass demand on Kabaka's health, the prime minister of Buganda Katikiro Charles peter Mayiga came out to press and addressed a press conference where he admitted that his boss the king Ronald Muwenda Mutebi II had health issues and added that Kabaka is just like any ordinary person gets health challenges from time to time that need to be effectively managed. On uttering this, many Baganda were left in questions as to why the king could not be taken abroad for best medications following the prime minister mentioning that the Kabaka's health challenges are caused by allergies, which trigger breathing difficulties especially when he has a mask on or a shield over his face.

However, the Kabaka of Buganda Ronald MuwendaMutebi ii being one of the most popular figures in this country, being a symbol of humanness, civility and course he is the custodian of the Buganda kingdom in reference to the heritage of the kingdom of Buganda. He is therefore not an cordially person with the fact that is one of the most loved public figures in Uganda and thus following his status in which people saw him called his subjects and mass concern within Uganda and the world at large following the fact that many Uganda's are living in the diaspora thus following news speculation on the recognized social media platforms these including twitter, what sup, Facebook among other platforms which got filled up with the challenging health pictures and astonishing miserly videos of the Buganda king an attribute that aroused masses hence leading to the public outcry and demand for the king from the astonishing, misery, sad and angry Buganda

together with some other tribes within Uganda hence a challenging period to the kingdom.

A day after the Kabaka's health became a public discussion which was followed by a fake latter that appeared on social media purporting to be relieving the prime minister of Buganda Katikkiro Charles Peter Mayiga of his duties as the katikiro of Buganda and that supported by the negative commentary about the prime minister accusing him of a litany of issues. This was elaborated that some people in Uganda most especially the angry Baganda believing that the Katikkiro should refrained the Kabaka from appearing in public while others think that the reason was that the Kabaka has not sought more specialized medical attention abroad and was also accused of trying to cover-up the issue from the astonishing Ugandans most especially the angry Baganda an aspect that aroused up the masses to bitterness thus demanding for their king's health conditions from the prime minister.

Another aspect was the speculations that some rumors emerged on the attribute that the issue of failure of the king to address or even attend culture scheduled important days was due to the political indifferences which existed between the kingdom and the central government to the factual mentioning's of the king which aided that most arrests and most deaths that were being registered during the challenging political times of 2021 general presidential elections an aspect which created mass awareness that despite the political attributes and differences within Buganda and the king's welcome to all political party candidates acted a spark thus leading to the third Kabaka crisis within Buganda in reference to Uganda.

It's also worth noting that for over a period of 28 years reign the king of Buganda Kabaka Ronald MuwendaMutebi II had never missed presiding over at any premier kingdom's event that was the first time missing the ending of the Buganda sports tournament that's being referred to as the **Masaza cup which finals were celebrated at St. Mary's Stadium Kitende, his absence at the kingdom's function portrayed the aspect that all was not well for this served the first time for the king himself to miss presiding over the ceremony an aspect which called upon public notice** that all with the king seemed not to be fine and this attributed led to many Ugandans but more especially the Baganda tribal men and women in which even many busted into cries thus the period was characterized with misery and sadness among the angry astonishing and uncontrolled Baganda thus leading to their demand with effect to know all what concerned with the king's health and on hearing all these aspects many Baganda allover Uganda and all over the globe went on rampage demanding for the best attributes of which the kingdom could aid it best for the improvement of the king's health thus leading to the third Kabaka crisis in Buganda in reference to Uganda.

Noting Kabaka's long awaited visit upon his subjects as it was organized by the Buganda sports

tournament locally referred to as the Masaza cup which is being enjoyed by all the Masaza of Buganda aided with the note to promote Buganda to its heights, promote peace among them despite their differences in totems of which the tournament is best and more importantly aimed to call upon all Baganda to believe in the oneness of their beloved Kabaka Ronald MuwendaMutebi II and also hold and promote all the recognized Kiganda cultures, customs and beliefs among the Baganda. However being a celebration of the winning teams turned to be a sad story to tell that despite the prime minister promising all the Baganda the presence of the king at the ceremony, this however did not happen leaving the prime minister Katikkiro Charles Peter Mayiga to handle the ceremonial attributes of handing over to the winning team Gomba but this sparked off the angry Baganda hence demanding the conditions of their king following Katikkiro's empty promises for his presence thus the third Kabaka crisis in Buganda in reference to Uganda.

The attribute of the Tuesday 13th april,2021 king's 66th birthday cake also aroused masses within Uganda and the outside world especially those Ugandans in the diaspora in which its designs and coffin looked shape tarnished masses hence leading to the third Kabaka crisis in Buganda in reference to Uganda. Following the 66thKabaka's birthday cake which was coffin shaped and designed with yellow color on its nature turned to be looked at as a merchant and a distinguished political move for the political differences among the Ugandans at large. This left many questions to be answered on the cake decisions and as per research in reference to the cake, the cake was designed by the one Kenneth Nsibambi of which urged that he only followed the given prescriptions from the organizers and it was thus made to the orders but back to the masses the cake was ranked mostly negative which aroused masses in Uganda most especially the angry Buganda with dues that it was aimed for political connotations and thus inquired why it was also made in a rectangular shape like format to other aspects an acronym which called upon massive commentaries to utter that a more neutral color could have been used so as the king to be seen not being politically divisive hence leading to the third Kabaka crisis in Buganda in reference to Uganda.

The attribute when the Kabaka failed to showcase upon the ending of the Masaza tournament following the empty promises of the prime minister Charles peter Mayiga who promised the king's presence just within a cup of days to the finals of the Buganda cup tournament thus leading to the outward third Kabaka crisis within Buganda in reference to Uganda. However the aspect was attributed when he failed to show up on the Buganda ceremony in which was to premier as the guest of honor, on his absence and being represented by his prime minister the Katikkiro of Buganda Charles peter Mayiga who informed the masses that his absence was due to his visit for friends in Kenya, his absence fed a rumor mill that started gaining traction on social media

platforms that the Buganda monarch king was critically ill and his tours to Kenya were not for recreation but rather for medical treatment for the fact he even looked to have lost weight and his body looked peril to he might have been suffering from a serious skin disease that his skin looked light when he last appeared at the Masaza cup opening and in December 2020 during the opening of the 28th Buganda Lukiiko on January 11th where he looked a bit different with probably small skin complications thus an aspect that soaked off masses hence leading to the third Kabaka crisis within Buganda in reference to Uganda.

The other attribute that led to the third Kabaka crisis in Buganda with reference to Uganda was the astonishing pressure from the angry Baganda both within Uganda and the outside world thus in the diaspora sparked by the challenging photos on the various social media platforms of seemingly dearer Kabaka of Buganda Ronald Muwenda Mutebi II meeting with the Kenyan president Uhuru Kenyatta and former prime minister Raila Odinga an attribute where the katikiro mentioned that he had moved for friendly visits, on hearing this, many astonishing Baganda resorted back to the Buganda cultural beliefs and customs in which it was proved that the king can never move for friends but rather friends move for him and this made the communications from his prime minister Charles peter Mayiga irrelevant and being regarded rubbish to he was lying to the kingdom an aspect where many angry Baganda resorted to disregard his as impartial and asked him vacate his position of the office of the katikiro hence a challenging attribute within the kingdom thus leading to the third Kabaka crisis in Buganda in reference to Uganda.

The aspect of the emerging rumors which stated that way back in September 2020 that claimed that the now 66th year old king of Buganda Kabaka Ronald MuwendaMutebi II had been poisoned and had been rushed to Kenya for treatment also fed a rumor mill hence leading to the spread of the third Kabaka crisis in Buganda in reference to Uganda. This falling into the ears of the already astonished, demanding, angry, miserable people of Uganda most especially the Baganda these both within and those in the diaspora aided in demand of their king for this looked clear when he turned up for his Tuesday 66th birthday of 13th April and his critical condition that his facial looked lightened a bit probably with a skip complications, he had lost weight and this was connected to his absence at the ending of the Masaza tournament an attribute which fed a rumor mill that started gaining traction on social media platforms that the Buganda monarch king was critically ill and his tours to Kenya were not for recreation but rather for medical treatment for the fact he even looked to have lost weight and his body looked peril to he might have been suffering from a serious skin disease that his skin looked light when he last appeared at the Masaza cup opening and in December 2020 during the opening of the 28th Buganda Lukiiko on January 11th where he looked a bit different with probably small skin complications thus an aspect that soaked off masses hence

leading to the third Kabaka crisis within Buganda in reference to Uganda.

Another astonishing attribute that led to the third Kabaka crisis of 2021 within Buganda in reference to Uganda was an aspect of long time demand of Buganda's independence as issue in which Uganda as a nation has never acted upon also is proved to have sparked off the angry masses of Buganda. The long time demand for Buganda's independence since the early 1953, which was also connected to the 1966 crisis which is also known as the Buganda crisis in which tribal conflicts of Buganda aimed for attain back the lost glory of the two lost territories that's Buyaga and Bugangaizi which Buganda lost back to Bunyoro through an organized referendum which was organized on 4th November 1964 in which the said county members chose by wider margin to return to Bunyoro but the process being pushed by the then prime minister Milton Obote with the intent to bolster Obote's support in Bunyoro and even created an outrage in Buganda an aspect in which the king replied by ordering Obote to live the Buganda land and also sought for Buganda's independence from the motioned Uganda but has never been granted till date even when his highness Kabaka Ronald Muwenda Mutebi II urged for the same with effect there are more other smaller countries than Buganda for example the Swaziland but still is being recognized by the united nations of which an attribute the central government has never lived to grant it independence thus leading to the third Kabaka crisis in Buganda in reference to Uganda.

The other attribute that sparked off the third Kabaka crisis within Buganda in reference to Uganda is the intentional aid in which the king of Buganda Ronald MuwendaMutebi ii during the 66th birthday celebrations of 13th April, 2021 he folded his hands back an acronym which called upon public notice to the effect that all was not well with the king to the fact that looked to have lost weight and his body looked peril to he might have been suffering from a serious skin disease that his skin looked light when he last appeared at the Masaza cup opening and in December 2020 during the opening of the 28th Buganda Lukiiko on January 11th where he looked a bit different with probably small skin complications. On the interpretations of the king's act of folding his hands according to the Kiganda culture, customs and beliefs the king cannot fold his hands back unless is under captivity and this on its interpretation many Baganda sensed the captivity an attribute which led to public outcry and misery within Uganda but more especially his subjects the Baganda hence the rising of masses against the effect hence the third Kabaka crisis in Buganda in reference to Uganda.

The attributed aspect of the repeated excuses from the prime minister of Buganda katikiro Charles Peter Mayiga on the king's health and absence on the scheduled and respected Buganda cultural and recognized ceremonies these including his missing of the ending of the Masaza tournament in which his prime minister played or stepped up for the king's role to hand over the trophy to the

winning team which most Baganda disregarded and never lived in support an act which had never occurred during his reign of 28th year period in which his prime minister mentioned that the king had traveled for a friends visit to Nairobi two to three days an aspect which aroused masses for kings do not travel for friends visits so it acted an excuse but masses referred the note that he was extremely sick that's leading to missing his attendance at the kingdom event which fed a rumor mill that started gaining traction on social medial platforms the monarch king was critically ill and his eventual tours to Kenya where not for recreation but, rather a treatment journey thus lighted the spark thus leading to the third Kabaka crisis in Buganda in reference to Uganda.

The other attribute that sparked of the third Kabaka crisis within Buganda in reference to Uganda was the heavy and combated brocades that was deployed within Buganda and at BulangeMengo palace on the king's 66th birthday celebration also led to the questioning of the attribute in which conditions were more characterized with fear, misery and tension within Buganda and this aroused more masses in Uganda but more especially the king's subjects the Baganda to the situations challenges and thus all streets filled with combated armed officers both police and the army an acted which left Buganda in cold for the worsening situations of their king which was all challenging and its proved many Baganda were keeping in wait to see what's next but tensions and fears raised high in the kingdom thus the third Kabaka crisis within Buganda in reference to Uganda.

The other attribute which also led to the outward spread of the third Kabaka crisis within Buganda in reference to Uganda was the immunization against covid-19 that injecting him of the vaccine control of the disease despite his clerical and critically ill king of Buganda in which it was already approved the king's health was not in line with that of a normal person and the eventual immunization of the already sick Kabaka aroused masses within Uganda and those in the diaspora but most especially the Baganda being his subjects, the issue of the king's immunization was mentioned to be an attribute in which more other medical complications were being carried out than the attribute aiding for his normal health and on this many Baganda's urged for the king to be taken abroad for proper and approved medication but however the Buganda prime minister came in and advised the angry Baganda that the ‘‘that the king was being worked on accordingly and also mentioned that the king was responding to his medication positively and thus saw no need to fly the king outside Uganda for some further treatment and this alone aroused masses and many called upon him to resign his office duties of being the prime minister of Buganda thus leading to the outburst tensions within the kingdom hence the third Kabaka crisis within Buganda in reference to Uganda''.

The attribute of most arrests which was characterized to be brutal and this affected the king's

subjects most that most imprisoned and most registered killings were Baganda by tribe an aspect in which many of the subjects called upon the Buganda board to talk on the matter so as to control the eventual astonishing arrests and detentions which were brutal in nature to the fact that those in custody were not being presented to courts for their writ of habeas corpus and also claimed for their right to be heard but this was never granted of which many remained in custody despite the 24 hour rule and many torture chambers were proved to being Buganda for where many Baganda were being mistreated and that was followed by the aspects of the zero number plate vehicles which were named drones in which many civilian citizens more especially the Baganda were being arrested without notifying their families and other never been seen to date an aspect which even the police representative mentioned to parliament about the said lost personalities and some police confirmed their detentions and also mentioned they were serving their different charges an attribute that called upon public worries, fear and tension hence leading to the third Kabaka crisis within Buganda in reference to Uganda.

The other aspect that led to the third Kabaka crisis within Buganda in reference to Uganda was the was the attributed aspect in which the king of Buganda Kabaka Ronald MuwendaMutebi II was left to cut his 66th birthday cake of Tuesday 13th April 2021 alone with the factual presence of his queen the beloved wife Mama Nabagereka Silvier Nagginda following the challenging times of the king's life which fed a rumor mill that started gaining traction on social medial platforms the monarch king was critically ill and his eventual tours to Kenya where not for recreation but, rather a treatment journey thus lighted the spark, the king of Buganda Kabaka Ronald MuwendaMutebi ii at his 66th birthday celebrations at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly and also the noting in the cutting of his cake that made round on various social media platforms all seemed the fact that called for public attentions thus periods of anger among the Baganda tribes men and women who claimed to know the king's health conditions to the fact that he had missed serious culture functions within Buganda he public worries, fear and tension hence leading to the third Kabaka crisis within Buganda in reference to Uganda.

The other aspect that led to the third Kabaka crisis within Buganda in reference to Uganda was the deployment of the armed man in casual who was well covered that even his face could not be identified on camera at the palace gate an attribute that called upon public awareness and it eventually aroused the miserable, angry and devastated Baganda into demanding of their king's health conditions. The situation also called upon massive questions as to why the deployment was

made to scare away the king from getting out his palace thus threatening his life too. This was followed by the eventual utterance from the katikiro of Buganda Charles Peter Mayiga who informed the masses that his absence was due to his visit for friends in Kenya, his absence fed a rumor mill that started gaining traction on social media platforms that the Buganda monarch king was critically ill and his tours to Kenya were not for recreation but rather for medical treatment for the fact he even looked to have lost weight and his body looked peril to he might have been suffering from a serious skin disease that his skin looked light when he last appeared at the Masaza cup opining and in December 2020 during the opening of the 28th Buganda Lukiiko on January 11th where he looked a bit different with probably small skin complications thus an aspect that soaked off masses hence leading to the third Kabaka crisis within Buganda in reference to Uganda.

The other attribute that led to the eventual outbreak of the third Kabaka crisis within Buganda in reference to Uganda and the outside worlds especially Ugandans in the diaspora was the eventual utterances of the prime minister of Buganda katikiro Charles Peter Mayiga in which he informed the press that the monarchical king was suffering from allergies and also admitted that his boss the king Ronald MuwendaMutebi II had health issues and added that Kabaka is just like any ordinary person gets health challenges from time to time that need to be effectively managed. On uttering this, many Baganda were left in questions as to why the king could not be taken abroad for best medications following the prime minister mentioning that the Kabaka's health challenges are caused by allergies, which trigger breathing difficulties especially when he has a mask on or a shield over his face an aspect which called upon public notice that all with the king seemed not to be fine and this attributed led to many Ugandans but more especially the Baganda tribal men and women in which even many busted into cries thus the period was characterized with misery and sadness among the angry astonishing and uncontrolled Baganda thus leading to their demand with effect to know all what concerned with the king's health hence the third Kabaka crisis in Buganda in reference to Uganda.

The other attribute that led to the astonishing third Kabaka crisis is the brutality and mistreatments of the captives and the eventual massive arrests and detentions that that was followed by the registered tortures and cruelty from the torture chambers which had been registered rampant within Buganda in reference to Uganda which created conditions of fears, misery, suffering and many deaths were also registered that many sought for the standup to rise against the forces which was followed by the heavy deployments within Uganda but more especially in the areas of Buganda situations which caused a public outcry worsening situations of their king which was all challenging and its proved many Baganda were keeping in wait to see what's next but tensions and fears raised high in the kingdom thus the third Kabaka crisis within Buganda in reference to

Uganda.

The other aspect of the eventual bringing of the king to the public notice in the situation that looked all too challenging in reference to his health conditions also aroused masses within Uganda but more especially his subjects the angry and astonishing Baganda thus leading to the third Kabaka crisis within Buganda in reference to Uganda. The ideal practice in which the king was brought to public notice in such a challenging health condition was referred to many that it was aimed to put the king's worse health conditions to light an aspect which was aimed to challenge and ashamed Buganda as a kingdom and others referred the matter that it aimed to invite public outcry among the astonishing and uncontrolled Baganda with view that Kabaka's health challenges are caused by allergies, which trigger breathing difficulties especially when he has a mask on or a shield over his face an aspect which called upon public notice that all with the king seemed not to be fine and this attributed led to many Ugandans but more especially the Baganda tribal men and women in which even many busted into cries thus Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly and also the noting in the cutting of his cake that made round on various social media platforms all seemed the fact that called for public attentions thus periods of anger among the Baganda thus the period was characterized with misery and sadness among the angry astornishing and uncontrolled Bagandathus leading to their demand with effect to know all what concerned with the king's health hence the third Kabaka crisis in Buganda in reference to Uganda.

The other attribute is the immeasurable and eventual death of the religious leaders within Buganda in reference to Uganda but this more affected Kabaka's subjects more especially the Baganda for which it eventually aroused masses hence leading to the third Kabaka crisis within Buganda in reference to Uganda. The immeasurable death of religious leaders in Uganda but most especially king's subjects the Baganda of which around 6 supreme religious deaths were registered Just in a period of 6 months these including Archbishop Cyprian KizitoLwanga the head of catholic church in Uganda aged 68 years in the capital of Kampala who was found dead in his bedroom Saturday 3rd April 2021, the others include Bishop Kaggwa in mass, Owobushobozi Bisaka, Sheik Nuhu Muzaata, Dr. Anas Kaliisa who was a renowned scholar and Pastor Yiga and their death also created periods of tension, fear and misery within Buganda in reference to Uganda for it was registered a great loss to the lord's community in the country and the world at large thus living a regrettable that deprived to the east African region thus leading to the third Kabaka crisis within Buganda in reference to Uganda and the world at large.

The other attribute is the eventual practicing of the burning of the Masiro on the occasional basis an aspect that sparked off masses both within Buganda in reference to Uganda and those in the diaspora but most especially king's subjects the Baganda. The Kasubi tombs in Kampala, Uganda having been recognized as site of burial grounds for four Kabaka's and other members of the Buganda royal family remains an important spiritual and political site for the Ganda people as well as an important example of traditional architecture, living in reference with the burning of the Masiro on the army attack during the reign of Kabaka Mutesa II living in the disagreement with the prime minister Obote, the tombs have continuously suffered from serious fire outbreaks these include the march 16th 2010 followed by the recent burnings of June 5th, 2020 in which the spiritual Buganda royal twins caught fire and aspect which called up history reminding Baganda of the sad mysterious fires which even led to the collection of the locally known Etofali both within Uganda and the outside world living the untold story which left heart warming moments between Buganda kingdom and the central government in which the government in restoration promised shs.5 billion to Buganda in restoration and this sparked off the angry, terrified, living a miserable life of the Baganda hence leading to the third Kabaka crisis within Buganda in reference to Uganda and the outside world most especially Ugandans in the diaspora.

The other aspect of central government failure to pay the rent arrears to the kingdom of Buganda an attribute which has created massive awareness thus the raise of more questions as to why the central government could not pay the Buganda arrears thus creating a thread line relationships between Buganda and the central government thus leading to the third Kabaka crisis within Buganda in reference to Uganda. This breathed attributes to the fact that central government owes Buganda large amounts of money in reference to rent arrears an aspect in which the katikiro mentioned that Buganda demands large sums of money these worth shs.20 billion with effect that the government occupies several properties that belong to the Buganda kingdom including the Kigo prison and the supreme court building in Mengo, with the central government living in no payment to Buganda and this has even led to economic difficulties within Buganda projects thus leading to slow or no developments hence sparking off masses in Uganda but most especially the king's subject the Baganda thus leading to the third Kabaka crisis within Buganda in reference to the state Uganda.

The other aspect was the massive killings, arrests and torture within Buganda in reference to Uganda which called massive awareness following the brutal arrests within Buganda and Uganda at large thus leading to the third Kabaka crisis. These eventual killings were characterized with brutal arrests within Uganda but more especially king's subjects the Baganda taking in note an example where the country registered 6 deaths caused by the army officer Dennis Owino who killed six

innocent civilians and four were registered injured in the trading center of ganda, Nansana Municipality in Wakiso district on the outside skirts of the capital of Kampala an aspect which became a public notice of the use of fire arms by the trained officers thus raising of the public outcry of many Ugandans but most especially the Baganda who even called upon the outside worlds to intervene in the matter due to the aspect that Buganda was registering eventual deaths these included the immeasurable death of religious leaders in Uganda but most especially king's subjects the Baganda of which around 6 supreme religious deaths were registered Just in a period of 6 months these including Archbishop Cyprian Kizito Lwanga the head of catholic church in Uganda aged 68 years in the capital of Kampala who was found dead in his bedroom Saturday 3rd April 2021, the others include Bishop Kaggwa in mass, owobushobozi Bisaka, Sheik NuhuMuzaata, Dr. AnasKaliisa who was a renowned scholar and Pastor Yiga and their death also created periods of tension, fear and misery within Buganda in reference to Uganda for it was registered a great loss to the lord's community hence public worries, fear and tension hence leading to the third Kabaka crisis within Buganda in reference to Uganda.

However, in reference to the causes of the third Kabaka crisis within Buganda in reference to Uganda these in the notions as both social, political and economically in nature are all explained in the above ways and despite the causes explained, the third Kabaka crisis also created challenging periods within Buganda in reference to Uganda thus effects which are both positive and negative in nature as explained in the ways as hereafter.

The third Kabaka crisis led to eventual loss of lives among Uganda's but more especially the king's subjects the Baganda for more deaths were registered which created periods of public outcry against the central government this is explained where the country registered 6 deaths caused by the army officer Dennis Owino who killed six innocent civilians and four were registered injured in the trading Centre of ganda, Nansana municipality in Wakiso district on the outside skirts of the capital of Kampala an aspect which became a public notice of the use of fire arms by the trained officers thus raising of the public outcry of many Ugandans hence an effect of the third Kabaka crisis within Buganda in reference to Uganda.

The third Kabaka crisis also registered a period of misery and suffering among king's subjects that's the Baganda in reference to the whole Uganda hence an effect of the crisis. The sufferings, tensions, miserable periods for many had lost their loved ones and family friends an aspect explained by the eventual deaths these included the immeasurable death of religious leaders in Uganda but most especially king's subjects the Baganda of which around 6 supreme religious deaths were registered Just in a period of 6 months these including Archbishop Cyprian kizitoLwanga the head of catholic church in Uganda aged 68 years in the capital of Kampala who

was found dead in his bedroom Saturday 3rd April 2021, the others include bishop kaggwa in mass, owobushobozi Bisaka, Sheik Nuhu Muzaata, Dr. Anas Kaliisa who was a renowned scholar and Pastor Yiga and their death also created periods of tension, fear and misery within Buganda in reference to Uganda for it was registered a great loss to the lord's community thus an effect of the third Kabaka crisis.

The third Kabaka crisis also raised an aspect of tribal conflicts hence an effect to the notion that masses more in demand of the Kabaka was the most recognized group of the angry Baganda by tribe who lived to uplift all the standards of Buganda thus living in their beliefs both in terms of political, social and economic in nature but all these aimed for basing on Kiganda cultures, customs and beliefs of Buganda. This was hampered by the Kabaka's ill health which spilled up into a public view when he arrived at Bulange Mengo palace in company of his beloved wife the queen mama Nabagereka Silvier Nagginda but the king's lighting from his car became an obvious marking point to many in the crowd attendance and others that were streaming online live on televisions these included BBS TV that all with the Kabaka of Buganda was not well an attribute which left more questions. The notion was in line with the eventual deaths registered within Buganda include Bishop Kaggwa in mass, Sheik Nuhu Muzaata, Dr. Anas kaliisa who was a renowned scholar and pastor Yiga and their death also created periods of tension to led to more questions as to why more deaths were registered within Buganda thus living an effect of the third Kabaka crisis.

The third Kabaka crisis also spilled up massive arrests within Buganda in reference to Uganda hence an effect of the crisis. This attribute of massive arrests within Buganda and Uganda in which the eventual astonishing arrests and detentions which were brutal in nature to the fact that those in custody were not being presented to courts for their writ of habeas corpus and also claimed for their right to be heard but this was never granted of which many remained in custody despite the 24 hour rule and many torture chambers were proved to being Buganda for where many Baganda were being mistreated and that was followed by the aspects of the zero number plate vehicles which were named drones in which many civilian citizens more especially the Baganda were being arrested without notifying their families and other never been seen to date an aspect which even the police representative mentioned to parliament about the said lost personalities and some police confirmed their detentions and also mentioned they were serving their different charges an attribute that called upon public worries, fear and tension hence an effect of the third Kabaka crisis within Buganda in reference to Uganda.

The third Kabaka crisis also created periods of emergency within the state following the heavy deployments which was vested within Buganda in reference to Uganda an aspect that raised more

periods of tension and fears within Buganda and the attribute was referenced to the astonishing existing relationship that existed between Buganda as the kingdom and the central government which was aroused masses following the central government failure to pay the rent arrears to the kingdom of Buganda an attribute which has created massive awareness thus the raise of more questions as to why the central government could not pay the Buganda arrears thus creating a thread line relationships between Buganda and the central government and the other aspect was the public sight of their glory that's the king of Buganda Kabaka Ronald Muwenda Mutebi ii at his 66th birthday celebrations at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly all conditions created more terifications, fears, tensions thus lived a threat to many Ugandans but more especially king's subjects the Baganda hence an effect of the third Kabaka crisis.

The situations also still left the Buganda economic situations in misery to the effect that the economic conditions became worse following the eventual burning of the Masiro on the occasional basis an aspect that sparked off masses both within Buganda in reference to Uganda and those in the diaspora but most especially king's subjects the Baganda. The Kasubi tombs in Kampala, Uganda having been recognized as site of burial grounds for four Kabaka's and other members of the Buganda royal family remains an important spiritual and political site for the ganda people as well as an important example of traditional architecture, living in reference with the burning of the Masiro on the army attack during the reign of Kabaka Mutesa II living in the disagreement with the prime minister Obote, the tombs have continuously suffered from serious fire outbreaks these include the march 16th 2010 followed by the recent burnings of June 5th, 2020 in which the spiritual Buganda royal twins caught fire and aspect which called up history reminding Baganda of the sad mysterious fires which even led to the collection of the locally known Etofali both within Uganda and the outside world hence an effect of the third Kabaka crisis.

The third Kabaka crisis also raised more tensions between the Buganda kingdom and the central government with respect that the periods created back the lost glories of Buganda that were lost during the earlier Kabaka crisis of 2009 the Kayunga saga the situation in which the kingdom's broadcast media were being curtailed since September 2009 and this was characterized by the closure of four radio stations on the orders of the central government among these was radio cbs that remained off the air Kimeeza a popular open air broadcast from which could comment on the events in Buganda most especially the crisis but on closure government aided it was temporary and up to date not restored to its functions and this still on minds of the angry Ugandans most especially

Kabaka's subjects with effect that even following the king's health at his 66th birthday celebrations at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly and also the noting in the cutting of his cake that made round on various social media platforms all seemed the fact that called for public attentions thus periods of anger among the Baganda tribes men and women thus massive fears and periods of tension within the kingdom thus an effect of the third Kabaka crisis.

The crisis also created challenging periods within Buganda in reference to the native cultures, customs and beliefs thus the situation living a threat to Buganda natives living in reference to Uganda hence an effect of the third Kabaka crisis. The notion in line with Kiganda cultures, customs and beliefs were put to light when for over a period of 28 years reign the king of Buganda Kabaka Ronald Muwenda Mutebi II had never missed presiding over at any premier kingdom's event that was the first time missing the ending of the Buganda sports tournament that's being referred to as the Masaza cup which finals were celebrated at St. Mary's stadium Kitende, his absence at the kingdom's function portrayed the aspect that all was not well for this served the first time for the king himself to miss presiding over the ceremony and this was reflected with the Tuesday 66th birthday of 13th April and his critical condition that his facial looked lightened a bit probably with a skip complications, he had lost weight and this was connected to his absence at the ending of the Masaza tournament an attribute which fed a rumor mill that started gaining traction on social media platforms that the Buganda monarch king was critically ill and his tours to Kenya were not for recreation but rather for medical treatment for the fact he even looked to have lost weight and his body looked peril to he might have been suffering from a serious skin disease that his skin looked light when he last appeared at the Masaza cup opining and in December 2020 during the opening of the 28th Buganda Lukiiko on January 11th where he looked a bit different with probably small skin complications thus arousing masses creating periods of challenge within Buganda kingdom hence an effect of the third Kabaka crisis.

The other aspect is that the third Kabaka crisis also undermined the glorified acronyms of Buganda thus the burning of the more treasured and respected Buganda attributes at both Kasubi and the earlies Mengo 1966 crisis in which the royal drums and other aspects were stolen, this today is explained in the situation of the burnings of the Kasubi tombs of June 5th, 2020 in which the spiritual Buganda royal twins caught fire and aspect which called up history reminding Buganda of the sad mysterious fires which **even led to the collection of the locally known Etofali** both awithin Uganda and the outside world hence periods of tension and misery among Ugandans but

most especially the king's subjects the Baganda for which period was characterized with challenging moments for the loss of the Buganda royal attributes end created room for tensions and fears among Ugandans but more especially king's subjects the Baganda hence an effect of the third Kabaka crisis within Buganda in reference to Uganda.

The situations of the third Kabaka crisis created a period where the tragic symbolize entrenched impunity and the curtailment of free expression in the attribute due to the heavy deployments within Buganda in reference to Uganda hence an effect of the third Kabaka crisis. Within this aspect following the heavy deployments that were seen within Buganda towards the king's 66th birthday of Tuesday 13th April, 2021 and also towards the presidential general elections of 2021 in Uganda which was also characterized with the heavy and brutal arrests with mistreatments from the deployed armed that lived in line with the fatal and non-fatal shooting, combated and the well trained and equipped army men together with the police and attribute that called upon public outcry for fear of people's rights an aspect that lived a threat to human life together with their rights of expression hence an effect of the third Kabaka crisis within Buganda in reference to Uganda.

The third Kabaka crisis also created a back fire period of thoughts within Uganda but more especially among the king's subjects the Baganda and situations went rooming when the king of Buganda Kabaka Ronald Muwenda Mutebi II was presented to the public in such a vegetative state at his 66th birthday celebrations at Bulange Mengo palace, Kabaka seemingly not to be fine with reference that he looked frail, and seemed to have lost weight that he even struggled so as to keep his eyes open and worth noting that his throat also looked struggling to take anything with the note of fact that even his speech was slurred with reference that was seen struggling to breath properly all conditions created more terifications, fears, tensions thus lived a threat to many Ugandans but more especially king's subjects the Baganda hence an effect of the third Kabaka crisis.

THE KABAKA BIRTHDAY CRISIS "AN UNTOLD STORY OF 2021"

For a period of over 28 years of his reign on the throne, Ronald Muwenda Mutebi the king of Buganda had not missed out on any serious occasions of the kingdom such as opening of Buganda Parliament (Lukiiko), coronation anniversary, general community cleaning, opening and closing of Masaza cup and his birthday. Surprisingly, in March 2021, he was conspicuously absent at the closure of the annual Masaza cup final an event that was at St Mays Stadium Kitende.

He was represented by Katikiro Charles Peter Mayiga the kingdom premier who remarked that he was not to turn up reason being he had an urgent meeting with some visitors in Kenya. This increased the presumption that the rumor going round on social media that the Buganda monarch is critically ill might be true. The rumour had started in early September 2020 that the king had been

poisoned and rushed to Kenya for treatment.

Due to the pressure from the natives, the kingdom rushed and released photos of the king with the president of Kenya Uhuru Kenyatta and former Prime Minister Raila Omolo Odinga.

Previously, when he appeared for the opening of the Lukiiko and the Masaza cup, the Kabaka seemed not to be in a good condition. His facial skin had lightened a bit-probably a small pointer to a skin complication. When eventually he failed to light up as usual for the Masaza tournament closure, the rumour of his ill health gained more attraction and some online bloggers pronounced him dead something that put Buganda on Tenterhooks about their king.

On the 13th of April 2021, the Kabaka celebrated his 66th birthday but surprisingly, he was presented before the Baganda in such a nasty health condition. Many of the natives started allegations that he had been poisoned by the central government[1292]. The occasion was graced by a few dignitaries including the vice president Mr. Edward Kiwanuka Ssekandi, the state minister for higher education, Mr. John Chrysestom Muyingo, Deputy Supreme Mufti Muhamood Kibaate and mengo ministers among others. As usual, the king turned up with his family including the queen Nnabagereka Sylvia Nagginda.

When he arrived for this ceremony, the audience in attendance realized something was not well. Some actually started to shed tears on seeing the frail Kabaka who could not maintain his breath. His eyes were not in proper condition. The king was indeed struggling for his breathe a situation the weak hearted could not explain at the moment.

When questions arose about his health, an unclear source from the palace stated the there was an intense debate on whether he should come out in the public. “If he didn’t then this would confirm the rumour that he was very sick or actually dead like some people had pronounced. So it was agreed that he should come out because surely no one would believe anything if the person celebrating his birthday didn’t attend the party in person.”[1293]

What annoyed most of the masses is the fact that the Katikiro Charles Peter Mayiga kept on deceiving them that the king was well something they referred to as an insult to them.

Following this, a lot of them were seen shading tears and others blamed the “Katikiro” for being an ally of the central government working towards the destruction of the kingdom which the prime minister rubbished. In his defense, he informed the public that the king had been battling allergies andwas to get well. This was however rubbished by the populance who started to demand for his resignation[1294].

[1292] James Kabengwa. Stop Speculating about Kabaka’s health-Mengo.Daily Monitor. Retrieved on 25th May 2021
[1293] The source stated while having an interview with The Observer a newspaper based in Uganda.
[1294]The Bridge. Too many unanswered questions as Kabaka Appears in Public sick and frail.April 14th 2021 by Sourced. Many started to throw postesinfront of Mengo palace demanding for the resignation of the Prime Minister

It seems the conflicts and clash between the two shall not end. Upon the completion of the2021 general elections, many of the leaders from the ruling party of NRM were seen pointing figures in Buganda being the major reason why NRM lost the majority seats of Parliament in Buganda or central region[1295].

One can arguably say that the clashes between the central government and Buganda may not end due to the increased differences between the two factions despite the continues call for unity among them. The Baganda seem to be serious on the matter of achieving federalism in Uganda which idea does not manifest in the programs of NRM government. It is now clear that the kingdom cannot be separated from politics as it eyes the Buganda politicians as its own way for achieving federalism.

THE CONFRONTATION OF KATIKIRO

After the birthday, a fake letter appeared on social media which attracted attention. In this letter, its content was relieving the Katikiro of his duties as the Prime Minister of Buganda. Besides, there were some significant comments about Mayiga accusing him of a litany of issues.

Opinion from the masses increased that he was responsible for the mess. Some stated that he would have refrained the Kabaka from appearingbefore the public and others that he was the reason the Kabaka had not sought more specialized medical attention abroad. Many amplified their voices that he would have informed the public of his health other than hiding his condition.

This saw some of the officials torn. Some blaming the Katikiro and others supporting his move. "The problem with some of our people is that they think the Katikiro is the boss of the Kabaka. He is not; therefore, hecan't order him on what to do or what not to do. Imagine him speaking out about something as sensitive as one's health without first getting clearance to do so. Surely, like any other person, he might have made mistakes as Katikiro but most of the attacks on him are unreasonable"[1296]

Many people both within and abroad were demanding for his resignation. Many posters were thrown at the entrance of mengo palace demanding for the katikiros resignation alleging that he was a servant of the central government working towards the weakening of the kingdom.[1297]

The loyalists decoded to make unsubstantiated allegations against Katikiro in relation to the Kabaka's worrying health. "Katikiro is working with the enemies of he kingdom to end the king's life" Through the various social media, they expressed their anger against him arguing that it was

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Charles Peter Mayigawhich he declined.

[1295] Minister Kiwandasuubi had a press conference where he remarked that the kingdom had supported the National Unity Platform headed by Robert Kyagulanyi Ssentamu a muganda. He also blamed it to religious leaders in Buganda.

[1296] A source from mengo informed the press.

[1297]The Observer. Who to blame when Kabaka is sick? Retrieved 8th June 2021.

wrong for Mayiga to keep them in dark about the king's health. Unknown to them, the Mayiga cabin was not willing to resign. Though the situation lasted for long, it was short lived and he continued to reign as the kingdom premie.

"…when Mayiga failed to communicate that the Kabaka was sick and deceived the masses that he was well, he was supposed to resign. In 1953 crisis, there was Katikkiro who was called Paul Kavuma. The moment Muteesa was deported Kavuma was made to resign because he failed to handle the crisis…"

Just like his predecessors, Mayiga is faced public outcry from the public that he should resign. Some alleging that he is a mole to the kingdom by allying with the central government to weaken the kingdom. Why would he deceive the masses that the Kabaka was well yet bed ridden? Some allegations concerned self-enrichment just like what happened to J.B.Walusimbi.[1298]

For long, any katikkiro who made any mistake concerning the health, custom and culture or leadership of Buganda had to resign regardless of the achievements made for the kingdom. Mayiga would have resigned had he existed in the 40s and 60s where people were serious about independence of Buganda. He could not have survived from resignation following his conduct about the health of the King. What and how would it be if the Kabaka had passed on? He is a lucky man!! Indeed, he is.

In 1964, Katikkiro Michael Kintu was showed his exit. When a young and gentle Legislator Milton Obote was first presented before SseKabaka Muteesa II by some of his old friends of Buddo in his palace in Bamunaanika, and asked him to bless UPC with an alliance of KY. Katikiro Kintu stood up and declined these entreaties. He suspected a ruse and would not bring himself to trust the unknown Obote trying as much to dissuade the Kabaka from committing.

This was not known by many Baganda that Kintu never liked such treaties but the king ignored him. When they had gone for the Lancaster Conference, he continued to demand for complete independence of Buganda though he was unlucky that he never achieved this.

Important to note is that it did not take long for his premonitions to come true. After independence, events started to fall out one by one. The biggest event was the referendum for the return of the lost counties. When Buganda had lost the two counties following the referendum, whom do you think was blamed? A mob quickly descended upon the Lukiiko and demanded Katikkiro Kintus immediate resignation. The Kabaka does not make a mistake. Once it happens it's the Katikkiro responsible. The Katikkiro has to always find way out for weakening and ashaming Buganda.

Katikkiro Michael Kintu had succeeded Katikkiro Paul Kavuma who was also shown the exit for

[1298] New Vision April 2021. The Assault on Mayiga and the trials of Bugandas Katikkiro. Dr Martin M. Lwanga. Also available on https://www.newvision.co.ug.

failing Buganda in one way or another. In the 1950s, the Katikkiro faced unpleasant challenge when the British decided to depot the Kabaka Muteesa II who was opposed to the East Africa Federation a proposal by the British. Many people started spreading rumors that he had a hand in the plot during the Kabaka crisis and demanded for his resignation.[1299]

In his memoir, he states that, "he felt it was better to continue holding on to the reign of government." [1300]Though his efforts to stay in power later paid off when the king was returned in 1955, he was shown exit by the Baganda due to continued allegations that he had been part of a scheme with the British to rob the king of his power.

Paul Kavuma had as well succeeded the son of Apollo Kagwa, Kawalya Kagwa who too had been pushed out like his father. His case was based on weakness. He had failed to secure support in his battles with the British for supremacy of Bugandas region. The "beer permits" where Katikkiro Kagwa felt he had the final say on who to license permits which the British deferred, ultimately led him to quit his 33 years old on to the premiership.

Kagwa had done so much for Buganda. He welcomed the introduction of cash crops in Uganda like cotton and coffee. It was him that prevented the whites from invading and taking over land like what they had done in Kenya. He inspired the construction of schools like Kings College Buddo which has given the nation three heads of state. He welcomed the missionaries that built hospitals like Mengo hospital and the construction of St Paul's Cathedral Namirembe. Despite all these achievements, one mistake led to his dismissal. Indeed, he died a sad man in Nairobi.

The most resisted Katikkiro of Buganda was Martin Luther Nsibirwa. He was a protégé of katikkiro Kagwa who had mentored him into the Buganda government service. He was shown doors for promoting immorality contrary to the Ganda culture.[1301] Nsibirwa supported the Nnamasole to remarry which earned him the ire of many traditionalists. This was against the customs. It was an act of equating the man to Kabaka Daudi Chwa yet the Kabaka is considered Ssegwanga and Ssabasajja.

When you fall out of favor among certain Baganda, they start questioning your ancestry. Katikiro Nsibirwa signed off 200 acres of land to the British to expand Makerere University. This was a great move and a brave of a man at a time. But it could not be noticed. After this, in the early morning while about to enter Namirembe Cathedral for morning prayers, Nsibirwa was shot dead by a one Ssenkatuka.

[1299] The 1953 Kabaka Crisis was as a result of deportation of Kabaka Muteesa II following his decline to the East African Federation.

[1300]Michael Kintu in his memoir "Crisis in Buganda."

[1301] Summers, Carol. " Scandal and Mass Politics: Bugandas 1941 Nnamasole Crisis." International Journal of Africa Historical Studies 51, no 1 (2018); 63-83..

He was replaced by Katikiro Samuel Wamala but his administration was short-lived. He was also shown exit in a shameful way due to outcry by the Baganda following 1945 riots for sponsoring. He along with other chiefs of Buganda were arrested and taken to Seychelles, written off as a mad man and it was from there that he died. Surprisingly, despite his fight against British domination, he is not so much remembered, mentioned and honored among the Katikkiros Buganda has ever had. That is how Katikiros in Buganda lose offices in case of a small mistake that is taken to cost the Kingdom.

THE BIRTHDAY CAKE

The controversies about the cake arose about its shape that was coffin like in nature and its color as well. This cake raked mostly negative reviews on social media as some complained about the color of choice which was deemed to have political connotations. This cake was made in a rectangular shape with yellow decorations something that left many commentators questioning about this color choice. It painted a certain picture in the view of many that indeed it was a political move.

In his defence about the cake, Kenneth Nsibambi the baker came out to clarify on this cake amidst rising threats from the Baganda about this theorem that had been adopted where he stated that he only followed the specifications provided by the organizers. "It's not the baker that decides on the color and shape of the Kabaka's birthday cake. The Royal family does and this time round that was the shape and color that was preferred. Sorry for all those that have been negatively affected long live the king of Buganda."[1302] No one best understands why this was opted for though some speculate that it was a political move adopted by the kingdom to insinuate violence.

Most of the Baganda raised eyebrows concerning their Kabaka's birthday cake. They connected the dots to the already mysterious health whereabouts of their ruler. They had taken long since they last saw the king in public and when they finally set focus on him, he was in an ill condition that did not attract attention. There were reports developed that the Kabaka was in and out for months treating throat cancer whereas other unconfirmed reports suggested that he was poisoned.**[1303]**

This had come in a period of political tension that was created by the 2021 general elections where NRM has won but with a defeat in Buganda. NRM had lost most of the Parliamentary seats that saw NUP win in the great divisions of Buganda. Misunderstandings had developed between NRM and Buganda where most of the officials in the party were blaming their defeat to the kingdom claiming that it had sidelined with NUP and religious leaders to defeat NRM.

But nonetheless, this view cannot be undermined for Buganda has for long demanded for its property that is in possession of the central government and it had proven beyond doubt that the NRM government could not raise its eyebrows to witness Buganda's demands. Perhaps this

[1302] Nsibambi while explaining about the coffin like cake tainted with yellow.
[1303] Baron Kironde. I was ordered by the Kingdom. Kabaka Mutebis "CASKET" birthday cake maker Nsibambi. "Makes some things clear" Grapevines Uganda News.

underlines the untold truth in NRM assertions.

It's for this reason that the kingdom hides behind a few opposition political parties in the struggle against Musevenis government in the view that upon success, Buganda can revive and receive its property. When this fails, many times Buganda continued to raise its voice to the elected MPs of Buganda region to demand for its property and work on its demands.

Because of this tension and internal feud between the kingdom and the central government, many spectators of the birthday believed that perhaps the Kabaka might have been poisoned by the government as a move to weaken the kingdom. The kingdom had gone through a lot ever since it started to raise demand for its property. In 2009, there were riots that were spearheaded by the central government where it deployed heavy security machinery to block the Kabaka and Katikiro from heading to Bugerere.

These riots led to loss of lives and destruction of property. Many Baganda vowed not to support the central government for this seemed to be an insult to the Kabaka. In 2010, when the "Masiro" "kasubi tombs" were torched to flames, the Baganda pointed this blame to the central government claiming that it was responsible for this. Though the president warned about such allegations, the Baganda were still not convinced.

Ideally, no one up to now can vehemently explain the reasoning believed the presentation of the Buganda king for his birthday in such a condition. They had demanded that the king should say something to the people having heard rumours that went viral on social media that the Kabaka had passed on. When he was traced in Kenya, the royal family including the Katikiro alleged that he had gone to Kenya to meet the president Kenyatta over certain matters. Reports from unclear sources stated that he had been taken for treatment.

EXORCING THE BUGANDA GHOST

In my conclusion therefore, The third Kabaka crisis was an arousement of the masses in Buganda in reference to Uganda and was characterized with notions of both political, social and economically in nature but the all situations was sparked off following the attributed presentation of the king of Buganda Kabaka Ronald MuwendaMutebi ii to the public is the vegetative state at his 66th birthday celebrations of Tuesday 13th April, 2021 at Bulange Mengo palace, howeverthe third Kabaka crisis not to be confused with the earlier Kabaka crisis these including the 1953 and 1955 in which a period evolved and developed into a political and constitutional crisis in the Uganda protectorate where the king of Buganda pressed for Buganda secession from Uganda as a protectorate and therefore his attributes were subsequently deposed and exiled by the british governor Andrew Cohen. That was therefore followed by the Kabaka crisis, the 1966 Kabaka crisis that was stormed by the political differences and grievances that existed between the then king of Buganda Kabaka Mutessa II and the then prime minister of Uganda Dr. Milton Obote and all the a mentioned attributed are explained in their different notions an above.

NUP 2021 STUNNING POLITICAL VICTORY IN BUGANDA

"…the Baganda who failed to pass through, they failed because they stuck to Museveni they feel offended. In Buganda it was a wave and if Mzee continues that theory it will not end if he remain blaming those that ignored things which are preferred by the Parliament…. if America Kyambadde had accompanied Museveni and crossed to NUP she would have stayed in power…"

In a stunning wave of results, all the 13 cabinet ministers from Buganda were defeated by opposition candidates in particular those from Kyagulanyis NUP. The humbling ended NRMs dominance of the key strategic strong hold of Buganda. Most of them alleged that the continued brutalization of Kyagulanyi and his supporters on the campaign trail swayed the electorate to vote against them. One of the biggest eye openers in Buganda was that president Museveni lost at the polling stations in Buganda.[1304]

Truth be told, that was an expression of the Baganda hatred towards the central government of NRM following its continued neglect of Buganda's grievances and demands. The Baganda had hope that perhaps if Kyagulanyi a muganda won the elections, they would have their demands catered for. Buganda has for long demanded for federo, its property that was taken by the central government after the 1966 Kabaka crisis, rent from the central government for utilizing its property and many more but all this has been always turned down by the government.

What hurt most of the electorates in the region was having their own friends, relatives, children and grandchildren working for the NRM government and secondly using them to challenge Buganda and silence its demands yet the region actually benefited nothing from them. Many of these ended up losing the elections. These included America Kyambadde, Vincent Ssempijja, Nakiwala Kiyingi, Edward Ssekandi, John Chrysestom Muyingo, Ronald Kibuule and others. These were strong holds of NRM.

Buganda had always demanded for Federal to return to its position where it was in 1966. Speaking at Kabaka Ronald Mutebis 27th coronation anniversary, Mr. Charles Peter Mayiga, the kingdom prime minister told the Kabaka that there was growing demand within the kingdom for the government to address their quest for federal status. He said this is because of the milestone the kingdom has achieved amid difficulties, to re-revamp institutions which had collapsed and establishing new ones which are restoring the status the kingdom enjoyed before its abolition in 1966.[1305]

The decline to this had been due to government desire to distance Buganda from Uganda's politics alleging that it shall draw the Pearl back to political instability while relying on history mappings. When the government came to power in 1986, one of the challenges it faced was the position of Buganda in contemporary Uganda. The restoration of the kingdoms had been a promise by

[1304] The Observer Jun 22, 2021. Brutality on Bobi cost us in Buganda-defeated. By Observer Team.
[1305] Daily Monitor Aug 2, 2020. Buganda tasks government on Federal system. Stephen Otage.

Museveni to the Baganda during the bush war but unsolved was how the kingdom of Buganda was to operate.

Perhaps this explains the return to kingdom system but on condition that the kingdoms do not involve in politics. The government ended up making them Constitutional monarchs that were only concerned with customs and not to involve in political activities of Uganda. Yes, returning the kingdom was welcomed by the Baganda but denying them the autonomy was never to leave their hearts. They continued to demand for their Autonomy as it was at independence.[1306]

The demand for Federal system would be a return to the past according to the government. Secondly, the central government is settled on Buganda soils and perhaps the heart of Uganda is in Buganda. This posed a big question as to what would happen when Buganda was returned to its position of 1962. This left the Baganda hurt. Most of them stared at Museveni as a betrayer. He had betrayed his promise towards them of returning the kingdom to its height which to them meant having their autonomy.

This accompanied by the September 2009 riots, burning of the Kasubi tombs poor service delivery in Buganda, unemployment among the youth and increased rumors that the government was working towards weakening the kingdom left many Baganda in hatred towards NRM.

In September 2009, we saw an explosion of rioting in Kampala which is part of the kingdoms historical territory as thousands of young people took to the streets to protest a symbolic power play by the Ugandan government against the king of Buganda. The immediate cause was the central governments denial of the king to go Bugerere. [1307]This was an insult to the Ganda people. A year after this, the kasubi tombs were put on fire. The rumors started to spread throughout Buganda that Museveni and his government was behind all this.

The demands of Buganda created misunderstandings among people. At one end are the people of Buganda who hunger for the degree of autonomy for the ancient kingdom remains undiminished and there are those who wonder if the binaries are too extreme. The government went nervous about what they see as the risks of having a kingdom with political power thriving within a country whose Constitution defines it as a republic. To it the question had to be settled once and for all.

Ideally it could not make sense for them to vote for NRM in their region that had for long neglected their desires. How could they vote the NRM Baganda that they considered to be betrayers of the region by working with their long enemy president Museveni? If they had deserted Museveni and his NRM in that election and perhaps crossed to NUP, they would have won the elections.

[1306] Mikael Karlstrom. Imagining Democracy: Political Culture and Democratization in Buganda.Journal of the International African Institute Vol. 66, No 4 (1996).Pp 485-505. Cambridge University Press.

[1307] Fredrick Golooba-Mutebi. Settling the Buganda Question. Transition No 106, side B: Reflections from Contemporary Uganda. A selection of writing at work and photography (2011), pp.10-25.Indiana University Press.

CHAPTER FIFTEEN

THE EXECUTIVE AND RELIGION

This chapter explores the complexities of the church and state relations with keen focus placed on Uganda. Uganda's religious heritage comprises of indigenous religions such as Islam and Christianity. About four-firths of the population is Christian, primarily divided between Roman Catholics and Protestants.

The constitution of Uganda[1308] provides for the right to freedom of religion under Article 29(1) (c) which states that;

Every person shall have the right to-freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in practices of any religious body or organisation in a manner consistent with this constitution.

This right is also rooted in UN international law. Article 18 of the universal declaration of Human rights[1309] provides that;

"Everyone has the right and freedom of thought, conscience and religion; this right includes the right to change one's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Furthermore, the international covenant on civil and political rights, a UN treaty which Uganda is signatory to also contains a similar provision on the right to freedom of religion.

Article 18 (1) of the ICCPR states that;

"Everyone shall have the right and freedom of thought, conscience and religion; this right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Other regional treaties such as the European convention on human rights and the African charter on human and people's rights also contain provisions for the right to religion.

The right to the freedom of religion is indispensable for pluralism; it is one of the foundations of a democratic society. As noted by the European Court of Human Rights (ECtHR), this freedom undoubtedly is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists,

[1308] 1995 constitution of the Republic of Uganda as ammended
[1309] Universal Declaration of human rights, Article 18

agnostics, sceptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[1310]

The European court of human rights in the case of Francesco Sessa v Italy[1311], the right to freedom of religion is one of the most vital elements which go to make up the identity of believers and their conception of life; as well as a precious asset for Atheists, agnostics, sceptics and the unconcerned. Respect of freedom of religion is also a marker of a free society.

In the case of **R vs. Big M Drug Mart Ltd**[1312] it was observed that; "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance on the charter."

Having addressed the legal frame work around the right to religion, I proceed to look in to the relationship between religion and the state.

The Most rev. Archbishop Joseph Kiwanuka, d.d., Archbishop of Lubaga (Uganda) in his pastoral letter[1313] observes that "I believe that some are irritated and do wrong to others because they do not understand the changes that are taking place in the government, and neither do they understand the relation between Church and State. In fact, Church and State should have good relations with one another and work together for the common good."

The three forms of government found in the world up to this day were described long ago by a Greek philosopher, Aristotle.

i. The first form is the Absolute Monarchy. In that form of government, the power to make laws obliging the whole country (legislative) and the power to judge trials and punish (judiciary), are all vested in the king.

ii. The second form is that of Aristocracy (Bakungu) sharing in government. Then the power of ruling is in the hands of such chiefs.

iii. The third form is that in which all citizens take part, and the government is that of the people (democracy). The people themselves elect their representatives.

However, in certain countries these three forms have been joined together so that the government is formed of a king with the chiefs, and the representatives elected by the citizens. England has such a government.

[1310]Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) ¶ 31; Buscarini v. San Marino, 1999-I Eur. Ct. H.R. 605, ¶ 34.

[1311]Francesco Sessa v Italy application number 28790/08

[1312]R vs Big M Drug Mart ltd [1985]1 R.C.S 295

[1313]Pastoral letter of the most rev. archbishop joseph kiwanuka, d.d., archbishop of lubaga(uganda) church and state Guiding Principles November 1961

STATE VERSUS RELIGION EXECUTIVE MANDATE

Speke's route traced old Arabic trade routes that carried ivory and slaves to Sultan Majid's Zanzibar. He drove inland and then curled up and along the western shore of Lake Victoria into the Buganda kingdom. Arabic traders had a toehold for Islam among the Baganda elite by the mid-1800s.[1314] Islam occupied a privileged place in Mutesa's court by the time of Speke's arrival, though he appeared not to notice its influence.

When the Christian missionaries retraced Speke's red-lined route to Buganda, they found Islam the state religion under the Kabaka. Islam would lose much ground to Protestants and Catholics in the coming decades, but it remained a defining characteristic for many inhabitants of the future Uganda state. Only the Marriage and Divorce of Mohammedans Act of 1906 explicitly addressed Muslims and their laws. Like the other marriage statutes, the law provided procedures for registering and dissolving marriages, though according to Islamic principles. While it clearly applied to Muslims of Arabic, Somali or Indian origin, it also applied to the not insubstantial African Muslim minority. The major legal instruments from the Uganda Order in Council of 1902 to the Judicature Act of 1962 were silent on whether Islamic law was a valid source of law. A series of High Court judgments would fail to build a coherent position on this question.

Islamic law cases were a rarity in the High Court's first six decades. The few cases that did reach the courts invariably dealt with marital issues. An early case in 1921, **Bibi v. Bibi**, disputed the High Court's jurisdiction and valid sources of law in child custody cases Justice Guthrie held that the High Court could make orders for the custody of Muslim children according to received English law. However, a judge might follow the special customs of community so long as it was not "so inhuman as to deprive the mother of her custody of an infant child. The High Court would invoke the repugnancy clause to limit the use of lslamic custom in a 1928 case, **Satardin v. Mahomed**. The Court annulled a marriage contracted by a girl's father against her will, stating "parents in Uganda have no authority to contract for the marriage of their children whether Muhammadans or not.[1315] This decision prohibited jabr, a father's right to make a marriage contract that compelled his daughter to marry under some interpretations of shari'a law. By the 1930s, the High Court applied first the Marriage and Divorce of Mohammedans Ordinance, then

[1314] S. 2 of the Marriage and Divorce '! Mohammedans Ordinance states: "The Marriage Ordinance and the Marriage of Africans Ordinance, shall cease to apply to the celebration of marriages between persons both of whom profess the Mohammedan religion". See J.N.D. Anderson, "The Isma'ili Khojas of East Africa" (1964) 1 Middle Eastern Studies 21.

[1315] S. 2 of the Marriage and Divorce '![Mohammedans Ordinance states: "The Marriage Ordinance and the Marriage of Africans Ordinance, shall cease to apply to the celebration of marriages between persons both of whom profess the Mohammedan religion". See J.N.D. Anderson, "The Isma'ili Khojas of East Africa" (1964) 1 Middle Eastern Studies 21.

received English law and finally Islamic "customs" not repugnant to English morals.

In 1956, the High Court heard an application from a woman to separate from her alleged husband. The woman had married the man, also an Isma'ili Khoja, when she was 15 years old under the Marriage Act, unaware that it did not apply to Muslims. The Court decided her purported marriage was invalid because it was registered under the wrong law and dismissed her claim. In Mohamed v. BhilliJi, an appeal to the East African Court of Appeal, the judges referred to the "Constitution, Rules and Regulations of His Highness the Aga Khan Isma'ili Councils of Africa," which set 16 as the minimum age of marriage to a woman[1316]

The Court characterized the "Uganda Isma'ili Khojas as a whole" as a "tribe or sect". Since this "tribe" was "bound by rules or customs which precluded marriage" of women under 16, then the appellant's marriage was invalid. The Court continued, however, to posit a "normal Shia law" that takes puberty as the minimum age for marriage. Thus the Aga Khan's Rules must "be read in conjunction with the general Shia law", which trumps them in this case. This conclusion directly contradicts the testimony of two expert witnesses -the President of the Kampala Provincial Council and a member of the Uganda Supreme Council of the Isma'ili Community- who both said that a marriage was invalid if the woman was under 16.[1317] Yet the Court made a "correct construction" and concluded that "the [Aga Khan's] Rules do not modify the Sharia, either by imposing a new age limit ... or by defining new forms. ..essential to the validity of a marriage."[1318] A contemporary British expert on Islamic law observed that many variations and schools of shari'a existed in Uganda and no ideal or pure shari'a existed.[1319] The Court in Mohamed v. Bhimji thus seemed to create an ideal Islamic law in the mould of the more familial customary law.

The Succession Act of 1906 did not explicitly deal with Islamic law, [1320]this oversight left the High Court with a tricky question of what law applied to the property of deceased Muslims in Uganda. In an early High Court decision, Re Habash: Valisa v. S. 2 of the Marriage and Divorce '! [Mohammedans Ordinance states: "The Marriage Ordinance and the Marriage of Africans Ordinance, shall cease to apply to the celebration of marriages between persons both of whom profess the Mohammedan religion". [1321]

Sophia, Justice Smith found that the Succession Ordinance did not include Muslims.[1322] He continued: There is no room anywhere for the application of Mohammedan law to land and it

[1316]JN.D. Anderson,"Muslim MarriagesandtheCourtsinEastAfrica"(1957)1JAfr.L.14at20
[1317]*Id.*
[1318]*Id.*
[1319]*Id.*
[1320]Cap.139.
[1321] See J.N.D. Anderson, "The Isma'ili Khojas of East Africa" (1964) 1 Middle Eastern Studies 21.
[1322] (1920)3 U.L.R.

would lead to hopeless confusion if the course of descent of land depended both of tribe and religion. The conclusion is that this case falls to be determined according to the English rules of succession.[1323]

Justice Smith's reasoning revealed his unwillingness to accept that multiple legal orders might apply to an individual. In this case, the deceased had no customary law attached to him since as a non-African he had no tribe. Given the bifurcated legal system discussed above, Smith decided that the deceased must be subject to civil laws by default. And since the Succession Ordinance did not apply to Muslims, the only valid law available to him was English rules of succession.

Two decades later in 1941 the High Court again found the Succession Act did not apply to Muslims in Re Alibhai[1324] Rather than fall back on English law, Gamble Ag. C.J. held that the widow should receive the share of her husband's estate provided for Islamic law. In a 1949 decision, the High Court confirmed that cases of intestacy for foreign Muslims, who were also exempted from the Succession Act, should be decided "according to the rules of Muhammedan law governing intestacy"[1325] In both judgments, "Islamic law" had become a term for a fixed set of rules interpreted by judges. Muslims were thus treated as a distinct tribal category governed by an idealized Islamic law.

The High Court's interpretation of Muslim marriage and succession was shaped by its experience with customary law. Its early decisions rejected shari'a as a valid source of law. But the Court later accepted it in the guise of custom influencing their use of English law, so long as it was not morally repugnant. By the late 1950s, however, the High Court had postulated a rarefied "normal Shia" law universally applicable to all Muslims. While not territorially defined, it mirrored the development of customary laws into "an idealized version of traditional marriage" unique to each tribe. All Muslims were forced into the same "tribe" even at the expense of abandoning the repugnancy principle. In Mohamed v. Bhimji, for example, the Court upheld their shari'a construction, which permitted marriage at puberty for women, rather than accept a multitude of interpretations for each of the diverse, overlapping Muslim communities in Uganda.

"Islamic law" thus became the latest customary law attached to members of the newly created, though geographically dispersed, Muslim tribe. The civil courts' changing view on Islamic laws' applicability to marriage and succession had little direct impact on shari'a in practice since a vast majority of disputes never even reached them. If a father made a jabr marriage contract with which his daughter disagreed, for example, the parties would first appeal to local Imams, then the Isma'ili

[1323] Emphasis added.
[1324] (1941) 6 U.L.R. 89 (H.C).
[1325]&*DinEstate (Deceased)* (1949), Admin. Cause No .36(H.C.) [unreported) cited in J.N.D. Anderson,"The Law of Succession in Uganda: An Unreported Case"(1963)7J.Afr.L. 201at206.

Councils or the Muslim Religious Council in Kampala. The Kampala Council, for example, "had certain nebulous functions", that included applying Islamic law in Buganda.[1326] But the Council was no binding court of law and unhappy individuals could always take their disputes to the High Court. Respected experts trained in shari'a most often applied Islamic law, like two Imams in Bomba who married people regularly. Yet they refused to sanction jabr marriages for fear of government disapproval even though they believed it was a correct reading of shari'a law.[1327] Although historical evidence is scarce or tangential, it appears that the colonial state influenced Islamic laws most by having religious councils or individual Imams modify their interpretation of shari'a to avoid having their adherents appeal to the colonial courts.

Islamic laws occupied an ambivalent place in the legal history of Uganda. The colonial government treated it at different times as statutory, customary or an idealized "sharia" law. And at yet other times it was treated as local custom or simply ignored! Since Uganda's small Muslim population was scattered throughout the country, it did not fit into the indirect rule scheme that presumed a unique customary law for each geographically discrete "tribe". When faced with individuals like Abu Mayanja, the attorney for Matovu, who was Baganda, Muslim and a minister in both the Kabaka's Lukiiko-, and Obote's, cabinets, it was unclear what law applied-Islamic or customary.[1328] In addition to indigenous converts Muslims represented a diverse group of Somali and Arab visitors and long-time residents of Asian origin. Administrators and especially judges used to customary law had trouble with egocentric Islamic laws. Some chose village Imams to interpret shari'a, while those part of transnational communities like the Isma'ili Khoja relied on foreign authority of the Aga Khan. In between there were countless shari'a variations. Since courts did not have a ready-made tribe for Muslims, they invented one that took its final form in Mohamed v. Bhimji. When the state tried to coerce a geocentric projection from egocentric laws, most Muslims responded by avoiding civil courts and thus disappeared from the state law map.

Idi Amin's rise seemed a blessing for Uganda's Muslims who had lost out to Christian and Protestants in the religious wars of the 1880s. Before joining the army, he had studied at an Islamic school and excelled in reciting the Qur'an. Amin seemed to cement his relationship with African Muslims in 1972 by clearing the hilltop ruins of Lugard's fort to start building a 15,000 seat mosque. But that same year he expelled "Asians" from Uganda, most of whom were fellow Muslims. Amin's deepening atrocities eventually drove Muslim leaders away and after his fall Muslims had again become a marginal force in Uganda. In 1993, George Kanyeihamba, a former

[1326] Anderson 1970, at 154.
[1327] ld. at 153
[1328] Nganda, supra

Supreme Court judge, chaired the International Conference on Uganda Muslim Unity and Reconciliation in Kampala to bring together the country's fractured leadership. His effort failed, however, and the Muslim community remained divided along political, not religious, lines of Baganda and non-Baganda.

While Islam was fractured at the national level, a local "clergy" developed from the Islamic schools, like the one Amin attended, "to lead prayers, to interpret the law and to guide the faithful". These experts, half-monk and half-priest, were unique to Uganda and even received the prestigious title of sheik upon graduation Sheiks give opinions on shari'a, including the fiqih (Islamic jurisprudence) and tafsir (commentary on the Qu'ran and other holy books). Without the title sheik, however, no Muslim can lead prayers or run a mosque in Uganda. This informal consecration of sheiks began in with Sheik Ssemakula graduating his two top students as sheiks. These pioneers dispersed to rebuild Islam in Uganda after its near death in the 1880s religious wars.

Today about 10 per cent of Ugandans are Muslims, and so conduct their family and inheritance affairs with the help of certified sheiks in the penumbra of the state legal regime. Islam began an institutional resurgence not seen in the days of Amin or Mutesa. In 1990 Parliament established the Islamic University in Uganda, only the country's second public university, with a dedicated law faculty. Moreover, Article 129(1)(d) of the 1995 Constitution provided for "qadhis' courts for marriage, divorce, inheritance of property and guardianship". Despite trained Islamic lawyers and this constitutional provision, no such qadhis' courts exist currently. The Domestic Relations Bill, however, promised to create them for applying Islamic laws within a larger domestic law framework and would override the century old Marriage and Divorce of Mohammedans Act. As under the old law, two Muslims could marry according to Islamic customs provided they register with the District Registrar of Marriages. More controversially, the law condoned polygamy only if a husband received permission from his existing wife (or wives) before marrying another woman. It also ensured an equitable division of matrimonial property. The law thus represented a concerted attempt to bring Islamic laws within the state legal hierarchy.

When details of the Domestic Relations Bill first came out, it caused a furore in Uganda's Muslim communities. Protestors in Kampala claimed the bill violated Islamic law by constraining polygamy and overruling Qu'ranic rules of inheritance. Many protesters that day were women, despite the law's claims to protect women's rights. Members of women's advocacy groups, like MP Sheila Mishambi, countered that polygamy was rare before colonization and "increased women's servitude and marginalisation". The fierce debate forced the government to plunge the Domestic Relations Bill back into committees where it remained for a long time.

The protesters and the law's advocates both overstated the dangers of the Domestic Relations Bill to

Islamic laws in Uganda. Since the 1995 Constitution came into force, no recorded cases involving Islamic law made it to the magistrates' or High Court. Few Muslims registered their marriages under the old law and most preferred to settle domestic disputes outside state laws and courts. When Idi Amin died in 2003, his 54 children rushed to divide the spoils of his considerable estate. Rather than appeal to the Ugandan courts, however, they decided to follow Islamic law as interpreted by "religious elders to distribute the wealth and chose the heir". Ismail Icum, the Secretary for Education of the Uganda Muslim Supreme Council (a body created by Amin in 1971), reported that the "Council and the children have appointed a panel that will deal with the whole issue of inheritance".

Muslims have been remarkably perspicacious at evading state law and its courts. And for good reason (in the past at least). Uganda's judiciary has proven itself a poor interpreter of shari'a's multiple forms since it insists on likening it to customary law. Yet by existing in the shadow of the 1995 Constitution, some women cannot access the formal courts to challenge shari'a interpretations, like jabr, that might harm their interests. Given the fractured nature of Uganda's Muslim polity, this is a constant likelihood. Both protesters and supporters of the Domestic Relations Bill have valid arguments. The real sticking point is a judicial ideology that is blind to the egocentric projections of shari'a. Until formal courts can shed this, Muslims will continue to resist attempts to pull their laws into the full light of the state legal order.

RELIGION DISGUISED BY THE EXECUTIVE

THE FIRST SLAVE SHIP WAS NAMED ‘JESUS”

“Jesus” was the name of the slave ship captained by sir John Hawkins in 1564 by appointment of the queen of England, what has come to be referred to as ‘ The Good Ship Jesus” was in fact Lubeck a 700 tonne ship purchased by King Henry VIII from the Hanseatic League, a merchant alliance between the cities of Homburg and Lubeck in German twenty years after its purchase the ship in disrepair was leant to Sir John Hawkins by Queen Elizabeth, Hawkins s cousin of Sir Francis Drake was granted permission from Queen Elizabeth for his first voyage in 1562, he was allowed to carry Africans to the Americas “ with their own free consent” and he agreed to this condition. Hawkins had a reputation for being e religious man who required his crew to serve God daily and to love one another, Sir Francis Drake accompanied Hawkins on this voyage and subsequent others, Drake was himself devotedly religious services were held on board twice a day, off the coast of Africa near sierra Leone. Hawkins captured 300 to 500 slaves, mostly by plundering Portuguese ships but also through violence and subterfuge promising Africans free land and riches in the new world, he sold most of the slaves in what is now known as the Dominican

Republic, he returned home with a profit and ships laden with ivory, hides and sugar, then this was the official beginning of slave trade disguised under religion.

VOX POPULI VOX DEI (THE VOICE OF THE PEOPLE IS THE VOICE OF GOD): THE HIDDEN STRENGTH OF RELIGION IN THE HEART OF STATES

Biblically and theologically, whatever is said about the origin of state and its leadership is entirely a version of what started as religion and religious leadership and perhaps the confrontation between the religious leaders and the secular rulers in the early centuries. It's this notion that kept smelting to the modern days when religion was separated from the state. In that sense it is remarkable that religion gave birth to state and therefore the state cannot undermine religion because of its influence in society based on its history.

The notion of leadership is historically traced from the Bible. As Paul the Apostle remarked, everyone must submit himself to the governing authorities, for there is no authority except that which God has established. Roman 13:1 clearly states that every person is to be in subjection to the governing authority. Indeed, God was the first leader and authored the first leadership book called the Bible. God therefore supported the right of a government to govern and protect people from harm.

Biblical paradigms of leadership suggest that leadership is a response to a divine call to be in the service of God's love and justice. The paradigm reveals a theology of leadership which focuses on a pattern of God calling leaders to one mission enterprise-to be in the service and restoration of Gods image in everyone and everything.[1329]

Abraham, Moses, Saul, David, Nehemiah, the Hebrew prophets and Jesus are Biblical models of leadership from which the church drew its inspiration and commitment to the dream of God which was later manipulated to form the idea of modern states. In that sense leadership comes from God and every one ought to obey the state authorities for they are Gods ministers to execute justice. 1Peter 2:13-14 says, submit yourselves for the Lords sake to every human institution, whether to a king as the one in authority or to governors who are sent by him to punish those who do wrong and to praise those who do right.

[1329]Verna Dozier.(1991). "The Dream of God."

HOW IT ALL STARTED

The attitude of the first generations of Christians towards the existing political order was determined by the imminent expectation of the kingdom of God whose miraculous power had begun to be visibly realized in the figure of Jesus Christ.[1330] The importance of a political leader was thus negligible as Jesus once remarked that, "My kingship is not of this world." This brought about tension among the Christians whose orientation about the coming kingdom of God contradicted the demands placed on them by the state since the two were directly in conflict. The state was in conflict with faith.

This contrast was developed most pointedly in the rejection of the emperor cult and of certain state offices above all that of judge to which the power over life and death was professionally entrusted.

Despite their long waiting for the kingdom of God, the early Christians recognized the pagan state to be the holder of order and authority in the world. This can be traced from the Pauline missions who presented an idea that the ruling body or then political order of Roman Empire was from God and therefore every native of the land or any Christian was to be subject to the governing authority.[1331]

In the 4th Century, many emperors were noticed taking over century leadership of the Church. Emperor Constantine granted himself as Bishop of foreign affairs certain rights to church leadership. In the Byzantine Empire, the secular ruler was called priest and emperor and exercised authority as head of the Church.

The emperor held jurisdiction over ecclesiastical affairs which symbolically expressed directly that his authority was from God. This can be well noticed from both his anointing and crowning. In Russia's hemisphere or realms, the Tsardom maintained the same and claimed authority over the church and the area.[1332]

THE CHURCH AND THE WESTERN STATES

When the German tribes invaded the west, they brought about a political vacuum but despite all this, it is notable that only the Roman Church preserved and remained the single institution that preserved in its episcopal dioceses the Roman provincial arrangement. Concern must be drawn on how it administered justice largely depending upon the old imperial law. During the periods of legal and administrative chaos, the Roman administration was viewed as the only guarantor of order. Between the years of 590-604 was the reign of St Gregory I a pope who assumed the

[1330]The history of church and state. The Church and the Roman Empire available on https://www.britannica.com
[1331]E.P. Sanders.St Paul the Apostle. Christian Apostle. Duke University.
[1332] John. L. Teall. Byzantine Empire.Mount Holyoke College, South Hadley, Massachusetts. (1968-79).

decadent imperial bureaucracy.

His wisdom drove him into negotiations with the Lombard kings of Italy, oversaw public welfare and was the soldiers pay master. It was his administration that laid a foundation for the Papal States which emerged in the 8th Century. Supporting the Papal claims and responsibilities was the Petrine theory which high lightened the idea that the pope was the representative of Christ and the successor of St Peter.[1333]

EMERGENCY OF THE PAPAL STATES

The states emerged out of the quarrel between the Holy See and the imperial government at the time of the controversy over iconoclasm. In 725-726 Gregory II put himself at the head of regional Italian resistance to the taxation of the emperor Leo II.

It all started from the Bishops of Rome acquiring lands around the city in the 4th Century which came to be known as the Patrimony of St. Peter. In the 5th Century, there was collapse of the Western Empire and the influence of the Eastern (Byzantine) Empire in Italy weakened. This increased the power of the Bishops, who were often called the "Papa" or "Pope" as the populace turned to them for aid and protection.

During his reign, St Gregory I helped many refugees from invading Lombards and even managed to establish peace with the invaders at the time. He went ahead to consolidate the papal holdings into a unified territory.

In the 8th Century, the Eastern Empire increased taxation and failed to protect Italy, and more especially the emperor's views on iconoclasm, Pope Gregory II broke with the empire and his successor, Pope Gregory III upheld the opposition to the iconoclasts. When the Lombards had seized Ravenna and were on the verge of conquering Rome, Pope Stephen II turned to the king of the Franks, Pippin III. Pippin promised to restore the captured lands to the pope; he then succeeded in defeating the Lombard leader, Aistulf and made him return the lands the Lombards had captured to the papacy ignoring all Byzantine claims to the territory.

Pippins promise and the document that recorded it in 756 are known as the Donation of Pippin and provide the legal foundation for the Papal States.[1334]

Gregory desired to improve the Christian life of the people especially from the west. His efforts strengthened the church of Spain, Gaul and the northern Italy which eventually saw England convert to Roman Christianity. In the 6th century, the Frankish (Germanic) kingdom had an alliance that saw them becoming the new protectors of Papal States when Byzantine emperor was no longer

[1333]Supra.

[1334] Melissa. Snell.The Origin and Decline of the Papal States. Feb 11th 2019 also available on https://www.thouhtco.com

able to protect Rome. This brought together religious and secular leaders though it brought into play tension between them as to the nature of relationship between them.

Between the periods of 492-496, new powers emerged that saw the Carolingian rulers claim that they had special rights and duties to protect the church and so continued to have influence in the church through the continued appointments of Bishops of the empire who increasingly involved in political affairs.

In the 10th Century, many emperors maintained the status quo and the result of this was that the bishops in their empires also at times were princes of their dioceses which made them more political than conducting spiritual affairs. Eventually struggles emerge between the popes and secular leaders or rulers. This was followed by new definitions of sin of clerical marriage and simony by St. Peter Damian and Humbert of Silva Candida which virtually eliminated and checked on secular interference in episcopal and Papal succession.[1335]

One of the strong supporters of these reforms was King Gregory VII who was prompted to ban the principles and practices of lay investiture of Bishops and challenged the traditions of sacral kingship. However, his assertion of the Papal authority was opposed by the German ruler Henry IV. The conflict between the two led to the investiture controversy which became a center for the struggle for supremacy between the church and the monarchy. In the end, the resolution left the emperor in a weakened format and boosted the influence of secular rulers.

Despite its resurrection in the 12th century, it faced another challenge during the 13th Century from the rise of European Nation States. It's worth noting that the Papal ideology had been formed to challenge or deal with emperors who meant that it was not suited to challenge them or deal with kings of the nation states.

For instance, there arose a conflict over matters of ecclesiastical independence and royal authority. The Papal fortunes continued to decline during the subsequent Babylonian captivity of the Church, when the papacy resided in Avignon (1309-77) and was perceived as being dominated by the French monarchy.

From 1378-1417, there was increased secular control over the church during the period of Great Schism to the extent that even after this period, the status quo was maintained in Europe. This schism was a result of the growing demand for the return of Papacy's to Rome.

When he came into leadership, Pope Urban VI in Rome alienated a number of cardinals who returned to Avignon and elected a rival pope, Clement VII. This brought about concern of the validity of the consecration of Bishops and the sacraments administered by the priests ordained in Avignon. As a result, this was perpetuated by the European politics as rival rulers supported either

[1335] Daniel Fancis Callahan. Saint Peter Damian. Italian Cardinal. University of Delawar.Network Delaware.

the pope in Rome or the pope in Avignon to assert greater authority over the church in their realms. The growth of state power brought in a new normal especially during the reign of King Henry VIII of England. During his reign, there was church dissociation from the Papal Supremacy. Further, in the German territories, the reigning princes became in effect the legal guardians of the Protestant churches (a movement already in the process of consolidation in the late middle ages). The Protestant churches had come into existence as a result of the breakaway of the English church from the Roman Catholic Church doctrines. Protestant was a word derived from "Protestantism" which referred to all groups opposed to the Roman Catholic Church that arose into fame in what came to be known as the "Protestant Revolution."

THE PROTESTANT REVOLUTION / REFORMATION

This revolution started from Winterburg, German on October 31, 1517 when Martin Luther, a teacher and monk published a document called the "Disputation on the Power of Indulgences" or "The Ninety-Five Theses." It contained ninety-five ideas about Christianity that he invited people to debate with him. The ideas contradicted those of the Catholic Church's teachings.

His ideas challenged the Catholic Church's role as intermediary between people and God. He was specifically against the indulgence system which in part allowed people to purchase a certificate of pardon for the punishment of their sins.[1336]Luther argued against the practice of buying or earning forgiveness, believing instead that salvation is a gift God gives to those who have faith. He advocated for the printing of the Bible in the language of the reader rather than in Latin. To him the Catholic churches practices focusing on works such as pilgrimages, the sale of indulgences to obtain forgiveness and prayers addressed to saints were immoral.[1337]

This criticism posed a big threat to the Catholic Church and its doctrines throughout Europe for instance John Calvin in France and Huldrych Zwingli in Switzerland proposed new ideas about the practice of Holy communion and a group called Anabaptists rejected the idea that infants should be baptized in favor of the notion that baptism was reserved for adult Christians.

In fact, most of the challenges to the Catholic Church revolved on the broad notion that believers should mostly dependent on the Catholic Church and its pope and priests for spiritual guidance and salvation. For the Protestants, they believed that people should be independent in their relationship with God, taking personal responsibility in faith and referring directly to the Bible, the Christian Holy book for Spiritual wisdom.

[1336] Peter, J. Manning. A History of the Protestant Reformation.Journal of the History of Cobbets.University of Pennyslvania press.

[1337]Kranz, Nickie. (2005). "Martin Luther stands in History as a leader of th Protestant Reformation," Journal of Undergraduate Research at Minnesta State University, Mankato. Vol 5, Article 13. Available at https://cornerstone.lib.mnsu.edu/jur/vols/iss1/13.

These Protestant reforms all started in England during the reign of Henry VIII when the Pope declined to grant him a marriage annulment. This left him bothered and declined the Popes authority hence creating and assuming authority over the Church of England. This led to religious turbulence throughout England especially during the reign of Queen Mary (1553-1558) who reinstated Catholicism and many Protestants were seen persecuted and others flee to exile.

It was only during the Reign of Queen Elizabeth I that Protestants gained some peace as she strived to restore Protestantism.[1338]

Therefore the Protestant reformation that started in the sixteenth brought an end to the ecclesiastical unity of medieval Christianity in Western Europe and profoundly shaped the course of modern history[1339]. This was soon to appeal to the founders of the United States and some of its concepts of individualism and free expression or religion were incorporated into the first Amendment. Its reason that marks the freedom of religion that the natives should not be forced to be under the captivity of one religion.

These developments so occurred throughout the Catholic states such as Spain, Portugal, France and Others.[1340]

In the 17th Century, a national law conception of relationship between the state and church begun to develop. The result of this was evidenced in the Protestant Countries where state sovereignty was increasingly emphasized visa-vis the churches. This continued to influence the establishment of the right to regulate educational and marriage concerns as well as administrative affairs of the church. Such developments also happened in the Roman Catholic areas. In Austria, it was after Joseph II leadership.

THE HISTORY OF RELIGION IN UGANDA

Christianity came late to Uganda compared with many other parts of Africa. Missionaries first arrived at the court of Kabaka Muteesa in 1877; almost a century after the missionary impetus from Europe had begun. And yet within 25 years Uganda had become one of the most successful mission fields in the whole of Africa.

Any discussion of Religion in Uganda–the creation of colonialism at the end of the 19th Century–must begin with Buganda–the ancient independent kingdom on the northern shores of the lake which the Baganda call *Nalubaale* (the home of the *balubaale* gods) and which the British christened "Victoria." Over the centuries Buganda had evolved a complex system of government

[1338]The Protestant Reformation. By National Geographic Articles available on https://www.nationalgeographic.org
[1339]Robb. S. Harvey. Protestant Reformation.The First Amendment of Encyclopedia.Prsesnted by the John Seignenthaler Chair of Excellence in first Amendment studies.
[1340]Owen.W. Chadwick. The Protestant Herritage. University of Cambridge,1968.

under a *Kabaka* (king), a system unusual for its high degree of centralization and internal cohesiveness. Another feature of Kiganda society, of importance in explaining the eventual success of religion, was its remarkable adaptability and receptivity to change.

In 1856 Kabaka Muteesa inherited a kingdom which was already the strongest in the region. During his long reign of 28 years he consolidated and enhanced that power. A major part of Muteesa's strategy as rubber was to open up Buganda to the outside world. Swahili and Arab traders from Zanzibar were encouraged to trade their cotton cloth, guns and luxury items for ivory and slaves. But outside influences did not stop at trade; Islam was soon exerting a profound religious and cultural influence on Buganda. By the time Christianity arrived, the impact of Islam had already been felt for a generation.

CHURCH AND STATE IN COLONIAL UGANDA, CATHOLICS VERSUS PROTESTANTS

Protestants and Catholics [1341]

First forward to the colonial times; The Anglican Church was never an official established church in colonial Uganda. But it approximated to an established church, with the Bishop of Uganda standing third in order of precedence at official functions, after the Governor and the Kabaka of Buganda. The Catholics had no such political role in the colonial state, and in fact they felt it better to eschew politics altogether and to concentrate on their religious tasks. At times they could legitimately complain of discrimination, at least in the early years. But, by and large they felt reasonably content with the official British policy of religious neutrality. This allowed them to evangelize freely throughout the country, whatever the denomination of the local ruler or chief.

At times the British authorities preferred the non-political role of the Catholics to the gratuitous advice or criticism of the CMS.

The Church and Nationalism [1342]

The Protestant schools were the breeding ground for the rising nationalism of the 1950s. In Uganda, nationalism was complicated by the conflicting claims of Buganda nationalism and Ugandan nationalism. It was, by and large, the Protestants who made the running in both kinds of nationalism. But the hierarchy of the Anglican Church was often attacked for identifying itself too closely with the colonial authorities. It was widely believed that the new bishop of Uganda, Leslie

[1341]H.B. Hanson, *Mission, Church and State in a Colonial Setting, Uganda 1890-1925*, London, 1984.
Leslie Brown, *Three Worlds: One Word*, London, 1981.
[1342]. F.B. Welbourn, *Religion and Politics in Uganda 1952-62*, Nairobi, 1963.
J. Waliggo, "Ganda Traditional Religion and Catholicism," J. Waliggo, "Ganda Traditional Religion and Catholicism," in E. Fashole-Luke (editor), *Christianity in Independent Africa*, London, 1978.
M. Twaddle, "Was the Democratic Party a Confessional Party?" in Fashole-Luke op. cit.

Brown, was involved in one way or another with the deportation of the Kabaka in 1953, though he has always strenuously denied any such involvement. The Anglican Church lost a lot of support in those years when Kiganda traditionalist sentiment was running high.

But Catholics too were under attack in these years from the traditionalists. After long years of being passive in political matters, as Independence approached, the Catholic hierarchy increasingly saw the Democratic Party as a suitable party for Catholics to support, more acceptable than either Buganda's traditionalism (as finally embodied in *Kabaka Yekka*) or the secular and left with ideology of the Protestant dominated nationalist parties (which finally coalesced into the Uganda Peoples' Congress).

D.P. was headed by a Muganda Catholic, Benedicto Kiwanuka; but D.P.'s commitment to a unitary Uganda alienated Buganda. In the political maneuverings of the early 60s D.P. lost out to an alliance of Obote's U.P.C. and Kabaka Yekka (a strange and incompatible alliance). But it did ensure that the Catholics entered Independence still denied any real share in political power.

THE CHRISTIAN FAITH IN UGANDA

The arrival or Christian missionaries, 1877 [1343]

Stanley's famous letter to the *Daily Telegraph* painted a much romanticized picture of Muteesa. He represented the Kabaka as a great enlightened despot eager to hear the Gospel and speedily to propagate it throughout his kingdom. The reality was different as the missionaries were soon to discover once they reached Buganda. But the letter did produce a speedy response in Britain. The Anglican Church Missionary Society (CMS) hastily assembled a band of enthusiastic missionaries. The first two representatives of this group arrived at the court of Muteesa on June 30, 1877, having travelled from Zanzibar on the route pioneered by the Swahili traders. Eighteen months later, on February 17, 1879, a group of French Catholic White Fathers arrived, also by the East Coast route.

The presence of these rival versions of Christianity was immediately a matter of controversy. CMS understandably felt that this was a deliberate attempt to sabotage the Protestant missionary effort. The Catholics on the other hand, and equally understandably, could point to the fact that they had been planning the evangelization of the lake region of Eastern Africa for many years and were not to be out-staged by the superficial emotions aroused in Britain by Stanley's misleading letter. They could also point to the flimsy and insubstantial nature of the CMS presence in those early years.

[1343]Both the Centenary publications describe the coming of missionaries: T. Tuma & P. Mutibwa, *A Century of Christianity in Uganda*, Nairobi, 1978.
Y. Tourigny, *So Abundant a Harvest*, London, 1979.
For the rivalry between Mackay and Lourdel, see *Mackay of Uganda*, By his Sister, London, 1898; and K. Ward, "Catholic-Protestant Relations in Uganda: An Historical Perspective," in *African Theological Journal*, Makumira, Tanzania, 1984.

The rivalry has to be understood against the background of centuries of controversy and warfare between Catholic and Protestant in Europe. In these years (1877 -1890) the rivalry was embodied in two individuals: Alexander Mackay and Fr. Simeon Lourdel ('Mapera'). Both were young men in their 20's when they arrived in Buganda; and neither was the head of his mission. Both were passionately prejudiced, and both delighted in the vigorous cut and thrust of theological debate or rather polemic. The confrontation was a "scandal to the Christendom" (Kiwanuka). But the spectacle was also much appreciated by those in court, who applauded the dialectical skill with which each missionary defended his version of the faith. It should also be noted that the rivalry between the two religious groups fitted well into the traditional factionalism of court life. It was to encourage competition and zeal among the Baganda converts and is one factor in the success of Christianity in Buganda. For the Christian believer this is the first of many 'contradictions' in the success of Christianity in Uganda: that zeal for the Gospel should be fuelled by prejudice, partisanship and polemic. Even more scandalous aspects of the rivalry emerged later, with the "wars of religion" and the cut-throat scramble for political power in the 1890s.

CHRISTENDOME IN BUGANDA

A "Christian Revolution"[1344]

The events of this violent period in Buganda's history are sometimes characterized as a "Christian revolution"–by which is meant the fact that a fundamental change occurred in Buganda in which Christianity was the motivating force and the chief beneficiary. It was a revolution with several phases: a revolution of the 'new dini' (1888), a 'Muslim revolution' (1888-9), a 'Christian counter revolution' (1889), a 'Protestant seizure of power' (1892), and finally the consolidation of the revolutionary changes by the British take-over and loss of Buganda's sovereignty (1894/1900).

Christianity came to dominate the political arena of Buganda; and Islam was relegated to an under-privileged minority. But the Christian chiefs have also been called 'conservative modernizers'. They had a strong sense of Buganda's history and traditions. They wanted to graft Christianity onto these traditions, to use the literacy which Christianity had brought to preserve these traditions. Kaggwa wrote a history of the Kings of Buganda in Luganda. He also wrote a history of his clan. The institutions of the Kabaka'ship and the clans were the two fundamental pillars of Buganda. Christianity (in its two forms) was now added as a third pillar. This meant that the *balubaale* cults (especially the large shrines) were displaced by Christianity. But the national gods did re-emerge in times of national crisis, such as the deportation of the Kabaka in 1953. And the basic thought patterns and practices of Kiganda religion remain strong to this day.

[1344]The concept of a "Christian Revolution" is discussed in: C. Wrigley, "The Christian Revolution in Buganda," *Comparative Studies in Society and History*, II, l, 1959, pp. 33-48.
D.A. Low, *Buganda in Modern History,* London, 1971, pp. 13-53. M. Twaddle, "The Muslim Revolution in Buganda," *African Affairs,* 71, pp.54-72.

MOHAMEDAN FAITH IN UGANDA

The Impact of Islam [1345]

In the 19th Century two "world" religions–Islam and Christianity–were both making significant advances in Africa. Often they were in serious competition; and this indeed was the case in Buganda. But this should not disguise the fact that both Islam and Christianity were in many ways complementary. Both were called "dini" in contradistinction to the traditional African religious heritage. Both offered a "worldview," a universal explanation of life with all its opportunities and problems. Such systems seemed increasingly relevant to societies, like Buganda, which were being drawn into a larger world. In this sense, Buganda, Islam, despite its rivalry, prepared the way for Christianity in a number of ways. In fact, Christianity arrived at a strategic time–when Islam had awakened among Baganda certain needs and aspirations, but before Islam had become entrenched in society that Christianity failed to find a foothold. Islam had, for example, created a thirst for literacy, especially among the young pages (*bagalagala*) at court. Christianity was able to build on this interest, and with its printing presses and distribution of cheap books in the vernacular or Swahili, was able to satisfy that interest to a much greater extent than Islam was able to do.

But Islam had prepared the way in other ways. The idea of a holy book, of a holy day, of a God above all gods who was interested in the affairs of this life and in the moral life of the individual, the expectation of the resurrection of the body and of a judgment after death–these were concepts pioneered by Islam which received further emphasis from the Christian missionaries.

SSEKABAKA MUTESA II ISLAMIZATION

"…secondly SseKabaka Muteesa II entered the Muslim and he got qualified with Quran and also carried out fasting but he refused to be circumcised. The king of Buganda is not allowed to pure blood in his country…."

Ahmed Katumba remarks that, "Muteesa encouraged Islam as part of his political association with the Arabs and with the Sultan of Zanzibar." [1346]These were periods of trade boom at the coast and the Arabs had made an impact on Muteesa having given him instructions in Islam and Arabic.

According to Sheikh Abdullah Ssekimwanyi, Muteesa II changed his name from the fierce-sounding Mukanya to Muteesa which was more in accord with Islamic ideas of kingship. "He

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[1345]For the impact of world religions on Africa in the 19th Century, see the pioneering essay by Robin Horton, "African Conversion" in *Africa*, XLI, 1971. pp 85-108.
For the relevance of Horton's ideas for East Africa, see J. Iliffe, *A Modern History of Tanganyika*, London, 1979.
For an important discussion of Kiganda traditional religion, see F.B. Welbourn, "Some Aspects of Kiganda Religion," *Uganda Journal*, 1962, pp. 171-182; and F.X. Kyewalyanga, *Traditional Religion, Custom and Christianity in Uganda*, Freiburg im Breisgau, 1976.
[13461346]Ahmed Katumba and F.B. Welbourn. Writing in Vol 28 of the Uganda Journal of 1962.

ordered mosques to be built throughout the kingdom and read and explained the Quran to the chiefs. He became so much devoted to the Islamic religion that he ordered his subjects to greet, pray in Islam and not to eat any meant not killed in the Islamic way."[1347]

But what spoilt the soup, was that he refused to be circumcised. Ashe said, "Muslim martyrdom took place before Stanley visit." [1348]While J. W. Harrison, another missionary, writes that "by persecuting the Muslims, Muteesa had put himself in a dangerous dilemma. He had risked the anger of both Egypt and Zanzibar. He would therefore, be all the more ready to embrace Stanley's offer of help with its implied acceptance of Christianity."[1349]

The Muslims asked Muteesa I to call a meeting at which they instructed the Muslims of Buganda never to eat meat killed by an uncircumcised person and never to be led in prayer by such people. They insisted that circumcision was essential and central to Islam and an uncircumcised man could not claim leadership in the community.[1350]

As Ham Mukasa rightly says, everybody knew that the Kabaka led prayers in Lubiri but the question was whether he was circumcised. The Quran forbade the uncircumcised to lead in prayer and this law had to be followed in Lubiri. The Kabaka failed to comply to this text reason being he could not admit to any authority but his own and that all Baganda were subject to him. He had supreme authority in his palace and his mosque and none could prevent him if he chose to lead the prayers.

The Muslims especially those from Egypt insisted that everybody was to remain in respect to the Book of Allah and the norms of their religion and that the Kabaka's authority only was operative in state affairs. [1351]The impact of this as that many Muslims turned away from prayers in Lubiri which used to be led by Muteesa I and decline d any meat that came out of the palace.

This was an act of rebellion against the king's authority and those that had not converted tried to show some loyalty to the king. These were natives that feared forceful conversion by the Kabaka. Many chiefs and their followers started to make allegations against Islam claiming and denouncing Islam. In their allegations, they stated that Islam had turned away many Muslims from the Kabaka because he was not circumcised calling him a kaffir who could not lead prayers in a mosque and accusing him of eating pork.

These allegations were later to cause persecution. Disobedience to the Kings orders in trying to respect Allah annoyed Kabaka Muteesa. It was an act of belittling the king. Then all the matters of

[1347]AbdallahSekimwanyi. (1953). Ebyafaayoebitonotonokuddini ye Kiyisiramu.Luganda Publication.
[1348]P.Ashe. Chronicles of Uganda 1984.
[1349] J. W. Harrison. (1890) Mackay of Uganda.
[1350] T.W. Gee. A Century of Muhammedan influence in Buganda. 1852-1951.
[1351] Daily Monitor Jan 7, 2017. How Muslims fell out with Muteesa I. also available on https://www.monitor.co.ug.

that sort went on adding wrath to wrath until was full of the palace. Because of this, many young Muslims were seen flocking out to eat meat from the nearby Muslim communities since that of the palace was in the prohibited centers of Islam.

The Muslim pages also started disobeying Muteesa's orders in the name of following what the Quran was teaching. To Muteesa, this was a rebellion in making and challenging his authority. T.W. Gee remarks that, "shortly after the pages stopped eating palace meat, Muteesa was in the mosque with a group of pages when three boys entered well dressed in white tunics and the rest of the boys turned their attention to the new corners."[1352]

This annoyed the Kabaka who decided to move out and summoned the Prime Minister "Katikkiro" and ordered him to arrest the boys and all those that were disobedient. These were handed over to Mukajanga to have them persecuted at Namugongo. This was the Muslim martyrdom at Namugongo. The persecution of Muslims put Muteesa at loggerheads with Muslims in Egypt and Zanzibar. He would therefore be all the readier to embrace Stanley offer of help with its implied acceptance of Christianity.

As Harrison remarks, by the time of publishing of the letter inviting missionaries in London, the news of the Muslim martyrdom was not yet known and in calling for the Missionaries Muteesa was looking for protection against the angered Arab Muslims and the Egyptians.[1353]

MUTEESA'S LAST YEARS AND THE SUCCESSION OF MWANGA

By 1897 Muteesa had come to realize that a complete alliance with one of the Christian groups was neither practicable nor desirable. (The insistence of both on monogamy was a fundamental obstacle, but there were other factors.) Muteesa decided that he should identify with none of the new 'dini', while allowing them to stay and extracting what advantages he could from each, without letting any one group get too much power in the country. Muteesa was a consummate master at this political balancing act His successor, in the much more difficult international climate of the late '80s, prove incapable of keeping things under control.

Mwanga succeeded his father in October 1884. He was 18 years old. Mwanga seems to have lacked strong religious convictions–he was a skeptic in an age of faith. Like all Kabaka's at the beginning of their reign, Mwanga needed to assert his authority over all elements and factions within the country, including the foreign missionaries (the White Fathers had not yet returned and so at first this meant the Protestants). This general need to assert his authority and the personal antagonisms with the three missionaries in the country (especially with Ashe) led to the death of the first three

[1352] Ibid.
[1353] J.W. Harrison. (1890). Mackay of Uganda.

Baganda Christians on January 31, 1885. The young protestant martyrs, Makko Kakumba, Nuwa Serwanga and Yusuf Lugalama, were all members of the mission household. The missionaries were being warned against becoming a focus of political power or political discontent against the young Kabaka.

UGANDA MARTYS AND DEATH OF BISHOP HANNINGTON

The deaths of Bishop Hannington and the Uganda martyrs[1354]

Whatever may have been his personal attitudes to Christianity, Mwanga, like his father, was of necessity primarily concerned with the political implications of the new religions. By 1885 this was causing very grave anxieties. The Muslim threat from the north had receded with the Mahdist rebellion in the Sudan in 1881. But a new and greater threat to Buganda's independence quite suddenly emerged from the East African coast with the intrusion of German imperialism early in 1885. It was fear of a European invasion which principally caused the death in Busoga on October 29, 1885 of the 37-year-old Anglican Bishop, James Hannington. Hannington was either ignorant of, or chose to ignore, the precarious position of the Christian community within Buganda and the dangers, in the international climate, of approaching Buganda by the politically sensitive 'back-door' of Busoga. Hannington was killed on the orders of the Kabaka. His death is often blamed on a fickle and revengeful young king; but this is very unfair to Mwanga, who was certainly acting on the advice of his great chiefs–including the normally friendly Kulugi. Hannington's death, from the Kiganda point of view, was a legitimate act of state, designed to ward off a potential invasion.

Nevertheless, it was politically a mistake. Hannington had not been heading an invading army–on the way up from the coast his caravan had been ridiculed for its puny size. Hannington's death had repercussions within Buganda. It led to further killings of Christians. Only 2 weeks later, on November 15, 1885, Joseph Mukasa BaIikuddembe was brutally killed for daring to criticize the Kabaka for the murder of the Anglican bishop. Balikuddembe became the first Catholic martyr.

In May and June 1886 a large massacre of Christians, both Catholic and Protestant, took place. Many were executed at Namugongo, the traditional execution site also used for the Muslim martyrs of 1876. The immediate cause for the killings was the Kabaka's anger at the disobedience of his Christian pages. Charles Lwanga, the Catholic head of the pages in the king's private apartments, had been particularly vigilant in protecting the Christian boys under his charge from the advances

[1354]. The deaths of the three boys and the circumstances of Hannington's death are well described in the contemporary account of the CMS missionary Robert Ashe. R. Ashe, *Two Kings of Uganda*, London, 1890.
The now classic work on the Catholic martyrs (but with attention to the Protestants too) is J.F. Faupel, *African Holocaust*, London, 1962. (Reprinted in paperback by St Paul's Publications, Africa, 1984.)
L. Pirouet, *Strong in the Faith*, Kisubi, Uganda, 1969, is a good, popular account, with particular attention to the Protestant martyrs.

of the Kabaka and some of the chiefs.

But, in addition 10 young pages, quite a number of the victims were minor chiefs: men such as Andrew Kaggwa and Matthias Mulumba for the Catholics; and Robert Munyagabyanjo, Nuwa Walukaga and Freddie Kizza for the Protestants. The youngest page, Kizito, was about 14 years; some of the chiefs were in their 50s. Some of these chiefs were the victims of particular grudges by their seniors- (for example Katikkiro Mukasa, the Prime Minister), jealous that these up and coming young men would soon be ousting them from power.

MOSLEM, PROTESTANTS, AND CATHOLICS MARTYRS KILLED AT NAMUGOGONGO

The history of the Uganda Christian martyrs is a well-known tale of intrigue and murder. It tells the story of about 45 young men, mostly from Buganda's eminent families, who willingly surrendered their lives for the sake of their religious beliefs.

We are told that they defied their king by refusing to denounce Christianity, a religion that had been newly introduced to Buganda by Catholic and Anglican missionaries.

We are further told that the Kabaka, Mwanga II, construed it as treachery and had them arrested. In all, a total of about 45 Christians made the long trip to Namugongo, where they went up in flames on a funeral pier.

Ten years before the Christian martyrs, men had made the same long tortuous journey to Namugongo where they were burnt in an inferno on the orders of Kabaka Mutesa I. Their exact number is not known, but some historians have put the number to more than 70.

Events leading to their death begun in 1857 when Kabaka Mutesa I ascended the throne after the death of his father, Kabaka Suna. By the time of Suna's death, Islam had started taking root in Buganda. It had been introduced by Arabs and Swahili traders from the coast.

Like his father Suna, Mutesa was fascinated by Islam and took great pride in studying the Quran and its teachings. Although the king did not impose the new religion on his subjects, it is said that normally once something took the king's fancy, all his subjects were naturally expected to adopt it. And so it was with Islam.

Before long, many people started learning the new religion. Reverend Batulimayo Musoke Zzimbe, writes in "Buganda Nne' Kabaka" that Mutesa was so committed to Islam, he even ordered a mosque to be built at his palace in Kasubi, then known as Nabulagala.

Such was his devotion that five times a day, a Muezzin, would summon the faithful for prayers, led by the king himself.

A brilliant man, Mutesa had by then learnt to read and write Arabic and bestowed upon himself the title of Imam. “He was very well loved by his subjects. Because he was unusually intelligent, his Katikkiro (prime minister) Kayira called him Mutesa which means the one who is wise in council”, writes Sir Apollo Kaggwa, a regent of Kabaka Daudi Chwa.

But just as he was much loved, he was equally loathed, for his cruelty and soon, the new king came to be also known as Mukabya, which means “one who makes others cry”.

History records reveal that Mutesa maintained at least four punishment sites in Buganda where insubordinate subjects would be carted to be punished for real and imagined crimes.

A subject could be killed for something as ‘small” as not properly addressing the Kabaka by his rightful titles. Surprisingly, for one schooled in Islam Mutesa did not completely fulfil all that was required by the Quran.

Katende, a former eminent Buganda judge and current leader of the Olugave clan writes in one of his unpublished memoirs that the king continued to eat meat from animals slaughtered by non Muslims. He also refused to be circumcised, on the advice of his powerful chief administrative officer, Katikkiro Mukasa.

Mukasa, a former Saaza chief, was renowned for his cruelty and was said to exert much influence over the king. J.F. Faupel writes in the “African Holocaust”, Mukasa contrived to render his position almost unassailable by means of a blood pact with Mutesa, which made him both blood brother to the reigning monarch and ‘father’ to his future successor”.

Katende writes further that Mukasa was afraid that if the king accepts to be circumcised, he would compel the rest of the Muslim subjects including him to do likewise.

In those days, circumcision was carried out using sharpened reeds. It was a long and slow painful surgical procedure that would sometimes last a whole day. Back then there was no anaesthesia to dull the pain, as it is today. It is not surprising therefore that the katikkiro was fiercely opposed to circumcision.

Katende writes that Mukasa sought audience with the king and told him that Buganda traditional royal custom forbade the king to shed his blood. The king, therefore, could not be circumcised, as demanded by Islamic law.

This meant that religious observances that had been led by the king under a more easygoing Muslim regime, including the slaughter of animals could no longer be accepted as being carried out by a true Muslim.

At about this time, a group of Muslim fundamentalists from Egypt visited the Kabaka's court at Kasubi. However, whereas they were impressed by the spread of the new religion, they were unhappy at the king's un-Islamic conduct and reluctance to be circumcised.

The visitors reportedly started criticising the king and very soon, they incited the rest of the king's subjects to rebel against the Kabaka.

It was not long before the Kabaka's subjects started challenging him openly about his lifestyle. Where once hundreds would turn up for prayers, only a few would now show up. Most found excuses to be away from the palace while others simply decided to pray on their own.

Mutesa noticed the dwindling number of worshippers and decided to investigate. It is said that one day the Kabaka summoned one of his most loyal servant, nicknamed Muddu Awulila (the obedient servant) to inquire why he was not turning up for prayers.

Muddu Awulila answered: "My Lord, it's because we feel you should not lead the prayer because you are not circumcised". "But I am your King. You are supposed to obey everything I tell you to do", argued the Kabaka.

"My Lord, our actions are not meant to disobey you, but in this case, we are not looking at you as our king but as a fellow Muslim worshipper".

Katende writes that Mutesa was so angry at his servant's casual and almost insolent response. He stayed in a foul mood for the rest of day. Several weeks later, Mutesa held a grand feast to celebrate the opening of a new mosque. Several cows, goats and chicken were slaughtered for the occasion.

It is said several of the Muslim courtiers ate just the food and refused to touch the meat, because uncircumcised Muslims had slaughtered the animals.

Angry, the Kabaka construed it as an act of treason and ordered all those who had refused to eat the meat to be arrested. The group was rounded up and taken to jail in Bukeesa, near Nakulabye where they were confined for four days without food.

On the fourth day, the Kabaka sent them some food and meat. They ate everything except the meat. When the King's officers inquired why they had not touched the meat, they told them to go back and ask the king to send them a live cow and goat so that they could slaughter it themselves.

The Kabaka had them transferred to another jail in Nansana, hoping they will come to their senses sooner or later. On the fourth day, Mutesa again sent them food and meat. It was the same story. They were then relocated to Bukoto where again they were given a last chance to repent but again, they ate everything else apart from the meat.

When they refused to budge, the Kabaka ordered his chief executioner to kill them. The exact date and month of their martyrdom is not known but it said, they were marched to Namugongo and killed in 1877.

More than 70 martyrs were burnt to death that day. Only three of them; Yusuf Sebakiwa (Elephant clan), Amulane Tuzinde (Mushroom clan) and Musirimu Lwanga escaped the inferno. It is said they died of natural illness, a result of the long trek to Namugongo.

While the both the Ugandan Catholic and Anglican churches mark June 3, in pomp and prayer in commemoration of the death of the martyrs, hardly anything is held to remember the Muslims.

It's only after Idi Amin Dada came to power in 1971, after overthrowing Milton Obote that the history of the Muslim martyrs started to come to light.

It is said that president Amin was typically irked that it's only the Christians martyrs who had been honoured and ordered a memorial to be erected in recognition of the Muslims as well.

Land was acquired just opposite the present Anglican Church Martyrs, and a foundation was laid for a mosque. A small mosque made of mud and iron sheets was reportedly built at the site, to coincide with the Christian martyr's celebrations that year.

It is said Amin had planned to build a huge mosque later but he was ousted before he realised his dream. In 1979 after the fall of Amin, soldiers of the Obote II regime reportedly occupied the mosque and desecrated it by slaughtering several pigs in it.

The mosque was knocked down and another was built a few meters from the original site. "The mosque has never been officially opened due to various wrangles.

Kivumbi alludes, the original foundation stone laid by Amin was dug up by mercury prospectors. The stone's bronze plaque that contained the inscription was stolen too.

"They completely uprooted the stone, hoping to find mercury underneath, but there was nothing," recalls the Imam. The present mosque is a small affair, seating about 200 worshippers. Over the years however, it has slowly become dilapidated and is a painful eye sore in the surrounding community. A few old dirty mats lay inside of the mosque carelessly strewn all over the cement floor. But despite its dilapidated state, the mosque is not short of daily worshippers.

The Imam says about twenty or more worshippers come to the mosque to pray, mostly in the evenings. But the numbers increase during the Muslim holy month of Ramadhan. There has not been any special celebrations for the Muslim martyrs since the ouster of Idi Amin, in part because of lack of funding and also because unlike Christians, Muslims do not ordinarily mark such days.

Undoubtedly these Uganda martyrs who are argued to have been of majorly three faiths, MOSLEMS (more than 70 Muslims martyrs burnt to death on orders of Kabaka Mutesa 1 in 1877) PROTESTANTS (26 in number killed on 3, 1886 on orders of Kabaka Mwanga), and CATHOLICS (22 in number kicked on orders of Kabaka Mwanga) there were Bunyoro and Basoga as well as Baganda) died under the orders of Kabaka Mwanga of Buganda in 1885 and 1887 believing and trusting in their faiths. They sang hymns on the way to their deaths, preached to their

persecutors, strongly believed in a life after death, and their courage and fortitude made a great impression on those who saw them die. But naturally, secular historians have been cautious about accepting wholesale the simple pieties of hagiography. The deaths of these faithfuls must be put in the context of the traditional precariousness of life at court, and the deeply ingrained habits of obedience which made Baganda generally face death philosophically if the Kabaka so wished.

It is also argued by other secular historians that all these religions have martyrs' at Namugongo not because of religious issues but because they were spies working for the white man to gain influence in the country during The Kabaka's reign. So in act of tainting this act of mass killings, the white man spread rumours that they, "the martyrs had been sodomized and killed on religious grounds" to alienate the Kabaka.

We therefore see Religion working for the executive and for the colonial invaders in his quest to conquer Uganda, no wonder the first ship to ferry slaves off Africa was called Jesus.

ANTI-TERRORISM AND ISLAM IN UGANDA.

It is vital to comprehend the influence of anti-terrorism legislation, programs, and practices on community cohesiveness, equality, and human rights. There have been concerns that anti-terrorist legislation and policies are alienating Muslims, particularly young people and students, and that anti-terrorism measures may feed and prolong terrorism.

The constitution forbids religious discrimination and declares that no governmental religion exists. It guarantees freedom of thought, conscience, and belief, as well as the right to practice and propagate any religion and to join and participate in the practices of any religious group or organization in accordance with the constitution. The government may also limit these rights by taking actions that are "reasonably justifiable for dealing with a case of emergency," according to the constitution. The formation of political parties based on religion is prohibited by the constitution.

Religious organizations must register with the government in order to receive legal entity status. The government requires faith-based organizations to register as non-profit organizations with the Uganda Registration Services Bureau and then obtain a five-year operating license from the Ministry of Internal Affairs, according to the Uganda Registration Services Bureau. Although there is no formal process for requesting an exemption from the requirement to obtain an operating license, larger religious organizations, such as the Catholic, Anglican, Orthodox, and Seventh-day Adventist Churches, as well as the UMSC, are de facto exempt, and the government does not require them to obtain one.

Religious instruction in public schools is optional, according to the constitution. Separate curriculum has been produced for a variety of world religions, including Christianity and Islam. Public primary and secondary schools have the freedom to pick which religious studies to include in their curricula, if any at all; nonetheless, they must follow the state-approved curriculum for each religion they teach.

There have been allegations that the government has maintained a policy of discrimination and persecution towards Muslims, and that it continues to do so when appointing senior and lower-level officials. Former Minister of Security Henry Tumukunde accused the Uganda Police Force (UPF) of victimizing Muslims in its effort to investigate a series of unsolved killings on May 21, 2018, according to local media.

According to reports, the UPF detained at least 116 people, 106 of them were Muslims, in connection with high-profile homicides between 2010 and 2018. According to local media, the state has only convicted 13 Muslim individuals since 2010, with no convictions in 2018. Authorities, according to the Uganda Muslim Supreme Council (UMSC), do not grant Muslim detainees the same rights to bail and visitor access as other detainees.

The UPF denied ever victimizing Muslims, but stated that if it had convincing evidence of a crime being committed or planned, it would not hesitate to arrest Muslim suspects for fear of offending Muslims.

President Yoweri Museveni has been fighting a half-dozen rebel factions since coming to power in 1986 through armed insurrection. The president has reacted to calls from civil society, particularly religious leaders, to pursue peace talks with rebel groups, in addition to creating and equipping the Uganda People's Defence Force (UPDF).

However, this strategy did not succeed with some of the rebel factions, whose ideologies were incompatible with Museveni's. The ADF was fighting for the establishment of a sharia-ruled Islamic state. To weaken the group, Museveni used a carrot-and-stick strategy, offering amnesty, financial gifts, and government employment to scores of ADF commanders who decided to end the conflict.

One of them was Maj. Kiggundu. He was granted an undisclosed amount of money as a "resettlement allowance" after he left the revolt. He was assigned to the military intelligence branch of the UPDF and promoted to major. Those who remained angry with the decision of some ADF leaders to leave their rebellion in return for money and jobs, accusing the defectors of abandoning the cause.

Sheikh Jamil Mukulu, the ultimate rebel leader, issued a fatwa ordering the execution of all defectors at the end of 2010. Sheikh Abdul Karim Sentamu, Uganda's recognized authority on

Islamic hadith and Quran interpretations, was the first victim. He was assassinated in 2011, just months after leaving the ADF. Sheikh Abdul Muwaya, Uganda's Shia Muslim leader, was assassinated a few months later in the Lake Victoria Mayuge district.

The main source of concern for Ugandans is that the rebel group, which was formerly limited to the jungles, appears to have evolved into an urban-based terrorist organization. The ADF has evolved from a conventional rebel army into a terrorist outfit with no frontlines, according to a senior military intelligence officer who declined to be named. The ADF has been subjected to relentless military attacks on its positions in Eastern DRC by the UPDF.

The insurgents have dispersed over East Africa. According to the officer, the ADF currently has hundreds of operators operating throughout Uganda, particularly in Kampala, where plans to assassinate their victims have been meticulously carried out.

Ugandan police reported the arrest of multiple suspects in the assassination of Assistant Police Chief Kaweesi in late March 2017. They were apprehended all around the country, but particularly in Kampala, Busia, Kenya's border town, and Kasese, DRC. All of the people detained are Muslims.

According to reports, Kaweesi's death was intended to send a message to the government that the rebel organization is still alive and well despite the arrest of their commander, Jamil Mukulu, in Tanzania last March and his extradition to Uganda.

Mukulu is being imprisoned in the Luzira jail in Kampala. He is accused of terrorism, murder, and torture, among other things. General Kale Kayihura, the police head, claims that the killers of Kaweesi had previously sent a message threatening to inflict "pain deep in the police heart." Following a police raid on a Kampala mosque, scores of Muslim leaders were arrested on suspicion of collaboration in the assassinations of senior Muslim leaders who had repudiated and opposed the ADF.

The police also claim to have seized guns and ammunition during the raids, which the Muslim leaders categorically deny. Al Hajj Abdul Nadduli, a government minister, criticized the police raid on Kampala's Nakasero Mosque and denied police charges of guns and ammunition as a lie.

“The alleged guns are the police's attempt to demonstrate that they are doing something to stop the killings. Engineer Abdul Maganda, a renowned Tablighi sect supporter, said, "They planted the firearms in the specified mosques." Sheikhs Yunus Kamoga, the Tablighi sect's leader in Uganda, and Yahaya Ramadhan Mwanje, who took over the sect's leadership when Kamoga was incarcerated, have both been arrested on charges of participation in Maj. Kiggundu's murder.

Kaweesi, the assassinated cop, was a rising star in the force and was generally projected to become the next police chief. His assailants accuse him of being behind the mosque attacks and the arrests of preachers.

The High Court in Kampala, Uganda's capital, found five of the 13 suspects guilty of murder and terrorism in July 2016. Three of them were given life sentences, one was sentenced to 50 years in prison, and the other was given a community service sentence.

On June 1st, 2021, another top government official; Gen. Katumba Wamala was attacked and jis car shot. His daughter and driver did not survive the scuffle. The perpetrators are alleged to have been following Katumba for days, and when his security detail took a detour from him on the Kisaasi-Kyanja Road, leaving him at the mercy of his bodyguard and driver, the gunman pounced.

During a search for three suspects in the attempted assassination of Gen Edward Katumba Wamala, a joint security force lead by Police Crime Intelligence personnel sealed down three zones in Kawempe Division for more than six hours.

Ismael Hussein Sserubula and Siraji Yusuf Nyanzi, two suspects, were eventually captured and accused in court with the murders of Nantongo and Kayondo, as well as the attempted murder of Gen Katumba. According to Crime Intelligence sources, the suspects were traced down using new technological skills acquired as part of the smart city initiative.

When the five defendants who were apprehended after the incident were brought to court, they had severe marks on their bodies. They alleged that the marks on their bodies were caused by police abuse. Muhammad Kagugube, Siriman Kisambira, Abudallah-Aziz Ramadhan Dunku, Kamada Walusimbi, and Habib Ramadhan Marjan were all remanded in government custody in Kitalya. After Sheikhs Yasin Nyanzi and Hussein Serubula were remanded the previous week, this brought the total number of suspects formally charged in the attempted murder of Gen Katumba to seven.

Some of the suspects apprehended were later slain by their captors. Security operatives shot and killed the first suspected assassin, Hussein Lubwama, after he allegedly resisted capture. Security forces are believed to have killed three more suspects. On this note, the court ordered security services to present death certificates or images of Lubwama and the other three individuals murdered by police.

The continuing murder of prominent people has exposed the inability of the country’s security forces to deal with the crime. Since the first killing in 2011, the police have not made any significant arrests, triggering fears that more killings of a similar or greater magnitude are in the offing, since the perpetrators of the murders are at large. For many Ugandans the question is: If top officials can be attacked in this way, how safe is an ordinary Ugandan?

STATE AND CHURCH

Let us turn to the second part of this letter in which I shall speak of the relations between the forms of government explained above and the Church.

Time and again, I have heard such things as "keep religion out of politics, leave religious ideas out of politics and take religion out of schools." Among those who speak like that some do it out of pure hatred of religion. It could not be explained otherwise since in fact religion strives to remind people of their duty to serve God, which in no way harms politics on the contrary it is a real help to it. But there are others who are induced to say that they don't want religion to be mixed with politics by the mere fact that they are afraid of the truth and justice inherent in religion. They would like to deceive people in order to bring them to their side, but religion helps people at the time of choosing a government to see objectively what is right and to choose a good government.

There are finally many people who repeat "keep religion out of politics" without any understanding whatsoever of what it is all about.

SEPARATION OF CHURCH AND STATE

The separation of church and state is largely attributed to the American and French revolutions that took effect towards the end of the 18th Century.[1355] It was majorly achieved through ideas arising out of opposition to the English episcopal system and English throne as well as from the ideals of Enlightenment. In France, it was circulated due to the opposition raised against the wealthy ecclesiastical hierarchy due to social-revolutionary criticism and because of the desire to guarantee freedom to the church.

This saw the French state taking over all the civil nature activities, education and other state functions that previously lay in the hands of the church. The church was not to deal with all the activities of a civil nature but to practice its religion without interfering in state affairs.[1356]

In the morning of the 18th Century, two fundamental attitudes were developed relating to the idea of state separation from the church. One of it was witnessed in the United States Constitution which was to set the church free from state supervision as well as leaving the church with freedom in the realization of its spiritual, moral and educational tasks.[1357]

The separation of church from state that resurrected from the French revolution finally spread diagonally and horizontally in various corners of Europe among many other countries. Specifically, it started from Soviet Union and later to all other countries that were under her sphere of influence.

[1355]French Revolution 1789-1799 by Encyclopedia Britannica Editors.Also available on https://www.britannica.com.
[1356]Josephs.Szyliowicz: Education.University of Denuer, Colorado.
[1357]Constitution of the United States of America.United States Government.The Editors of Encyclopedia Britannica.

But unique about to their system was not only to prohibit or restrict public role of the church but also work towards its gradual disappearance.[1358]

In Germany, under the leadership of Hitler, the National Socialism was contradictory in nature. It was indeed difficult to analyze and understand. On one hand, the Nazi ideology prohibited public role of the church and its teaching. On the other hand, Hitler was concerned with the idea of not causing a confrontation with the church. The neutrality of this was settled by the Concordat agreement in 1933 between Germany and the Roman Catholic Church.[1359]

Its noteworthy that by 1918, the old state-church tradition was eliminated following the establishment of the Weimer Republic that saw the abolition of the monarchical system of administration which in the end saw the churches being deprived of the episcopal heads. The Weimer Constitution called for the total separation of the church from the state.

Thus through state agreements, special rights, primarily in the areas of taxes and education, were granted to both Roman Catholic Church and the Evangelical churches of the individual states. This continued up to date seeing religious or clergy exempted from military service and privilege from taxation.

John Dickinson one of the founding fathers wrote a statement in 1768 on the advent of the American Revolution. In his writing, he remarked that, "Religion and Government are certainly very different things instituted for different Ends; the design of one being to promote our temporal Happiness; the design of the other to procure the favor of God, and thereby the salvation of our souls. While these are kept distinct and apart, the peace and welfare of society is preserved and the Ends of both are answered. By mixing them together, feuds the world in Blood and disgraced human Nature."[1360]

He was a Pennsylvanian and this being the case, his statement was not because of the religion of his colony but rather he was concerned with the relationship between religion and government in society. In early 1800s, the separation of church and state became part of the nation's legal and cultural nomenclature Judges, politicians, educators and even religions leaders have embraced church-state separation as central to church-state relations and cornerstone of American democracy. In 1879, the Supreme Court of USA for the first time employed the term "separation of church and state" as a shorthand for the meaning of the First Amendments religious clauses, stating, "It may be accepted almost as an authoritative declaration of the scope and effect of the amendment." This has

[1358] Robert Conquest. Soviet Union historical state, Eurasia.Hoover Institute on war, Revolution and Peace, Stanford University California.
[1359] Michael. David Knowles. Roman Cathlicism. University of Cambridge 1954-63.
[1360] John Dickinson, Pennsylvania Journal, May 12,1768, reprinted in The Founders on Religion,ed. James H.Huston (Princeton, NJ: Princeton University Press, 2005, 60-61.

been supported by many Americans up to date considering it as one of the hall marks of American government.[1361]

Although the phrase is not found in the Constitution, no organizing theory has a greater impact on the way Americans conceptualize the intersection of religion, culture and politics than the principle of church-state separation.[1362]

The important note to take is that though the idea was included in the democratic virtues, it did not become constitutional canon until the mid-twentieth century when incorporation of Bill of rights to the states through the Fourteenth Amendment took effect.

The Court in Everson v Board of Education remarked through Justice Hugo Black that**,** "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[1363]

From then onwards, separation of church and state became the center for the church-state jurisprudence, endorsed by liberal and conservative justices like particularly in the earlier years, Justices opined that the separation must be "Absolute" "uncompromising," "high and "impregnable" and complete and permanent." This is basically embedded in the freedom of religion.

That said, it should be remarked that the idea of separating the functions and powers of the sacred and the profane reaches far back into Western History. In his writings in the fifth century, Augustine of Hippo distinguished the authority and duties of the sacred and temporal worlds. However, the church-state separation can be traced chiefly to the Protestant Reformation, the enlightenment and Whig politics.

It's from that far, that separation of the church and state was given a worldwide welcome to respect and halt would be conflicts between the state and church given the fact that its religion that nurtured and shaped states. The idea spread to various countries and was adopted in the jurisprudence of various jurisdictions mainly recognizing the freedom of religion.

Religion is so paramount to the extent that the whole world affords it respect. No leader can

[1361] Steven K. Green. The Separation of Church and State in the United States. Oxford University Press 2014.
[1362]Reynolds vUnited States 98.US.145 (1879); Mariana.Servin-Gonzalez and Oscar Torres-Reyna, "The Polls-Trends: Religion and Politics," Public Opinion Quarterly 63 (Winter 1999): 592-621,603.
[1363] Everson,330 U.S at 1; McCollum v Board of Education,333 U.S 203 (1948); Zorach v Clauson, 343 U.S 306 (1987)

peacefully enjoy his tenure without having respect for religion. That is how deep religion goes in state administration. Indeed, all states have remained observant of the freedom of religion. In most democratic countries, the notion of religious freedom has been observed with Constitutions prohibiting state religion given its history of religion.

In the U.S, The First Amendment of the US Constitution says that everyone in the United States has the right to practice his or her own religion or no religion at all. The Establishment clause of the First Amendment prohibits government from encouraging or promoting religion in any way**.** "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…"[1364] Religious autonomy is thus respected by the state. In **United States v Ballard,** court noted that; "judicial intervention into religious questions is similar to the doctrine of a political question, wherein, it can be understood that just like it is expected that political branches are more opposite to decide the political question, religious bodies are suitable to decide questions about religion."[1365]

Further in Serbian Eastern Orthodox Diocese for the United States of America and Canada et al v Milivojevich, court noted that, "whenever the questions of discipline or of faith or ecclesiastical rule custom or law have been decided by the highest of the church adjudications to which the matter has been carried the legal tribunals must accept such decisions as final and binding." It further remarked that; "Religious freedoms encompass the power of religious bodies to decide for themselves free from state interference matters of church government as well as those of faith and doctrine."

In Uganda, the status quo has been maintained. Article7 and 29(c) have granted the freedom of religion. This is strong observation of the Church Autonomy. Article 7 prohibits the adoption of state religion and Article 29(c) mandates everybody to practice a religion of their choice. In this sense, the law cannot compel a citizen adherence to a religious belief and must always protect the privilege of infidelity.

The legal tribunals have continued to uphold these provisions and avoid state conflict with religion. Justice Stephen Mubiru in **Rev Father Cyril Adiga Nakari v Right Reverend Ocan Odoki and Registered Trustees of Arua Diocese** observed that, "This is a suit in which difference to organs of governance with the religious community of the Church ought to be observed. This court should use restraint and be slow to intervene in internal affairs of the church whenever it is still possible for the church to correct its errors with in its own Constitutional means." The mere adjudications of such questions would pose grave problems for religious autonomy. This kind of second guessing of

[1364]First Amendment of the US Constitution.
[1365] 322 U.S 78 (1944)

ecclesiastical decisions would constitute a clear affront to rights of religious autonomy.

The state only intervenes in religious affairs when checking on the legality of the Church laws to ensure that they are not against the principles of equity, justice and good governance especially when they destabilize the Constitutional fabric. Guidance is sought from the variety of decisions by Uganda's judiciary. In **Dimanche Sharon V Makerere University**[1366]wherein the appellants were staunch members of the Seventh day Adventist Church that were opposed to the University policies of teaching and organizing exams on Saturday claiming it was in contravention with their religion and depriving them of their right to education. The Court observed that the University principles policies did not in any way violate their freedom of religion and education reason being upholding such would not be in line with fairness and natural justice as other religions could also seek for such reforms.

Religion is thus a strong shareholder in state governance whose respect should be highly respected for peace to prevail by upholding the Church autonomy doctrine. It's for this reason that Justice Musa Ssekaana in **Rev Charles Oode Okonya v The Registered Trustees of the Church of Uganda remarked that,** "the courts generally have extracted the prohibition against litigating religion from the Church autonomy doctrine which require judicial deference to religious institutions." [1367] Therefore, it seems clear in this modern world that religion is stronger and superior than states despite its silence with religious affairs.

INDISCRIMINATE RULE

As I said above, religion and state are distinct powers, the difference lies in the power itself and not in the person in whom it is vested. All people, the ruler as well as those he/she governs, have the obligation to abide by the sound principles given by the Church, the ruler being the head since he has to lead the others; as our own proverb goes: "The road is opened by the elder."

Therefore, if civil authorities behave as if God is not their Ruler, they incur the very serious guilt of being a scandal to their country and such people do not deserve to be elected as rulers. This is not all, a ruler who is concerned with religion only at home and in the church where he / she is seen worshiping but who, when he/she is engaged in his political activities tries to give the impression that he/she does not worship God, is in grave error.

For that reason, rulers who really concern themselves with religion, those who set an example to their neighbour by their practice of religion, are those who would really be useful to the country: they are the ones who deserve to be elected.

[1366]Supreme Court Constitutional Appeal No 2 of 2004.
[1367] HCCS No 305 of 2020

Therefore, all those who suggest throwing all religion out of politics, those who strive to withdraw denominational schools and to change into state schools, those who say they do not care about religion, are dangerous to our country, Buganda and Uganda, because they want to take away from us an indispensable element of good government: that is religion.

THE LEGAL FRAME WORK ON RELIGION

The constitution of Uganda[1368] provides for the right to freedom of religion under Article 29(1) (c) which states that;

Every person shall have the right to-freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in practices of any religious body or organisation in a manner consistent with this constitution.

This right is also rooted in UN international law. Article 18 of the universal declaration of Human rights[1369] provides that;

"Everyone has the right and freedom of thought, conscience and religion; this right includes the right to change one's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Furthermore, the international covenant on civil and political rights, a UN treaty which Uganda is signatory to also contains a similar provision on the right to freedom of religion.

Article 18 (1) of the ICCPR states that;

"Everyone shall have the right and freedom of thought, conscience and religion; this right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Other regional treaties such as the European convention on human rights and the African charter on human and people's rights also contain provisions for the right to religion.

The right to the freedom of religion is indispensable for pluralism; it is one of the foundations of a democratic society. As noted by the European Court of Human Rights (ECtHR), this freedom undoubtedly is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia,

[1368] 1995 constitution of the Republic of Uganda as ammended
[1369] Universal Declaration of human rights, Article 18

freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[1370]

The European court of human rights in the case of **Francesco Sessa v Italy**[1371], the right to freedom of religion is one of the most vital elements which go to make up the identity of believers and their conception of life; as well as a precious asset for Atheists, agnostics, sceptics and the unconcerned. Respect of freedom of religion is also a marker of a free society.

In the case of **R vs. Big M Drug Mart ltd**[1372] it was observed that; "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance on the charter."

Having addressed the legal frame work around the right to religion, I proceed to look in to the relationship between religion and the state.

The Most rev. Archbishop Joseph Kiwanuka, d.d., Archbishop of Lubaga (Uganda) in his pastoral letter[1373] observes that "I believe that some are irritated and do wrong to others because they do not understand the changes that are taking place in the government, and neither do they understand the relation between Church and State. In fact, Church and State should have good relations with one another and work together for the common good."

The three forms of government found in the world up to this day were described long ago by a Greek philosopher, Aristotle.

i. The first form is the Absolute Monarchy. In that form of government, the power to make laws obliging the whole country (legislative) and the power to judge trials and punish (judiciary), are all vested in the king.

ii. The second form is that of Aristocracy (Bakungu) sharing in government. Then the power of ruling is in the hands of such chiefs.

iii. The third form is that in which all citizens take part, and the government is that of the people (democracy). The people themselves elect their representatives.

However, in certain countries these three forms have been joined together so that the government is formed of a king with the chiefs, and the representatives elected by the citizens. England has such a government.

[1370]Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) ¶ 31; Buscarini v. San Marino, 1999-I Eur. Ct. H.R. 605, ¶ 34.
[1371]Francesco Sessa v Italy application number 28790/08
[1372]R vs Big M Drug Mart ltd [1985]1 R.C.S 295
[1373]Pastoral letter of the most rev. archbishop joseph kiwanuka, d.d., archbishop of lubaga(uganda) church and state Guiding Principles November 1961

In Buganda

For a very long time, the form of government in Buganda was of the first type, an absolute monarch, but with wide powers left to the aristocracy *(Abakungu)*

The absolute power of the kings *(baKabaka)* in all fields was never questioned until the Europeans made a repartition of powers. When Buganda came under the protection of the British Government, the absolute power of the Kabaka came to an end, but he remained one of the governing body.

DUTY OF STATE

The State should do its best to make the country to progress in temporal matters and to establish order and peace, and good morals.

The State must also leave the Church free to fulfil her duties and even defend her against her enemies.

Indeed, like Archbishop Joseph Kiwanuka points out that the church has superior jurisdiction on spiritual matters as compared to the state; the church has come out on different occasions to take a stand in controversial matters

Take for instance the anti-homosexuality act, 2014. This act was passed by parliament on 20th December 2013, which prohibited sexual relations between persons of the same sex. The greatest supporters for the passing of this law were the church that was strongly against relations between persons of the same sex and the reason for this stand was based on religious convictions.

In a letter addressed to the archbishops of Canterbury, Archbishop Stanley Ntagali said that "homosexual practice is incompatible with scripture." He further said that the church of Uganda had been encouraged that the country's parliament had amended the Anti-homosexuality bill to remove the death penalty, and make other provisions of the bill less severe. All amendments which he said the church had recommended.

In my view and in support of the views expressed by Archbishop Joseph Kiwanuka in his pastoral letter, the state and church authority should live together harmoniously while complimenting or working with one another.

There have been different instances where the authority of the church has been recognised by the state take for instance; in the case of kakaire sadiki and Suleiman isotah magumba vs Uganda National Examination board UNEB and Fagil Mandy.

WHAT THE STATE MUST DO FOR THE CHURCH

The State must recognise that it is also bound by the laws of God. Civil rulers have a duty to remember that God has the authority above them, that He rules over everybody on earth and in

heaven. They must relate all their activities to Him and in the exercise of their government duties; God is the Rule which they have the obligation to follow. (*Immortale Dei*)

Therefore, if a ruler, even when engaged in State duties, neglected to concern himself with religion, he would be openly violating God's law and would thus refuse to achieve the end for which God created him as well as that for which He created the country that the ruler is governing.

WHAT ARE THE POWERS OF THE CHURCH AND THOSE OF THE STATE?

Whatever is consecrated to God, all matters concerning souls, religious and moral matters, are governed by the Church who judges them. On the other hand, whatever concerns the government of people in temporal matters belongs to the realm of the State (*Immortale Dei*).

WHAT THE CHURCH CAN AND MUST DO

I wish here to clarify for you this question of what the Church can and must do in relation with politics and what is outside of her domain. Also you must understand what the State can and must do in relation to the Church. God Almighty has appointed the charge of the human race to two powers: The Church and the State. These two powers are distinct; each in its kind is supreme. In other words, neither the Church nor the State interferes with each other; each has what it needs to attain its end.

Each one is a domain of its own whose limits are defined by the nature and special object of the province of each. (Pope Leo XIII, *Immortale Dei*)

BUT WHAT IS THIS ORDER?

The teaching of the Church to her people has always been: "In all temporal matters in which no religious principle in involved, the State is supreme." The Church does not merely say this but goes further and defends the State and promotes its rights.

See what the Pope says to his brother Bishops: "Lord Bishops, instruct your people very often on the duty to keep away from forbidden societies and to mix with rebels who plot against the State and breed sedition. Instruct your people to obey their legitimate rulers in what is right, are achieving something excellent." (Diuturnum illud, Leo XIII).

It is clear that the Church recognizes the authority of the State and its rights, and she does not interfere with them, indeed more she helps the State in its duties. The same duty applies to the State: it has the duty to recognise that religious and moral matters, the Church is also supreme and independent in the government of her own affairs. The Holy Father explains in this way: "The

Church is a society responsible exclusively to God who established her and gave her the authority in all that she needs to attain her end. Her Founder has placed in her whatsoever is needed to stand firm and to fulfil her duties. The jurisdiction of the Church over man is much higher in dignity than that of the State, since the Church works in the supernatural order for the eternal welfare of souls. The state works in the natural order for the temporal welfare of its citizens. Therefore, the authority of the Church is far above that of the State. The authority of the church must have precedence over that the State; no one can say, that the Church can be subject to the State in the fulfilment of her duties. Jesus Christ gave his Church all the authority she needs, absolutely all, in religious and moral matters, to make laws, to exercise her juridical power and the authority to punish." (*Immortale Dei, 5*) 8

THE STRUGGLE FOR SUPREMACY BETWEEN THE EXECUTIVE AND CHURCH

Let us turn to the second part of this letter in which I shall speak of the relations between the forms of government explained above and the Church.

Time and again, I have heard such things as "keep religion out of politics, leave religious ideas out of politics and take religion out of schools." Among those who speak like that some do it out of pure hatred of religion. It could not be explained otherwise since in fact religion strives to remind people of their duty to serve God, which in no way harms politics on the contrary it is a real help to it. But there are others who are induced to say that they don't want religion to be mixed with politics by the mere fact that they are afraid of the truth and justice inherent in religion. They would like to deceive people in order to bring them to their side, but religion helps people at the time of choosing a government to see objectively what is right and to choose a good government.

There are finally many people who repeat "keep religion out of politics" without any understanding whatsoever of what it is all about.

THE CHURCH AND THE STATE, WHICH IS MORE SUPERIOR ?

This is a question often asked but has not been clearly answered. In this part of this paper we analyse the concepts proposed by modern scholars studying the relationship between the church and the state. The relationship between secular and ecclesiastical authorities, the state and the church throughout the development of the state and statehood is one of the most pressing problems. The Article emphasizes the importance of spiritual revival for the further development of statehood. From a more historical perspective, the church had always had a more superior position or say in important affairs.

During the middle ages, in Europe, the Christian religion determined the position of the state as well as the position of the church. Religion gave state authorities and the state power its legitimacy, and government was the protector of the Christian faith.

However nowadays religion is no longer that fundamental; and the starting points are democracy and the rule of law.

This development shows the secularization of the state and constitutional theory. The position and meaning attributed to religion in several European states no longer has a religious basis.

To an extent it can be argued that the position now is that of the state verses religion. But from different scenarios it's evident that the state authority overrides religious sentiments.

In the famous American decision in the case of **Roe v. Wade** the court was faced with this kind of complex situation of deciding between whether the rights ordained by God are more superior to the authority of the state.

Facts of the Case were that; In 1969, Texan Norma McCorvey was a poor, working-class 22-year-old woman, unmarried and looking to end an unwanted pregnancy. But in Texas, abortion was illegal unless it was "for the purpose of saving the life of the mother." She was eventually referred to attorneys Sarah Weddington and Linda Coffee, who were looking for a plaintiff to challenge the Texas law. On their advice, McCorvey, using the pseudonym Jane Roe, filed a lawsuit against the Dallas County district attorney Henry Wade, an official responsible for enforcing criminal laws, including antiabortion statutes. The suit said the law was unconstitutional because it was an invasion of her privacy; she sought the overturn of the law and an injunction so she could go ahead with the abortion.

The district court agreed with McCorvey that the law was unconstitutionally vague and violated her right to privacy under the Ninth and 14th Amendments but refused to issue an injunction. McCorvey appealed and the Supreme Court agreed to hear the case, along with another case called *Doe v. Bolton*, lodged against a similar Georgia statute.

The Supreme Court case filing occurred on March 3, 1970, when McCorvey was six months pregnant; she eventually gave birth and that child was adopted. She said she wanted to continue with the case to support other women's rights. Arguments for *Roe v. Wade* began on December 13, 1971. Weddington and Coffee were the plaintiff's lawyers. John Tolle, Jay Floyd, and Robert Flowers were the defendant's lawyers.

Constitutional Issues

The *Roe v. Wade* case was argued for the plaintiff Jane Roe on the grounds that the Texas abortion law violated the 14th and Ninth Amendments to the U.S. Constitution. The due process clause of the 14th Amendment guarantees equal protection under the law to all citizens and, in particular,

required that laws be clearly written.

Previous cases challenging abortion laws usually cited the 14th Amendment, claiming that the law was not specific enough when a woman's life might be threatened by pregnancy and childbirth. However, since attorneys Coffee and Weddington wanted a decision that rested on a pregnant woman's right to decide for herself whether abortion was necessary, they based their argument on the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The framers of the Constitution had recognized that new rights might be developed in years to come and they wanted to be able to protect those rights.

The state prepared its case primarily on the basis that a foetus had legal rights, which ought to be protected.

The Arguments

The argument for the plaintiff Jane Doe stated that, under the Bill of Rights, a woman has the right to terminate her pregnancy. It is improper for a state to impose on a woman's right to privacy in personal, marital, familial, and sexual decisions. There is no case in the Court's history that declares that a foetus—a developing infant in the womb—is a person. Therefore, the foetus cannot be said to have any legal "right to life." Because it is unduly intrusive, the Texas law is unconstitutional and should be overturned.

The argument for the state rested on its duty to protect prenatal life. The unborn are people and, as such, are entitled to protection under the Constitution because life is present at the moment of conception. The Texas law was, therefore, a valid exercise of police powers reserved to the states to protect the health and safety of citizens, including the unborn. The law is constitutional and should be upheld.

Majority Opinion

The Supreme Court handed down its ruling, holding that a woman's right to an abortion falls within the right to privacy protected by the 14th Amendment. The decision gave a woman a right to an abortion during the entirety of the pregnancy and defined different levels of state interest for regulating abortion in the second and third trimesters.

- In the first trimester, the state (that is, any government) could treat abortion only as a medical decision, leaving medical judgment to the woman's physician.
- In the second trimester (before viability), the state's interest was seen as legitimate when it was protecting the health of the mother.
- After the viability of the foetus (the likely ability of the foetus to survive outside of and separated from the uterus), the potential of human life could be considered as a legitimate

state interest. The state could choose to "regulate, or even proscribe abortion" as long as the life and health of the mother was protected.

Siding with the majority were Harry A. Blackmun (for The Court), William J. Brennan, Lewis F. Powell Jr., and Thurgood Marshall. Concurring were Warren Burger, William Orville Douglas, and Potter Stewart

IN MIXED MATTERS

In “mixed matters”, where both State and Church have jurisdiction, the Church is the higher authority; such is the case, for example, in questions concerning marriage and education. Then, the State’s decision must be subordinated to the decision of the Church, since the State works in the temporal order and the Church in the supernatural order. Temporal matters must be subordinated to spiritual matters. When there is need to defend spiritual matters and Christian morals among people, the Church has the obligation to stand firm. Pope Leo XIII writes: “God entrusted to the Church the duty to exert herself firmly if the State tries in any way to do harm to religion; the Church has been given the duty to strive to improve the impact of religion in all laws and commands ruling people” (*Sapientia Christiane, 16*).

WHEN COURTS DISTANCE FROM RELIGIOUS AFFAIRS:

“Whenever the questions of discipline or faith or ecclesiastical rule custom or law have been decided by the highest of church adjudications to which the matter has been carried the legal tribunals must accept such decision as final and as binding.”[1374]

The statement natures lots of uncertainties and questions concerning the thin line hidden in its reasoning. Does it mean that the highest church adjudications are an equivalent of the Supreme Court? Doesn’t this outrage the supremacy of the Constitution? Doesn’t this affect the Constitutional Spirit embedded in Article 126[1375] and if not where does it leave the constitutionality of Article 129[1376]?

The Supreme law of the land is the Constitution which underlines the fact that it’s from it that other laws derives their validity. Besides, this connotes that everything done in the state must be in the same breath with the supreme law followed by the notion that no one is above the law. For effective operationalization of its supremacy, the Constitution puts forward the Courts of Judicature. These courts are clothed with mandate to exercise judicial power.

[1374] Justice Musa Ssekaana, in Rev. Charles Oode Okunya v The Registered Trustees of The Church of Uganda HCCS No 305 of 2020
[1375] The 1995 Constitution of the Republic of Uganda as amended.
[1376] Ibid

Article 126 establishes that judicial power is derived from the people and shall be exercised by the courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. [1377]One of the aspirations of the people is obtaining justice whenever they appear before these courts. Perhaps this marks the rationale for Article 126(2) (e) which emphasizes that substantive justice shall be administered without undue regard to technicalities.

Therefore, courts always have to intervene and shape the public discourse. They are the custodians of the law and neglect of which may beat the primary aim of justice.

Justice Musa Ssekaana in **Rev. Charles Oode Okonya v The Registered Trustees the Church of Uganda**[1378] remarked "the court has to understand that they are ill-equipped to deal with religious beliefs and practices because of remoteness and lack of familiarity hence should only interfere when any practices seriously damage the Constitutional fabric. This makes it the main reason for prohibiting courts from litigating religion because they lack the ability to address religious questions."

My concern is on where this leaves the courts of law yet his remark means that the decisions of these highest church adjudications cannot be appealed anywhere in any courts simply because they lack ability and are ill-equipped.

Isn't this neglect of the court duties? How are those aggrieved by the decisions of these highest church adjudicators aided yet it's the courts to ensure justice.

In my understanding, conflicts involving religious issues pertain to questions of civil rights which should be decided by civil courts of law. For instance, the right to a religious office is in the nature of property which in my view is a civil right that civil courts have full jurisdiction to decide on the matter.[1379] A suit in which a right to an office is contested is a suit of a civil nature not withstanding that such right may depend entirely on the decision of question as to religious rites or ceremonies. In this regard such decisions should be appealable to the court and should be resolved in the case of discontent by the plaintiff.

Why should the modern courts neglect the modern society? Isn't there need to check on the laws, ecclesiastical rules, and faith to ascertain whether there in consonant with the principles of natural justice fairness and good governance when put in operation by the church in disciplining and deciding who should be in a particular office? Such customs and laws may not be constitutional and need not be operationalized and accepted in the countries affairs which role is supposed to be played by the courts. The decisions of these of adjudications should be observed analysed to understand whether they are fair or not and whether they are not against the rules of fairness and equity. This cannot in any way be analysed when courts distance themselves from the religious

[1377] The 1995 Constitution of the Republic of Uganda as amended.
[1378] HCCS No 305 of 2020
[1379] Raj Kali Kuer v Ram Rattan Pandey, Supreme Court of India, on April 1995.(1995 AIR 493)

affairs.

Besides, are courts not neglecting the coercion, undue influence and duress that fill the corners of these adjudications of the church? How are those aggrieved by such decisions able to receive justice if they cannot appeal their decisions? Besides, doesn't this affect Judicial Review simply because the courts have no ability and are ill-equipped with the historical beliefs? Courts are taken to be the only source of justice on earth and therefore must avail a solution to every problem.

To my understanding, judicial non –interference with religious affairs defeats the Constitutionality of Article 126 and 129 of the constitution which eradicates the primary role of courts, after all the constitution is the voice of the people and the voice of the people is the voice of God. (VOX POPULI VOX DEI)

GOSPEL ACCORDING TO JUSTICE SSEKAANA MUSA (VERBATIM) IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION) CIVIL SUIT NO. 305 OF 2020 REV. CHARLES OODE OKUNYA(PLAINTIFF) VERSUS THE REGISTERED TRUSTEES OF THE CHURCH OF UGANDA(DEFENDANT)

BACKGROUND

On 19th November 2019, the Plaintiff was duly elected as the Bishop elect of Kumi Diocese after a thorough process of vetting and nomination. Subsequently, by letter dated 16th December 2019, the Archbishop of the Church of Uganda communicated to the Plaintiff that there were complaints raised against him and issues concerning his first relationship with the mother of his children a one Dinah for which the Plaintiff was to respond to in writing.

The said letter also informed the Plaintiff that his consecration and enthronement as the 2nd Bishop of Kumi Diocese scheduled for 29th December 2019 was postponed till further notice.

The Plaintiff made a response in regard to the allegations in writing to the Archbishop of the Defendant. The said lady in question Dinah Amongin and her father Mr. Onyait Stephen also wrote to the Archbishop in respect of the allegations against the Plaintiff.

The House of Bishops sitting at Boroboro appointed a select committee of three bishops to investigate the matter. That among the issues that came before the Select Committee was the issue of the Bishop Elect's age. The Select Committee picked up the issue of age upon which the plaintiff was allowed to explain the discrepancy in his age and especially the date of birth of 1975 or 1970.

The Select Committee made a report to the House of Bishops sitting at Mityana on the 01st day of February 2020. The House of Bishops accordingly proceeded to revoke the plaintiff's election on grounds that he falsified his age by way of statutory declaration and had not attained the age of 45 years by the time he was elected.

The defendant in their defence contended that the plaintiff's assertion that he was born on 23rd November 1970 is fraudulent given the over eight documents from different Government and Educational Institutions where the plaintiff passed where he personally submitted information that he was born 23rd November 1975. He fraudulently altered his year of birth to 1970 to meet the requirement for the office of the Bishop which at the time he had not attained.

The plaintiff in his plaint sought the following reliefs;

(a) A declaration that the impugned decision of the House of Bishops revoking the election of the plaintiff as the 2nd Bishop of Kumi Diocese is illegal and unlawful.

(b) A declaration that the impugned decision of the House of Bishops barring the plaintiff's name from ever coming up among any future candidates is illegal and unlawful.

(c) A permanent injunction restraining the Defendant, its agents, servants and or employees from further conducting the search and subsequent appointment of another Bishop of Kumi Diocese until the determination of the suit.

(d) An Order directing the defendant to consecrate and enthrone the plaintiff as the 2nd Bishop of Kumi Diocese.

(e) General Damages.

(f) Exemplary Damages.

(g) Costs of the Suit.

The parties filed a joint scheduling memorandum where the following issues were agreed for court's determination;

Issues

(i) Whether the Plaintiff had attained the age of 45 as required by the Provincial Constitution and Canons by the time of his purported election by the House of Bishops;

(ii) Whether the Defendant illegally and unlawfully revoked the election of the Plaintiff as second Bishop of Kumi Diocese;

(iii) Whether the Defendant's decision in barring the Plaintiff's name from ever coming up among candidates for electoral office with the Defendant was lawful;

(iv) Whether the Defendant plays any role in the election of \Bishops in the Church of Uganda;

(v) Whether the Plaintiff is entitled to the reliefs claimed in the pleadings.

The plaintiff lined up 5 witnesses while the defendant presented 2 witnesses who filed witness statement which were admitted as their examination in chief.

I have decided to redraft issue no. 4 so as to make it wide enough to capture the broad issue of; ***Whether the plaint discloses a cause of action against the defendant.*** It appears from the pleadings of the defendant that it disputed the claims against the defendant.

Whether the plaint discloses a cause of action against the defendant.

The defendant in paragraph 4(d), 25 and 27(d) of the defence contended that;

- ✓ *The defendant shall aver and contend that it does not enthrone or consecrate a Bishop in the Church of Uganda.*
- ✓ *The defendant plays no role in the appointment and election of Bishops.*

- ✓ *The defendant does not consecrate the Bishop and hence a Court cannot make an order capable of being enforced.*

Analysis

As held in ***Auto Garage vs Motokov [1971] EA 514*** the three essential elements to support a cause of action are where the plaintiff enjoyed a right, that the right has been violated, and finally that the defendant is liable.

The main consideration in this matter is the appreciation of the nature of right the plaintiff enjoyed in this matter and whether such right is justiciable in the ordinary civil courts. The plaintiff is claiming a right to be consecrated as a Bishop of Kumi Diocese after the House of Bishop sat on 1st February 2020 and revoked the plaintiff's election as the 2nd Bishop of Kumi Diocese.

The nature of the plaintiff's case is a religious dispute and therefore religious issues arise out of this dispute since it involves the revocation of the plaintiff's election as a 2nd Bishop of Kumi Diocese. Generally, Religion is deemed by our culture to be a matter of persuasion. The law cannot compel a citizen's adherence to a religious belief, and must always protect the privilege of infidelity.

Countless are the times when courts have said that religious disputes are not within the jurisdiction of civil suits. This sweeping statement gets limited to read that a 'purely' ecclesiastical or doctrinal issue is outside the scope of civil jurisdiction, thereby enabling them to assume decision-making function over factions whose property squabbles are inextricably interwoven with doctrinal undertones. Or to put it the other way, a judge may say that religious disputes which involve property or civil dispute are within the scope of court.

In the case of ***United States v Ballard 322 U.S 78 (1944)*** the court noted that;

"Judicial intervention into religious questions is similar to the doctrine of a political question, wherein, it can be understood that just like it is expected that political branches are more opposite to decide the political question, religious bodies are suitable to decide questions about religion."

The court is basically ignorant of the historical beliefs and the reasoning behind it; hence they apply the judicial mind to check the veracity of faiths and beliefs because of which their interpretation is different from the beliefs of devotees. The court has to understand that they are ill-equipped to deal with religious beliefs and practices because of remoteness and lack of familiarity hence should only interfere when any practices seriously damage the constitutional fabric. This makes it the main reason for prohibiting courts from litigating religion because they lack the ability to address religious questions. There is '*limited jurisprudential competence'* to decide such religious matters.

Therefore, courts generally have extracted the prohibition against litigating religion from the '*church autonomy doctrine*' which requires judicial deference to religious institutions *''whenever*

the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by……church judicatories."

Justice Stephen Mubiru in ***Rev Father Cyril Adiga Nakari vs Right Reverend Ocan Odoki and Registered Trustees of Arua Diocese HCCS No. 002/2017*** High Court Arua had this to say on Church/religious disputes –

> "*This is a suit in which deference to organs of governance with the religious community of the Church ought to be observed. This Court should use restraint and be slow to intervene in internal affairs of the Church whenever it is still possible for the Church to correct its errors within its own institutional means*."

He went on further –

> "*On the other hand, the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity within the dictates of the religion falls within the core of religious functions. Civil Courts will defer to a religious organisation good faith understanding of who qualifies as its Minister where resolution of the dispute cannot be made without extensive inquiry by the Civil Court into religious law and policy, the court will not intervene.*
>
> *The mere adjudication of such questions would pose grave problems for religious autonomy. This kind of second guessing of ecclesiastical decisions would constitute a clear affront to rights of religious autonomy. The Church must be free to choose who will guide it on its way*."

Similarly, the other reason to prohibit courts from this decision making stems not from skepticism regarding judicial ability to resolve religious questions, but rather from concerns that judicial resolutions of such questions will be interpreted as an endorsement of one religious view over another or importing practices not conforming to spiritual and religious teachings.

The non-justiciability of some issues would mean that one cannot seek remedy elsewhere and thus leaving them without any options to vindicate their rights. The court is such circumstances should be open to address the issue before hand. However, where the religious institutions which have dispute resolution mechanism must be upheld. As a matter of constitutional law and sound policy, courts should wade in the waters of disputes turning on religious doctrine or practice so as to afford parties access to an adjudicative forum to provide redress for legal wrongs.

It bears emphasis, that whenever the questions of discipline, of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the courts must accept such decisions as final, and as binding on them, in their application

to the case before them. This is premised on the view that courts lack capacity to litigate religion and it stems in large part from worry that religious claims lack objectivity and empirical bases. Thus, "In contrast to ordinary questions of fact, religious questions are understood to lie beyond judicial competence because they do not depend on the logic of law. Instead, religious questions may be answered on the basis of faith, mystical experiences, miracles, or other non-rational sources." In the case of ***Ballard v United States*** *(supra)* The Supreme Court noted;

"Men may believe what they cannot prove-They may not be able to put the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law….when triers of fact undertake that task, they enter a forbidden domain."

The selection of a Bishop is a religious function in my view and the plaintiff's claims that are under adjudication would invite court to get involved in the resolution of religious question that involves the interpretation of the church constitution and the provincial canons that govern the appointment process. The United States Court of Appeals for the Third Circuit in the case of ***Petruska vs Gannon University*** noted:

"*The process of selecting a religious Minister is per se a religious exercise*."

Article 4(2) of the Provincial Constitution provides;

No person shall be allowed to administer as Bishop, Priest or Deacon in the Church of Uganda unless he or she has been licensed by the Archbishop in the case of Bishops or Diocesan Bishop in other cases.

The House of Bishops which is the highest organ responsible for selecting a Bishop has made a religious decision in their view that the plaintiff is not best suited to serve in that position as a leader of the Church in Kumi Diocese. The decision to certify the plaintiff or not is a religious one based on qualifications set out in the Provincial Constitution and Provincial Canons of Church of Uganda. This mandate as discussed earlier cannot be brought to question in courts of law and it must be respected for harmony in the Church management and administration. The intervention by courts would bring the Church and the State in direct conflict over the religious question contrary to doctrine of Ministerial Exception.

The doctrine of Ministerial exception is drawn from the USA where the First amendment guarantees freedom of religion and forbids Congress from enacting state religion. It is the equivalent of Articles 7 and 29(1) of the Ugandan Constitution. This doctrine has been applied in

several American cases and which cases are of persuasive authority as they discuss constitutional provisions which are in pari-materia with those of the Ugandan Constitution.

In ***Petruska vs Gannon University*** the United States Court of Appeal for the Third circuit had this to say –

> "*First, like an individual, a Church in its collective capacity must be free to express religious beliefs, profess matters of faith and communicate its religious message, unlike an individual who can speak on her own behalf. However, the Church as an institution must retain the collaray right to select its voice. A Minister is not merely an employee of the Church: she is the embodiment of its message. A Minister serves as the Church public representative, its ambassador, its voice to the faithful. Accordingly, the process of selecting a Minister is perse a religious exercise. The Minister is the chief instrument by which the Church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognised as of prime ecclesiastical concern. Consequently, any restriction on the Church's right to choose who will carry its spiritual message necessarily infringes upon its full exercise to profess its beliefs*."

In ***Hossana Tabor Evangelical Lutheran Church and School vs Equal Opportunities Commission***, the Supreme Court of the United States had this to say on the matter –

> "*A religious organisation right to choose Ministers would be hollow, however if secular courts would second guess the organisations sincere determination that a given employee is a 'Minister' under the organisations theological tenets*."

It went further to state –

> "*When it comes to the expression and inculcation of religious doctrine there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth and both the content and credibility of a religious message depend vitally on the conduct and character of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religion percepts that he / she espouses. For this reason, a religious body's right to self-governance must include the ability to select and to be selective about those who will serve as the very embodiment of its message and its voice to the faithful*."

These cases though decided by the Supreme Court of the United States of America are relevant because they discuss constitutional provisions which are similar to these in the Ugandan Constitution. The First Amendment in the US Constitution provides that Congress shall make no law respecting an establishment of religion. This is at times referred to as the Establishment Clause.

This is similar to Article 7 of the Uganda Constitution which states "Uganda shall not adopt a state religion."

The Free Exercise clause in the American Constitution protects the right of citizens to freely exercise their religious rights and beliefs and is similar to **Article 29 (1) (c) of the Ugandan Constitution** which provides:

> "***Every person shall have the right to freedom to practice any religion, and manifest such practice which shall include the right to belong to and participate in the practice of any religious body or organisation in a manner consistent with the Constitution***."

Justice Steven Mubiru in **Rev.Fr. Cyril Adiga Nakarivs 1. Rt. Rev. SabinoOcanOdoki and 2. The Registered Trustees of Arua Diocese – Civil Suit No. 0002 of 2017** (supra) made reference to the American case of ***Petruska vs Gannon University*** *and went on to say:*

> *"That statement underscores the fact that a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents. These are difficulties in separating the message from the messenger. I am persuaded by the interpretation and application given to the First Amendment by the Courts in the United States to hold that Articles 7 and 29(1)(c) of the Constitution of the Republic of Uganda 1995 protect the roles of religious leadership worship ritual and expression.*
>
> *The freedom of religious groups to engage in certain key religious activities (including the conducting of worship services and other religious ceremonies and rituals as well as the critical process of communicating the faith.*
>
> ***He went on further:***
>
> *Religious autonomy means that religious authorities must be free to determine who qualifies to serve in positions of substantial religious importance. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. If a Church believes that the ability of a priest to conduct worship services or important religious ceremonies or rituals, or to serve as a messenger or teacher of its faith or perform such other key functions has been compromised, then the constitutional guarantee of religious freedom protects the Church's right to remove the priest from his position. The Constitution creates a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. "forcing a group to accept certain members may impair its ability to express those views, and only those views, that it intends to express"* ***(Boy Scouts of America v. Dale, 530 U. S. 640, 648 (2000).*** *The Constitution leaves it to the collective conscience of each*

> *religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith. In the result, all church offices ought to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices.*

The same position was adopted by the Supreme Court of the United States which held in the case of **Serbian Eastern Orthodox Diocese for The United States of America and Canada et al vs. Milivojevich** as follows:

> "***whenever the questions of discipline or of faith or ecclesiastical rule custom or law have been decided by the highest of the Church adjudications to which the matter has been carried the legal tribunals must accept such decision as final and as binding****".*

and went on further to say;

> *"**Religious freedoms encompass the power of religious bodies to decide for themselves free from State interference matters of Church Government as well as those of faith and doctrine**".*

Therefore, the House of Bishops has made a decision that the Plaintiff is not the right messenger to disseminate its message and its beliefs given the Plaintiff's fraudulent engagement in changing his age and date of birth from 1975 to 1970. The decision must stand and should not be interrogated by courts as discussed earlier since the court is not best suited to handle religious question disputes or it is an affront on the 'doctrine of ministerial Exception'.

The actions of the plaintiff involving change of date of birth is contrary to the Provincial Canons and the Constitution of Church of Uganda **Canon 3.9.1 (Page 78) -** *A Bishop shall strive to be an example of righteous and Godly living ……"*

If the House of Bishops has determined that the Plaintiff does not meet such a standard, it would not be open to the Court to order the Archbishop to forcefully consecrate him. That would amount to forced inclusion and would run counter to the Ministerial exception doctrine which gives religious institutions residual power free from the Courts in determining who should be entrusted with the governance of its institutions.

The rights that the plaintiff enjoys are derived from the Provincial Constitution of the Church and the Provincial canons and the same must be ably enforced through the existing adjudication mechanisms instead of running to the civil court which is not very competent to resolve the same in

ignorance of applicable regulations and guidelines as derived from the Canonical Scriptures of the Old and New Testament as being the ultimate standard of faith, given by inspiration of God.

Church of Uganda as a religious institution with a constitution and provincial canons maintains internal ecclesiastical bodies tasked with resolving religious disputes or litigation. Therefore, Church of Uganda has primary authority over such matters involving religious questions. ***Article 16 of the Provincial Constitution*** provides;

The Provincial Assembly shall by Canon provide

a) That any Bishop, Clergy or Laity of the Church of Uganda shall not seek redress in any external adjudicatory body unless all the dispute resolution mechanisms provided under this Constitution and Provincial Canons have been fully exhausted.

Article 17 provides that:
The Provincial Assembly shall provide by Canons for the following tribunals-

a) Diocesan Tribunals;
b) A Provincial Appeals Tribunal; and
c) A Provincial Tribunal

The Plaintiff conceded in his examination-in-chief that as a Clergyman in the Church of Uganda, he is governed by the Provincial Constitution and Provincial Canons.

Article 21 (4) of the Provincial Constitution provides as follows –

> "*Any person who is subject to this Constitution by virtue of being a member of the Church of Uganda shall not seek redress in any external adjudicatory body in connection with a matter that can be handled before he or she has exhausted all dispute resolution mechanism under this Constitution*."

Article 4(5) of the Provincial Constitution provides as follows –

> "*Any dispute regarding the formal qualification of any person to Minister as a Bishop, Priest or Deacon in the Church shall be decided by the House of Bishops*."

The plaintiff failed to exhaust the available remedies with the church and this court would decline to handle the religious question which as discussed earlier is non-justiciable in this court. This matter stands dismissed on this ground.

Wrong Party

The plaintiff brought this suit against the defendant as "The Registered Trustees the Church of Uganda".

The defence counsel submitted that this suit was instituted against the wrong party; - the Registered Trustees of the Church of Uganda, because the Registered Trustees of the Church of Uganda is not a body that plays any role in the election of Bishops in the Church of Uganda. The two bodies; The Registered Trustees and the House of Bishops are different and play different roles.

The plaintiff's counsel submitted that According to **Article 18 (1) of the Church of Uganda provincial constitution 1972 as amended in 1994 and 2016** marked as DEX 19 provides that there shall be a board of the registered trustees of the church of Uganda which shall be incorporated under the Trustees Incorporation Act.

Under the same **Article 18(3) of the same constitution** provides for the composition of the registered trustees of the church of Uganda who shall consist of:

1. the Archbishop who shall be the chairman of the Board of Trustees.
2. dean of the province who shall be the vice chairman and
3. All other Diocesan Bishops of the church of Uganda who shall be members of the Board of trustees.

Under the **Church of Uganda provincial canons marked as DEX 18, Canon 3.6.1** on election and consecration of Bishops provides that in case of a vacancy for a bishop, the diocesan nomination committee shall on behalf of the Diocesan Synod forward two names to the Archbishop for consideration for appointment to the office of the Diocesan Bishop by the House of Bishops.

According to counsel in harmonization of the two provisions above, the Archbishop and the office of the Diocesan Bishop play a role in the election process and together are members of the Board that constitute the Registered Trustees of the Church of Uganda.

He prayed that this honorable court confirms and finds that the Archbishop and all other Diocesan Bishops are members of the Registered Trustees of the church of Uganda which is a legal person answerable to matters concerning and touching the pleadings before this Court.

Analysis

This court finds the submission of counsel for the plaintiff totally misleading and incomprehensible. The plaintiff as a member of the church is fully aware of the different organs of the church and the different roles they play in the Church administration and management. They are both established under different Articles under the Provincial Constitution as well as under the Provincial Canons.

The Provincial Constitution Article 18 provides for Registered Trustees of the Church of Uganda as follows;

(1) There shall be a Board of the Registered Trustees of the Church of Uganda which shall be incorporated under the Trustees Incorporation Act.

(2) The Registered Trustees of the Church of Uganda shall have perpetual succession and shall sue and be sued in its corporate name.

(3)

(4)

(5) The functions of the Registered Trustees of the Church of Uganda shall be as follows:-

(a) To hold all lands, property, funds and endowments of the Church of Uganda as may lawfully be entrusted to it for any specified purpose or for the general benefit of the Church of Uganda.

(b) To give effect to this trust, attaching to any land, property or endowment being held pursuant to the provisions of this Article.

In addition, Canon 1:6 of the Provincial Canons also provides for The Registered Trustees of Church of Uganda;

1.6.3; *All Church land and property shall be vested in the Board of Registered Trustees who shall be empower to hold them upon any trust which is approved and accepted by the Provincial Assembly.*

1.6.4 All business of the Board of Registered Trustees of Church of Uganda shall be executed through the Directorate of Land Management at the Provincial Secretariat.

It is clear from the above instruments that the Registered Trustees of Church of Uganda was established for a specific purpose and the capacity to sue or be sued is confined strictly to the functions for which it was created and established. There is nothing within their functions which provides for the election of Bishops and the different roles cannot be swapped or interchangeable as the plaintiff's counsel would wish this court to believe.

The highest organ of the Church of Uganda is the Provincial Assembly which consists of three Houses namely that of the Bishops, that of the Clergy and that of the Laity (Article 5(6) of the Provincial Constitution)

The appointment of Bishops is provided for in Article 13 of the Provincial Constitution and Canon 3.7.5 which provides for forwarding names of candidates to the House of Bishops for consideration for appointment as a Bishop.

The plaintiff throughout his pleadings complains against the House of Bishops and the Registered Trustees of Church of Uganda are not mentioned anywhere as being responsible for any wrongdoing or being involved in the appointment and revocation of the plaintiff's appointment as the 2nd Bishop of Kumi.

It could be deduced from the Provincial Constitution that creation of the Registered Trustees of Church of Uganda as a body corporate was purposely done to hold their property and indeed they could hold the same in their names. The creation of the body corporate was not to allow them take over liability or responsibility of the entire Church of Uganda administration. It is indeed true that the areas like appointment of Bishops or Clergy or Laity were left out without '*corporate status of suing or being sued*' is not justiciable in courts and the existing system of dispute resolution under Article 17 of the Provincial Constitution is conclusive.

As a general rule, all appropriate parties should be involved in the proceedings so that a proper and complete determination of all issues and comprehensive adjudication of all affected interests. A suit against a wrong party is incompetent and cannot be sustained in any court of law. A cause of action can only be sustained against a proper party against whom court can give orders. A court cannot give any orders affecting a person who was not a party to the suit or who was not heard by court.

The plaintiff sought an order against the defendant and yet the defendant is not involved in the election of Bishops in Church of Uganda. ***"An Order directing the defendant to consecrate and enthrone the plaintiff as the 2nd Bishop of Kumi Diocese."***

The Bishop is consecrated and enthroned by the Archbishop; therefore, any order made otherwise would be directed to a wrong party.

The plaintiff clearly sued a wrong party and this suit cannot be sustained against the Registered Trustees of Church of Uganda whose mandate and function under the Provincial Constitution as shown earlier is very different.

This suit would be dismissed on this ground alone. But for completeness the pertinent issue of age should be resolved.

Whether the Plaintiff had attained the age of 45 as required by the Provincial Constitution and Canons by the time of his purported election by the House of Bishops;

The plaintiff's counsel submitted that the plaintiff at the Second sitting of the Nominations Committee presented a Statutory Declaration with an attachment of Certificate of Birth No.23076 issued by Tauter Sub-county chief on the 18th March 1971 and a ministry of Health Young child clinic Immunization Card No.8251. The documents presented in the statutory declaration throughout the entire proceedings of court have never been in contention and the same have been adopted in the plaintiff's witness statement.

The purpose of the plaintiff to swear a statutory declaration was to correct an error that was not of his own making the birth certificate and immunization card hadn't been in his custody and it would be improper for this honorable court to overlook this glaring evidence on the face or record.

The defendant's counsel submitted that the requirement for the office of Bishop for one to have

attained the age of 45 is both a legal requirement under the Provincial Constitution and Provincial Canons. Article 13(6) of the Provincial Constitution and Canon 3.6.2 of the Provincial Canons. The Plaintiff himself agreed that as a priest in the Church of Uganda he is governed by both the Provincial Constitution and the Canons.

The Issue here is whether Rev. Charles Okunya (hereinafter the Plaintiff) was born on the 23rd of November 1970 or 23rd November 1975 and had attained the age of 45 on the 30th day of October 2019 on the date of nominations.

It is the contention of the Defence that he was born on the 23rd day of November 1975 and our reasons for the said submission are the following:

The following documents which the Plaintiff conceded were his own, some in his own writing indicate that he was born on 23rd November 1975.

These documents are:

1. Application form to Uganda Christian University; DEX 11
2. Admission Application to Uganda Christian University; DEX 11
3. Application to Uganda Management Institute; DEX 10
4. Curriculum Vitae presented to Bishop Illukor Girls' Secondary Schol, where the Plaintiff was a teacher; DEX 9
5. The Plaintiff's Passport; DEX 5
6. The Plaintiff's Electoral Commission Record. DEX 7
7. The Plaintiff's Diocesan Records to the Provincial Secretariat; DEX 8
8. The Plaintiff's Academic Transcript from Uganda Christian University; DEX 12
9. The Plaintiff's Driving Permit Spread from 2011 – 2019; DEX 14
10. The Plaintiff's application form for National Identity Card; DEX15
11. The Plaintiff's National Identity Card. PE 11

These documents cover a period of 2003 – 2019 from the time he applied to go to Uganda Christian University to his last driving permit that was issued in 2019. That is a period of 16 years where the Plaintiff consistently indicated to various Organisations that he was born in 1975.

It should be noted that when he wanted to stand for election as a Bishop, only three (3) days before the election, he swore a statutory declaration to indicate that he made a mistake when he was registering for his National Identity Card. (Exhibit PE II)

It should however be noted that in paragraphs 21, 22, 23 of the Plaintiff's witness statement, the

Plaintiff stated that the adoption of the year 1975 as his year of birth was because he wanted to maintain consistency due to a mistake that had been made in 1991 when his uncle the late Apedel registered him in Senior Three.

Analysis

The main issue for consideration is whether the plaintiff was qualified to stand at the time he was nominated for election to the position of Bishop. The main criterion for nominating a person to the office of Diocesan Bishop is set out in the Provincial Constitution Article 13(6) and Provincial Canons 3.6.2.

Article 13(6) and Provincial Canon 3.6.2provides:

No person shall be elected to the office of Bishop unless he or she has attained the age of forty-five (45) and is a holder of at least a Bachelor's degree in Theology, or a first degree in any other field with an additional Diploma in Theology from a Theological Institution recognized by the Church of Uganda, provided that a Bishop shall retire after serving for a period of fifteen (15) years or upon attaining the age of sixty five (65) years, whichever comes first.

Provincial Canon 3.7.23 provides:

The Diocesan Nominations Committee shall evaluate every candidate whose name is proposed for consideration for nomination on the basis of the following criteria-

a) *Age;*
b) *Academic qualification;*
c) *Experience in pastoral ministry;*
d) *Spiritual life and personal testimony;*
e) *Family life;*
f) *Social standing;*
g) *Integrity; and*
h) *Experience in administration.*

It can be deduced from the above that the issue of age is so paramount and is the first major consideration for one to become a Bishop.

The plaintiff's life within the Church of Uganda as a clergy was premised on information he availed at the time joining and this was categorically reflected as 23rd November 1975. This fact is not in dispute but the plaintiff now wishes to alter his date of birth by claiming that the actual date of birth earlier indicated on all his personal documents was a mistake or an error.

The act of altering the date of birth three days to being nominated as a Bishop becomes very suspicious and it is not an innocent act by the plaintiff and I would agree with the defendant's

counsel that it was indeed fraudulent. The plaintiff during cross examination confirmed that a Bishop should be a person of Integrity.

The Church was forced to carry out an investigation into the plaintiff's school background and it was established that he was consistently indicating the date of birth as 23rd November, 1975. It was also established that the plaintiff is some of the application forms to Uganda Christian University made some lies like denying having children and yet he had.

The official documents issued by the Government of Uganda like the Passport, National Identity Card, Voter's Card, Driving Permit and all academic testimonials clearly show that the plaintiff was born on 23rd November-1975. A statutory declaration could not suffice to make such a correction without changing the particulars in the National Data Base (National Register).

The plaintiff during cross examination stated that he wanted to maintain consistency in the date of birth well aware it was wrong. In the current legal regime under the Registration of Persons Act any person who wishes to change information must make an application to National Information Registration Authority. The information given in the National Register cannot be changed by statutory declaration but rather through a process set out under section 4 and such notification is in a particular form in Schedule 2.

Section 4 provides;

(1) The notification of the Authority of a change in the information contained in the Register shall be made by the person to whom the information relates within ninety days from the time the change in the information occurs.

(8) Where a change of particulars includes a change in the name, <u>date of birth</u>, place of birth, sex, the notification shall include a request for a new national identification card or alien's identification card, and in such a case the person shall surrender the old card to the Authority.

The plaintiff's date of birth could not change through statutory declaration as he claims to have done but rather through a process by process as set out in Section 4 and in particular on a form provided for under the Schedule. Otherwise, the National Register should not be changed at will without following the due process.

A party who has changed his particulars has a duty to notify the different institutions like former schools or Institutions of learning about the changes made to the particulars in order to avoid future issues about identity. Otherwise, any person who wishes to know about the plaintiff from his former schools or higher institutions may become confused with the change of the date of birth if such institution is not notified about such major changes to his identity. See ***Achola Catherine Osupelem v Electoral Commission Election Petition No. 02 of 2018***

The plaintiff according to the official documents issued from different government institutions like NIRA & EC his date of birth is still 23rd November 1975 and this date still binds him until it changed in accordance with the law. The plaintiff at the time of his nomination was not qualified to be elected a Bishop of Kumi since he had not yet made the mandatory age requirement of 45 years.

The House of Bishops was right and justified to revoke the election of Plaintiff as the second Bishop of Kumi Diocese.

For reasons stated herein this suit is dismissed with costs to the defendant.
I so order.

SSEKAANA MUSA
JUDGE
30th June 2021

EXEGESIS OF THE GOSPEL ACCORDING TO JUSTICE SEKANA MUSA

Briefly the Judge Discussed and Ruled On THREE Issues:

1) The "Jurisdiction" & Competence of Civil Courts in Adjudicating Ecclesiastical Disputes....And He Says: ```

"The rights that the plaintiff enjoys are derived from the Provincial Constitution of the Church and the Provincial canons and the same must be ably enforced through the existing adjudication mechanisms instead of running to the civil court which is not very competent to resolve the same in ignorance of applicable regulations and guidelines as derived from the Canonical Scriptures of the Old and New Testament as being the ultimate standard of faith, given by inspiration of God."

2) The Registered Trustees of the Church of Uganda as Defendant Party in The Case....And He Says the Plaintiff Sued a Wrong Party....And That``` *_"A court cannot give any orders affecting a person who was not a party to the suit or who was not heard by court."

3) The Age Issue....Whether The Plaintiff Had Attained the Age of 45 As Required by The Provincial Constitution and Canons by The Time of His Purported Election by The House of Bishops....And He Ruled That: ``` _*The plaintiff according to the official documents issued from different government institutions like NIRA & EC his date of birth is still 23rd November 1975 and this date still binds him until it changed in accordance with the law. The plaintiff at the time of his nomination was not qualified to be elected a Bishop of Kumi since he had not yet made the mandatory age requirement of 45 years.

KAKAIRE SADIKI AND SULEIMAN ISOTAH MAGUMBA VS UGANDA NATIONAL EXAMINATION BOARD UNEB AND FAGIL MANDY.

The background of the petition

The petitioner’s general allegation against the respondents was that their acts, in organising national examinations to be written on days coinciding with Idd Adhua, and idd el fitr Muslim religious holidays were inconsistent with and in contravention with the constitution.

While agreeing with the petitioners Justice Musoke observes the significance of this Islamic holiday to all that profess the Muslim faith and is celebrated in honour of prophet Ibrahim for his

willingness to sacrifice his son Ismail and the son's acceptance to be sacrificed as an act of submission to Allah's command to do so. The holiday also marks an end to the Muslim fasting period.

The court therefore observed that the organisation of examinations to be conducted on the relevant Muslim holiday of Idd el Fitr by the respondent infringed upon the religious freedom rights of Muslims to manifest their religion through observance of those religious holidays and this is because the Muslims consider their religious holiday to be sacred days on which they are supposed to partake only in faith related activities.

THE IMPACT OF ROE V. WADE

The Texas statute was struck down as a whole, and further, *Roe v. Wade* legalized abortion in the United States, which was not legal at all in many states and was limited by law in others.

All state laws limiting women's access to abortions during the first trimester of pregnancy were invalidated by *Roe v. Wade*. State laws limiting such access during the second trimester were upheld only when the restrictions were for the purpose of protecting the health of the pregnant woman.

In this land mark decision, we see the court taking on a more "Godly" role by legalizing abortion which is a matter of moral complexity.

Just of recent on 24th June, 2021. The European parliament adopted a report describing abortion as "essential health care" and a "human right" this is despite of the fact that European bishops denounced the report while insisting that the "unborn child has a human right to life."

The bishops declared that it is "ethically untenable" to classify abortion as an essential health service, an attempt that degrades the unborn child. They also lamented that the resolution negates the fundamental right to conscientious obligation and the corresponding right not to participate in a morally evil action such as abortion.

In Uganda's context, this conclusion is evident from the court's decision in the case of Dimanche Sharon and others v. Makerere University

DIMANCHE SHARON AND OTHERS V. MAKERERE UNIVERSITY

This case involved three appellants — Seventh Day Adventists — who were undergraduate law students at Makerere University (the respondent). They challenged the constitutionality of a policy and certain regulations of respondent university. The university required them to attend scheduled lectures and sit examinations on Saturday, their Sabbath, contravening their belief that God's commandments require complete rest on that day. 38 The appellants asserted that to do any work

on the Sabbath amounts to sin, for which they would be condemned to hell. For Seventh Day Adventists, the Sabbath begins at sunset on Friday evening and ends at sunset on Saturday. The university policy and regulations, distributed in advance to students, stated: Students are informed that University Programs may run seven days a week. Since the University has students and members from various religious backgrounds, the University may not heed the interests of a particular group, particularly in the crucial areas of attendance of lectures and do all your work, but the seventh Day is a Sabbath to the Lord your God. On it, you shall not do any work, neither you, nor your son or daughter, nor your man servant, nor your maid-servant, nor your animals nor the alien within your gates. For six days the Lord make the heaven and the earth, the sea and all that is in them, but he rested on the seventh day. Therefore, the Lord blessed the Sabbath Day and it is holy."

The appellants contended that they could not attend lectures or sit examinations on Saturdays as this amounted to performing work on the Sabbath. Accordingly, they claimed, the respondent's policy and regulations violated their constitutional right to freedom of religion.

The respondent contended that Makerere University, as a secular public

University did not favour any particular religion. To carry out its legal mandate of expanding university education and making it available to as many students as possible at the lowest cost possible, the university had formulated a policy of conducting its core activities, such as teaching and examinations, on any day of the week, including Saturdays and Sundays.

The Constitutional Court, after considering the affidavits and evidence filed by both parties, dismissed the petition by unanimous decision of the five Justices of Appeal. The decision of the Constitutional Court was upheld by the Supreme Court. Although each justice of the Constitutional Court issued a separate judgment, all five unanimously found that the respondent's policies and regulations were not inconsistent with, and did not violate, the appellants' freedom of religion and the right to education under Uganda's 1995 Constitution.

Deputy Chief Justice Mukasa Kikonyogo, in the lead judgment, held that, as a public and secular institution, the respondent had "no duty to accommodate some beliefs based on religious tenets."

Second, the Constitutional Court accepted that the policy of the respondent pursued legitimate aims, that it was non-discriminatory, and did not require the appellants to forego a chief tenet of their religious belief, namely, that they must not work on the Sabbath. Third, the Court noted, without giving specific content to the general right to education as articulated in the Constitution, that the right to education protected by Article 30 "does not

In any way mean the right to attend the respondent University at the students' own terms." The applicants had the option of taking courses scheduled on days other than the Sabbath. They had

many choices, including transferring to other universities or institutions.

Finally, one of the five justices, J. A. Twinomujuni, went so far as to challenge the appellants' beliefs, opining that "there are exceptions to God's commandment on Sabbath" that may permit attending lectures or examinations on the Sabbath.

The appellants appealed to the Supreme Court, which dismissed their claim. As found in the Constitutional Court, the central issue in the Supreme Court was whether the respondent's policy and regulations contravened the appellants' freedom of religion and the right to education as guaranteed by the Constitution. While the Supreme Court did not question the sincerity of the appellants' beliefs, it held that the respondent's policies and regulations were not inconsistent with and not in contravention of Articles 20, 29(1) (c), 30, and 37 of Uganda's Constitution as they pertained to the appellants.

LET CHURCH AND STATE HELP ONE ANOTHER IN HARMONY

God himself made and established these two authorities and commands all people to obey both powers. Doing this God did not intend to embarrass His creatures by commanding obedience to two rulers. It is true that both authorities, church (religion) and state, govern the same people, but they can do this in harmony: indeed, it is their duty to do so. On this point, Pope Leo XIII writes: "Each of these two powers has authority over the same subjects, and as it might come to pass that one and the same thing might belong to the jurisdiction of both, therefore God, who foresees all things, and is the Author of these two powers, has marked out the course of each in right connection with the others." If each authority follows the order set up by God, there is no trouble whatsoever.

HARMONIZATION OF THE CHURCH AND STATE

God himself made and established these two authorities and commands all people to obey both powers. Doing this God did not intend to embarrass His creatures by commanding obedience to two rulers. It is true that both authorities, church (religion) and state, govern the same people, but they can do this in harmony: indeed, it is their duty to do so. On this point, Pope Leo XIII writes: "Each of these two powers has authority over the same subjects, and as it might come to pass that one and the same thing might belong to the jurisdiction of both, therefore God, who foresees all things, and is the Author of these two powers, has marked out the course of each in right connection with the others." If each authority follows the order set up by God, there is no trouble whatsoever.

CHAPTER SIXTEEN

NOT A MERE CHANGE OF ARMS BUT A FUNDUMENTAL CHANGE A REALITY OR MYTH

THE EXECUTIVE BEFORE 1986:

Under the 1962 Constitution, Executive authority was split between the Prime Minister and the President. The latter was also the head of state and Commander in-Chief of the Armed Forces. The Constitution provided for the establishment of the offices of the President and Vice President as well as the procedure for electing persons to these offices.[1380] Article 61 further provided, among others, that "the Executive authority of Uganda shall vest in the President and shall be exercised in accordance with the provisions of this Constitution."[1381]

Article 77 provided thus: "The Executive authority of Uganda shall extend to the maintenance and execution of this Constitution (other than Schedules 1, 2, 3, 4 and 5 of the Constitution) and to all matters with respect to which Parliament has for the time being power to make laws." On the other hand, Article 62 established the Office of Prime Minister to be appointed by the President[1382] and "other offices of Minister of the Government of Uganda as may be established by the President, acting in accordance with the advice of the Prime Minister."[1383]

The 1967 Constitution resulted into the final dissolution of the 1962 constitutional dispensation by creating a central authority of government founded on an Executive President. The Office of Prime Minister was abolished and the President became the head of state, head of government and Commander-in-Chief of the armed forces.[1384]Under the constitution, the President had unlimited powers to appoint and dismiss constitutional and many other government officers.[1385] He therefore had limitless powers to create and appoint new Cabinet Ministers as well as other positions.

[1380]Constitution of Uganda, 1962; Articles 34, 35 and 36
[1381]The Constitution of Uganda, 1962, Article 61 (1). The 1962 Constitution also made specific provisions regarding the exercise of Executive authority in Buganda and other federal states. See Article 71 (2), (3) & (4).
[1382]Although the Prime Minister was to be appointed by the President, Article 36(2) provided, inter alia, that the Prime Minister could move a resolution for the removal of the President by the National Assembly.
[1383]Article 62(2);this is one of the longest Articles of the 1962 Constitution and in fact represented the basis of the 1966 constitutional crisis.
[1384]Republic of Uganda (1967);the Constitution of the Republic of Uganda, 1967, Revised Edition 1990. Article 24
[1385]Republic of Uganda (1967);the Constitution of the Republic of Uganda, 1967, Revised Edition 1990. Article 66

However, as discussed later in this paper, it is important to note that Milton Obote did not use those powers to create a bloated Cabinet. The 1971 military coup by Idi Amin against President Obote changed the 1967 Constitutional dispensation in dramatic ways. By Legal Notice No. 1 of 1971, Idi Amin suspended chapters IV and V of the 1967 Constitution regarding Executive and legislative powers. All powers, privileges, functions and prerogatives enjoyed by the President under the 1967 Constitution were concentrated in the President as Idi Amin became Commander-in-Chief and assumed all Executive and legislative authority in the country.

As such, Amin had powers to appoint any number of cabinet ministers as he wished. Amin's first cabinet was made up of 18 Ministers.[1386] The idea of a Defense Council which could have increased the size of the Executive was never implemented. From the time Amin was overthrown in April 1979 to the general elections in December 1980, Uganda had a succession of short-lived governments. Yusuf Kironde Lule, who was the Chairman of the Uganda National Liberation Front, assumed the presidency on April 12, 1979. Under the Uganda National Liberation Front government, Executive Authority was established under Legal Notice No. 1 of 1979 which nullified Legal Notice No.1 of 1971, suspended parts IV and V of the 1967 Constitution and vested executive powers in the President.

The Instrument also empowered the President to appoint Cabinet Ministers in consultation with the National Consultative Council which was the legislative organ of the Uganda National Liberation Front government.[1387] In a space of two months after his swearing in, the National Consultative Council removed Lule and replaced him with Godfrey Lukongwa Binaisa. However, the Constitutional Instruments constituting the Executive Arm of the government did not change. In May 1980, Binaisa's government was overthrown by the Military Commission of the Uganda National Liberation Front government led by Paulo Muwanga.

The Military Commission collectively exercised the powers of head of government under Muwanga's Chairmanship. A Presidential Commission composed of two high-ranking Judges, one from the High Court and the other from the Court of Appeal, and a senior civil servant was appointed to act as the head of state with full powers and privileges of the President as provided for under the 1967 Constitution.[1388] In reality, Executive powers rested with the Military Commission and its Chairman. The Commission had powers to appoint Ministers and Deputy Ministers who

[1386]Data as at September 1971.

[1387]Yusuf Lule was removed from power by the NCC after a conflict over the powers regarding the appointment of ministers. See Museveni, Y.K (1997). Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda; Macmillan Publishers Ltd, London and Basingstoke;Pg. 110.

[1388]The three Commissioners were: Saulo Musoke, Polycarp Nyamuchoncho and Yoweri Hunter Wacha-Olwol.

functioned under its direction.[1389] In December 1980, Uganda had its first Presidential and Parliamentary Elections since Independence. The Elections, whose legitimacy was contested by the Uganda Patriotic Movement, were won by the Uganda People's Congress and resulted into what is now commonly referred to as the Obote II Government.[1390] With the exception of the appointment of a non-Executive Prime Minister, the Executive arm of the government functioned under the 1967 Constitution.

As such, the President had powers to appoint all Cabinet Ministers, Deputy Ministers as well as other Public Officers. In the immediate period after the overthrow of the Obote II Government and before the taking over of power by the National Resistance Army/Movement of Yoweri Museveni, the composition of the Executive was based on the 1967 Constitution and the Nairobi Peace Accord.[1391] For its part, the Nairobi Peace Accord provided for the establishment of The Military Council made up of the different fighting factions.[1392]

Article 4 of the Agreement vested Supreme Executive and Legislative Authority in the Military Council. The Nairobi Peace Accord also provided for the Head of State to exercise the Legislative and Executive Powers of the Council "in exceptional circumstances" where such circumstances were determined by a two thirds majority vote of the Council.[1393]The Accord did not contain any specific provisions limiting specific appointments to key positions within the Executive. In any case, the Military Council never became functional as the National Resistance Army never took up its positions and, pushed its fight towards Kampala finally overthrowing Tito Okello's military junta on January 26, 1986.

Under the National Resistance Movement Government as regards the **"Ethnicity and the Size of the Executive"** It is important to recognize from the outset that a discussion on the role of ethnicity in constituting government under the National Resistance Movement administration, especially at the Executive level, can be a highly contested and even controversial matter. From its founding documents, President Museveni as the head and chief ideologue of the National Resistance Movement declared the organization's mission to work towards national unity and chastised previous leaders for using tribalism as a way of governing the country. However, over the last

[1389]See Ofcansky, T. (1996). Uganda: Tarnished Pearl of Africa. Westview Press. Boulder, Colorado. Pg.39-58

[1390]For the full results of the December 1980 elections, see Commonwealth Secretariat (1980). Report of the Commonwealth Observer Group; Commonwealth Secretariat; London;

[1391]See Republic of Kenya (1985). The Uganda Peace Talks Agreement for the Restoration of Peace to the Sovereign State of the Republic of Uganda; Nairobi, 1985

[1392]The Council was to be made up of a Head of State/Chairman, UNLA (7 members), NRA (7 members), UFM (1 member), FEDEMU (2 members), FUNA (1 member) and UNRF (1 member). Ibid, Article 2.

[1393]Supra, note 32. Article 3(3) & (5) of the Agreement made provision for General Tito Okello Lutwa to become the Head of State and the Chairman of the Military Commission and Yoweri Museveni the Vice Chairman of the Military Commission by virtue of their positions as head of the junta and head of the rebel NRM/A respectively at the time.

decade, ethnic considerations have emerged to play a dominant role in the way the Executive under the National Resistance Movement is constituted. Ethnic consideration, which requires that key tribal constituencies be given Ministerial positions, is perhaps the single most important reason that accounts for the increasing size of the cabinet. As a result, the role played by tribalism in constituting the Executive, the associated costs and the governance implications become important matters of public policy and debate.

From the outset, it is important to credit the National Resistance Movement government in general, and President Museveni in particular, for articulating very clear positions and taking specific actions to mitigate the scourge of tribalism in Ugandan politics during the first 10 years of coming to power. Indeed, at a theoretical level, the National Resistance Movement declared early enough its offensive against sectarianism. In its Ten Point Programme, it stated thus: "Politics in Uganda has been manipulated by past politicians along sectarian, religious and tribal cleavages.

The National Resistance Movement asks: What enmity can there be between a Muganda peasant and a Lango peasant? Or between a Christian peasant and Muslim peasant;[1394]On his part, while declaring a "fundamental change" in his inaugural swearing-in address on January 29, 1986, President Museveni stated: "Past regimes have used sectarianism to divide people along religious and tribal lines. But why should religion become a political matter? Religious matters are between you and your God: politics is about the provision of roads, water, drugs in hospitals, and schools for children.

Don't you see that people who divide you are only using you for their own selfish interest? Our Movement is strong because it has solved the problem of tribal and religious divisions."[1395]In his speech at the first anniversary of the National Resistance Movement administration in 1987, Museveni declared that "The National Resistance Movement is totally opposed to tribalism …"[1396]

While castigating the use of tribalism to achieve political objectives by the past leaders, Museveni thus said: "Take the road from here, Parliament Building, to Republic House.

This road is so bad that if a pregnant woman travels on it, I am sure she will have a miscarriage! Now, does that road harm only Catholics and spare Protestants? Is it a bad road only for Muslims and not Christians, or for Acholis and not for Baganda? That road is bad and it's bad for everyone. All the users of that road should have one common aspiration: to have it repaired. Don't you see that people who divide you are only using you for their own selfish interest – interests not

[1394]NRM Ten Point Programme – reproduced in Kabwegyere, T. B. (2000). People's Choice, People's Power. Fountain Publishers; Kampala; Appendix 1 at pp. 157-164.

[1395]Museveni, Y. (1992). What is Africa's Problem? Speeches and Writings on Africa by Yoweri Kaguta Museveni; NRM Publications; Kampala; pg. 21-25

[1396]Ibid, pg. 41; January 26, 1986.

connected with that road? They are simply opportunists who have no Programme and all they do is work on cheap platforms of division because they have nothing constructive to offer."The striking thing about this political narrative on tribalism is that similar declaratory statements were made by Milton Obote and Idi Amin.[1397] Indeed, the key question is whether the practice of the National Resistance Movement government under President Museveni has been different from that of the previous regimes and Presidents on the issues of tribalism and religion and their influence on the composition of the Executive.

Clearly, like the failed attempts by the Uganda People's Congress Government in the late 1960s, the National Resistance Movement made positive steps to tone down on the ethnic polarization that had been creeping into Uganda's politics for decades. Two major efforts may be cited as part of the evidence. First, during its first five years in power, the National Resistance Movement sought to reinforce national unity by bringing the various contending political forces into the government. By 1989, major political forces such as the Uganda People's Congress and the Democratic Party had been brought into cabinet hence accounting for the first major increase in the size of the Executive.

The number of full Ministers increased from 25 in February 1988 to 34 in 1989, State Ministers from 13 to 16 while Deputy Ministers increased from 25 to 27. To the credit of the National Resistance Movement Government, the expansion of the Cabinet at the time was undertaken more as a means of accommodating major political and fighting groups in the political process rather than the direct appeasement of tribal and religious constituencies. As early as 1990, the National Resistance Movement reported progress on the issue of national unity citing, among others, the creation of a broad-based government integrating all the political parties and military factions, establishing regional political schools for the army and civilians, enacting the anti-sectarianism legislation and the process of formulating a new constitution.[1398]

However, as the contestation for political power increased around 1990, the narratives of political accommodation began to expand to include tribal accommodation. In 1993, the Traditional Rulers (Restitution of Assets and Properties) Act was enacted guaranteeing the return of properties of the former Buganda Kingdom.[1399] This is in spite of the fact that there are some accounts suggesting that Buganda Kingdom was fully paid compensation when its properties were expropriated in 1966.[1400]Indeed, it is tenable to argue that the enactment of this legislation was a turning point in

[1397]See supra, note 39 and 42

[1398]NRM Achievements 1986-1990. NRM Secretariat; Kampala;seealso, NRM Secretariat (Undated); Political Programme of NRM: Two Years of Action. NRM Secretariat; Kampala; pg. 25;

[1399]Republic of Uganda (2000); Traditional Rulers (Restitution of Assets and Properties) Act, Cap 247, Laws of the Republic of Uganda, Revised Edition, 2000. Also see Traditional Rulers (Restitution of Assets and Properties) Act 1993.

[1400]In his account of the compensation payments, Ken Davey notes as follows: "… the various assets taken over by the

the political narrative of the National Resistance Movement and President Museveni regarding tribal politics in the composition of the Executive and other areas of political appointment. By circumventing the constitution-making process, Buganda emerged as the center of ethnic construction in the post-1986 Ugandan politics. Like Idi Amin who attempted to exploit the Baganda discontent with Obote, President Museveni sought to build an alliance with the Buganda monarchy and made appeasement of the Baganda a central element in subsequent political strategy and calculation.

During the Constituent Assembly debate, the discussions on the composition of the Executive and in particular the cabinet focused more on creating an efficient and cost-effective government. The Constituent Assembly sought to create constitutional restraint to ensure that subsequent Presidents did not abuse their authority to appoint a huge cabinet that could compromise efficiency while placing an undue burden on the taxpayer. By the time of the first Elections under the 1995 Constitution, the political landscape had already shifted.

After the elections, President Museveni was looking to building his own tribal and religious alliances and saw Executive appointments as one of the key platforms for executing this political strategy. Like Obote and Amin before him, tribal alliances were seen as an important vehicle for mobilizing political loyalty. Unlike the first 10 years of his Presidency where he sought to create national unity by bringing the political opposition into the political process, in the post-1996 dispensation, President Museveni sought to mobilize tribal and religious interests as a bulwark for political consolidation.

In effect, securing the alliances of various tribal and religious groups rather than the political opposition has become the cornerstone for a new political broad-baseness and hence made an oversize Executive inevitable.

THE FUNDAMENTAL CHANGE SPEECH (a mere change of guards)

On the 29th of January 1986, Mr. Museveni arrived in a gleaming black Mercedez Benz dressed in jangle military fatigues and polished combat boots for his swearing in after a success in a five-year guerilla war against the government of Tito Okello. He had seized power after commanding the National Resistance Army (NRA) in a rebellion against the military regime that succeeded Obote.

Uganda Government, including the Bulange and the Lubiri, were valued at market worth, and payment made to a trust account from which liabilities were met, including Buganda Government debts and retirement benefits for redundant staff. The balance was distributed to the four successor district administrations in ratio to population, the cheques being handed over personally by the Minister of Regional Administration in front of TV cameras and large, ebullient crowds. The sums were substantial enough to fund the construction of new headquarters buildings and staff housing in each district." In Brown, Douglas and Brown, Marcelle (Eds.), 1996; Looking Back at the Uganda Protectorate: Recollections of District Officers; Douglas Brown; Dalkeith, Western Australia;Pg. 332

He finally captured the capital city Kampala in January 1986. The ceremony witnessed by thousands of jubilant Ugandans was held on the steps of the Parliament building where some of the fiercest fighting erupted in the battle for Kampala.[1401]

The world went silent to hear the words of the country's war lord. Indeed, most of the Ugandans were jubilant. Museveni had saved them from the hands of the power hungry and blood stained men of Obote and Tito Okello and perhaps his existence was hope for many. In his speech, Museveni delivered a fundamental change message "No one should think that what is happening today is a mere change of guards. It is a fundamental change in the politics of our country. In Africa, we have seen so many changes that change, as such, is nothing short of mere turmoil"[1402]

He continued and remarked that while they could have wrong elements in the National Resistance Movement; their objective was primarily to improve the country's politics. He majorly focused on building a disciplined security force, unity and regional co-operation that would boost market for home made products. He also hinged his reign on restoring democratic practices and ensuring security. [1403]These were the hidden objectives in the fundamental speech.

This speech raised hope for many Ugandans who had experienced nasty events in the post-independence regimes and perhaps were tired of such crisis. It was because Uganda's post-independence period just like other African states was afflicted by authoritarian rule which had led to continuous crisises.[1404] In their desperate search for remedies, many of the natives found his speech a source of light for the future. Many praised God for blessing them with such a leader. Indeed, it created a lot of expectations from the war lord which he was to achieve through his movement system known as NRM.

William Muhumuza remarks that Museveni's promise of fundamental change took cognizance of the fact that Ugandans had lost trust in the state and subsequently denied it legitimacy.[1405]His major option was first to restore hope among the many reason being at the time of the war, his young government lacked support especially among the regions where it didn't fight from. The fundamental change he remarked was to be achieved through the "**Ten Points Programme of NRA."** These were to be used to achieve the populist reforms as shall be discussed later.

THE NRM TEN POINTS PROGRAM

The ten points programme was written during the guerilla campaign to assist them once in power.

[1401] Micheal Ntezza. "Musevenis speech on Fundamental change" 1986 . Chimprepoints. Jan 26th 2015.
[1402] Mr. Museveni in 1986 at the steps of Parliament during his swearing in ceremony.
[1403] Daily Monitor. Key Issues in Musevenis past five years inaugural speech by Patience Ahimbisibwe. Retrieved Jun 14th 2021.
[1404] Karugire (1980). Also see Karugire (1988).
[1405] William Muhumuza. "From Fundamental Change to No Change." NRM and Democratization in Uganda 2009.

These reflected the principles with which the NRA was to create a disciplined army, organize popular support through RCs and in particular to develop a coherent political and economic explanation of why the NRA was fighting against the Ugandan government. According to the guerilla fighters, Uganda's post-independence leaders greatly exacerbated the problems of economic distortion introduced by British colonial rule and the only solution to thus was through the ten points programme where they agreed that Uganda required a new political and economic strategy.

In other words, these were proposals for political programs that could form the basis for a national wide coalition of political and social forces that could usher a new and better future for the natives of Uganda drafted and formed by the National Resistance Council under of the National Resistance Movement together with the members of the High Command and other senior officers of NRA under the chairmanship of President Yoweri Kaguta Museveni.

The first was democracy. According to the fighters, this had to be organized at all levels from the villages created by the RCs up by elections to "people's committees" by elections to parliament and on the basis a decent standard of living in that the natives could resist the blandishment of unprincipled politicians. Democracy had been kept in darkness for a long period and perhaps it was as a result of the unconstitutional mans of accessing power that saw the country being in the hands of power thirst men that never wished to have political competition.

The second was security. Ugandans had undergone and lived under insecurity therefore there was need to improve security. The government of Obote and Amin had killed over 800000 people in the period after independence. The natives were apprehensive about security remembering the tyrannical rule of the pre-colonial days. This was to be achieved through building of a strong army and police to oversee security of Uganda.

Consolidation of national unity and elimination of all forms of sectarianism. Uganda had been dominated by sectarianism which was based on tribe and religion. This was witnessed by the various political parties formed like DP which was for the Catholics, UPC mainly for Protestants outside Buganda and KY for Protestants in Buganda. Besides, in the army, there were opportunistic factions merging according to opportunistic politics and manipulation of the day. Therefore, there was need to ensure national unity once in power by NRA.

Defending and consolidation of national independence. Uganda acquired its independence on 9th October 1962 from the British. It being independent, there was need to protect this independence. This independence must be viewed from the circumscribed boundaries. That is being free from any order or influence from other countries. But this seems to have failed after independence.

In 1971, Amin staged a coup against Obote and some leading circles in the west lauded him with

eulogies about his move. It was because Obote had gone socialist. The socialist continued to influence Obote's decisions to give him a second chance. When Amin had a misunderstanding with the imperialists, he decided to turn to the Soviet-Libyan camp. This was not justifying about independence. There was need to protect it by the NRA.

Building an independent, integrated and self-sustaining national economy. This was probably the most important point of the whole program. Uganda was economically backward at the time of independence. A lot of resources were flowing from the country to the outside world in from of cheap raw agricultural materials in return for consumer products that were highly priced. The fundamental solution developed by NRA was to make efforts to build an independent integrated, self-sustaining economy.

This meant a shift from the pseudo modern export-import sector that exports cheap raw materials and imports mainly consumer goods at exorbitant prices. This was the target of the NRA fighters by diversifying agriculture, building industries and construction of basic infrastructures to aid industrialization.

Restoration and improvement of social services and the rehabilitation of the war ravaged areas. The UNLF that overthrew the government of Amin and many other civil wars had left many people without the health incentives. There was no clean water, hygienic housing, literary adequate levels of calories or protein intake and doctors to treat the natives. The NRA therefore aimed at sensitizing the masses about health and sanitization, providing essential social services to everybody. Elimination of diseases like malaria, syphilis, worms, gastro-enteritis and others. This was to be through the creation of the ministry of health, establishment of health centers, and construction of schools to reduce on the literacy skills once they acquired power.

Elimination of corruption and misuse of power. It was noted by NRA that perhaps one of the dilemmas in Africa is corruption and misuse of power to enrich personal interests. This had been the reason for the law development levels not only in Uganda but Africa. In the urge to make Uganda a unique one, they were to embark on creation of the Inspectorate of Government (IGG) to inspect the operation of different state agencies and check on corruption.

A lot of funds had been swindled by Obote and Amin. They had misused their power to enrich their selves. The best example can be traced from the gold scandal of Obote and Amin where they amassed a lot of wealth.

Redressing errors that have resulted into the dislocation of sections of the population and improvement of others. This was to be under the three points raised which included;

1) People that have been displaced from their lands by illegal land grabbers of erroneously conceived development projects.

2) The long suffering karamajong people.
3) The salaried people that had been impoverished by inflation of the 70s and 80s were to be dealt with once NRA came to power.

Co-operation with other African countries in defending human and democratic rights of our brothers in other parts of Africa. One of the weaknesses of Africa is its balkanization into small and sometimes uneconomic units in that you hardly find an individual African country with resources that would match those of USA, USSR, Canada or South Africa. There was need to join and make strong economic integrations for NRA saw them as a basis for many opportunities to Uganda such as employment opportunities, market and improved relationships to weaken white influence and dominance.

Following an economic strategy of mixed economy. In order to achieve the above mentioned ideas, NRA was to follow an economic strategy of mixed economy which means allowing majority of economic activities being carried out by private entrepreneurs, small medium and even big –with the state owning some projects. This could perhaps allow in private investors to increase investment as a way of aiding government to raise revenue, create employment and improve on social services. This was welcomed by majority of the fighters of NRA.

Therefore, the fundamental change was to be achieved through putting the above ideas into operative. Indeed, some have been achieved by the regime and others have failed. To make it worse even those that were achieved are being tarnished due to over stay in power by the incumbent and policies developed to favor personal interests.

Resistance Councils (later Local Councils)

After his swearing in, Museveni embarked on a number of populist reforms as enshrined in the NRM ten points programme. One can argue that one of the fundamental policies was the grassroots structure known as the participant structure (Resistance Councils) (RCs). This was intended to motivate and encourage participation of the people in administration.

These Resistance Councils were hierarchical in nature ranking from RC5, RC4, RC3, RC2 and RC1. These were later turned into local councils (LCs) in 1993. This saw RC1 forming the village Council, Parish Council (RC2), Sub County Council (RC3), County Council (RC4) and District Council (RC5). These were later to influence democratic ideas in Uganda as well as rebuilding trust in the young NRM government. They were ideally a gear towards the achievement of a fundamental change.

The critical point of observance is that members of the village councils were directly elected by

citizens at the grassroots levels while those in other councils indirectly elected.[1406]

It reduced doubt and attracted applause from the international community that praised Museveni and his war comrades. He was at one time ranked among the new breed of African leaders by US Secretary of State Madeline Albright.[1407] The adoption of RCs increased a reflection of hope for the future. They were a mirror indeed and helped to rebuild the administrative structure of the collapsed state as they provided democratic climate for the citizens to actively participate in public decision making.[1408]

The other populist reform that followed this was the adoption of decentralization of power to local governments, election of people's representatives to the national legislature, affirmative action for women and the other categories of marginalized groups. These have indeed remained in existence being protected and availed to them by the Constitution.[1409]This was a good start for the government indeed the journey for the fundamental change had started to accelerate. No one expected or at one time dreamt of betrayal by the incumbent not until the 2000s when he changed the modus operendi.

THE BIRTH OF NATIONAL RESISTANCE MOVEMENT (NRM)

The center for the strongest party in Uganda is underpinned on the success of a five-year guerrilla war fair that was lodged in 1981. Indeed it was after Yoweri Museveni taking over power in 1986 when the National Resistance Army guerillas reached Uganda's capital Kampala after a five year civil war.[1410]The party started its officially in 1996 when its chairman Yoweri Museveni won the 1996 general elections. It has held itself in power since the up to date. During his swearing in ceremony at Parliament on 29th January 1986, Gen Yoweri Museveni promised Ugandans a fundamental change "No one should think that what is happening today is a mere change of guards; it is a fundamental change in the politics of our country."[1411] This raised hope for many Ugandans who had experienced the past nasty events and perhaps were tired of crisis's.

This was because Uganda's post-Independence period like in other African countries or states was afflicted by authoritarian rule which had led to continuous crisis's[1412]. In the desperate search for remedies, many of the natives had found Museveni ideologies as the best canopy against such

[1406] Villadsen and Lubanga (1996).
[1407] William Muhumuza. From Fundamental Change to No Change. NRM and Democratization in Uganda 2009.
[1408] Ddungu (1989)
[1409] Article 32,33 and 34 of The 1995 Constitution of the Republic of Uganda.
[1410]Giovanni.M.Carbone. Populism Visits Africa: The case of Yoweri and No party Democracy in Uganda. New Dheli, 13-17 December 2004.
[1411] Gen Yoweri Museveni Kaguta 1997.
[1412]Karugire, Samwiri. R (1980).A Political History of Uganda. London: Heinemann. Also see Karugire, Samwiri.(1988). Roots of Instability in Uganda.Kampala Fountain Publishers.

events in the success of the civil. Indeed, it created a lot of expectations from the war lord which he was to achieve through his movement party known as NRM/NRA. Because of the nasty history from the period of 1966-1986 where the country had experienced unprecedented authoritarian rule characterized by institutional decay and political insecurity.[1413] Museveni found it wise to give hope to the peace desiring populace. William Muhumuza remarks that Museveni's promise of fundamental change took cognizance of the fact that Ugandans had lost trust in the state and subsequently denied it legitimacy.[1414]

His major option was first to restore hope among the many reason being at the time of the war, his young government lacked support. Perhaps, this can be seen from the 1980 elections which he claimed had been rigged by Obote's Uganda People's Congress (UPC).

During the elections, his Uganda Patriotic Movement (UPM) had only acquired one seat in Parliament and Democratic Party (DP) that had won the elections was deprived of its success by Obote through duress posed on the electoral chairman. Truth be told, his political party was young when he lodged the 1981 guerilla war. Few people understood him from a political perspective. It's this reason why he promised a fundamental change from the onset in order to win the support for his young government through hope given to the natives.

THE FISRT TEN YEARS OF NRA/NRM "THE REFORM PERIOD"

Majority of the guerilla war lords had been witnesses of the post-independence administration of Uganda. They had been political exiles and others victims of the harsh regimes. To manifest their desire for a safe and peaceful Uganda as a way of fulfilling their fundamental change speech, Museveni through his NRA political wing NRM embarked on a number of populist reforms as outlined in the NRM Ten Points Programme. The ten points programme had been written by the guerilla war lords in 1981 to be guidance to them once in power.[1415]

One can argue that one of the fundamental policies was the grassroots structure known as the participant grassroots structure that was known as the **Resistance Councils (RCs).** This was intended to motivate and encourage participation of the people in administration. The Resistance Councils were hierarchical in nature ranking from RC5, RC4, RC3, RC2 and RC1. These resistance councils were later turned into **Local Councils (LCs)** in 1993.This saw RC1 becoming Village Council, Parish Council (RC2), Sub County Council (RC3), County Council (RC4) and District Council (RC5). These were later to influence democratic ideas in Uganda as well as rebuilding trust

[1413]Wiebe, Paul D. & Dodge Cole P. eds. (1987), Beyond Crisis: Development issues in Uganda Kampala: Makerere Institute of Social Research.
[1414] William Muhumuza. From Fundamental Change to No Change: The NRM and Democratization in Uganda 2009
[1415] Watson (994)

in the young NRM government.

The critical point of observance is that members of the village councils were directly elected by citizens at the grassroots levels while those in other councils were indirectly elected.[1416]This was a successive move by the NRM government .It reduced doubt and attracted approuse from the international community that praised Museveni. He was at one time ranked among the "new breed" of African leaders and the country considered beacon of Hope in Africa by US Secretary of State, Medaline Albright.[1417]Ddungu remarks that the adoption of the RCs helped to rebuild the administrative structure of the collapsed state[1418] as they provided democratic climate for the citizens to effectively participate in public decision making a thing that they had not gotten used to.

Indeed it was a cheerful moment in the political scene of a young nation. Other populist reforms adopted included the decentralization of power to local governments, election of people's representatives to the national legislature, affirmative action for women and the other categories of marginalized groups. It was followed by allowing civil societies to organize freely and the most outstanding was the writing of a new Constitution following the creation of the Odoki Commission. The idea of drafting a constitution was made easier following the organization created at the grassroots.

The Constitution making process was commenced in 1989 at the time unsurpassed in Africa in terms of civic participation from citizens, institutions and local councils but as I shall later discuss, by the adoption of the constitution in 1995, the process had been manipulated by NRM to entrench its leaders to hold on power. This can be traced in the Fact that the president was invested with significant powers of appointment.[1419]On the side of local administration, the whole setup was shut or settled through the 1993 Local Government Statute which was arguably an outstanding promising reform.[1420]

The wide spread atrocities that were committed during Obote's regime and Idi Amin represented traumatic past which the leaders of NRM and Uganda at large wished to avoid repeating which influenced the government to adopt Institutional reforms that were majorly fostered towards the observance of human rights. In May 1986 after he had taken an oath of allegiance, the NRM government established a commission of inquiry into human rights violations that was charged with investigating the human rights record of all governments that it had replaced since independence

[1416]Villadsen.S &Lubanga Francis.eds (996). Democratic Decentralisation in Uganda: A New Approach to Local Governance Kampala Fountain Publishers.
[1417]From Fundamental change to No change: NRM and Democratisation in Uganda 2009.
[1418] See Ddungu, Expedit (1989). Popular Forms and the Question of Democracy: The case of Resistance Councils in Uganda. Working Paper 4 Kampala: Center for Basic Research.
[1419] ARI Interview with Nicholas Opiyo, 29th January 2016
[1420] African Research Institute. Steady Progress? 30 years of Museveni and NRM in Uganda 5th Feb 2016.

until the seizure of power by NRM government.

The commission was to make recommendations on the clear observance of human rights. Although it lacked adequate funding, it was able to carry out extensive hearings throughout Uganda and increased on the rate of human right rights awareness in Uganda. Among its recommendations was the appropriate punishments for human rights violators, the inclusion of human rights culture and education in the general curriculum and the training of army and security forces as well as the establishment of permanent human rights commission.[1421]

Following it recommendations, the Uganda Human Rights Commission was to be established. Its establishment was amplified by Odoki Constitutional Commission that defined the proposed functions and powers in significant detail.[1422] Its recommendations were later adopted in the 1995 Constitution of Uganda and implemented through the Uganda Human Rights Act of 1997.[1423] The next question was on the appropriate administration the Commission. This question was answered by the NRM government through its chairman and president Yoweri Kaguta who appointed Margret Ssekagya and seven members to chair and head as well as overseeing the effective observance of Human rights in Uganda to break away from the previous government as a gear towards achieving the fundamental change a promise by the incumbent to the citizens.

Unknown to many. This was to be overturned by the regime it's self in trying to pursue its interests. Indeed, the Human rights were observed in the initial administration of NRM government. Justice Odoki once remarked that "there is a great improvement in the general human rights situation in Uganda. You no longer see restrictions on basic freedoms and a state of anarchy in this country. But we underplay political freedoms in light of these advances.[1424]

The semblance of legal democratic reforms created an impression that perhaps Uganda was taking a right path to democratic rule. Indeed during their first ten years, the NRM leadership or government appreciated and embraced participatory politics and divergent political views which are exemplified from Museveni's first cabinet which was all embracing and broad based. His government sorted out the issue of sectarianism and divisions that had been created in the initial stages of after independence. He drew members from NRM, traditional political parties and other shades of political life. It tried to accommodate Uganda's religious leaders, regional and ethnic social diversities.

His major ambition for these reforms was to unify and stabilize the country especially after many

[1421]Commission of inquiry into violation of Human Rights Final Report.Entebbe UPPC. 1993.

[1422]Uganda Constitutional Commission. Report of the Uganda Constitutional Commission (Entebbe: UPPC, 1993. PP185-188)

[1423] The 1995 Constitution , Articles 51-88. See also Uganda Human Rights Commission Act 1997.

[1424] Human Rights Watch Interview with Justice Benjamin Odoki, chair Constitutional Commisssion, Kampala April 4th, 1998.

years of political dislocation. One can easily assert that the first ten years of NRM were its great achievements in Uganda. This is evidenced by the variety of reforms the government opted for in trying to set a platform for the long awaited ideology of democracy in Uganda. Many of the reforms adopted by the regime were later to be undermined and destroyed by its administration in a bid to hang on power for a long period viewing its self as the only capable political movement to administer Uganda. It is therefore worth noting that the grassroots participatory structure is the reason for the strength of NRM regime especially in the rural areas. Though this is slowly reducing on the ground that majority of the population in Uganda is a youth population that desires change.

REASONS FOR NRM REFORMS

Museveni's desire to pursue populist reforms from the aftermath of his swearing in can be attributed to a number of factors which ought to be short run and long run in nature.

First and foremost, his democratization reforms and efforts are embedded in his need for international recognition and support. He had a view that there was need to attract donor support in order to fish the economy from the long and deep economic and devastated status and condition.[1425] African countries had been filled with civil unrests, political crisis and heavy misunderstandings to the effect that even those that were stable had been painted with darkness implying no hope for Africa. Hence Museveni had to demonstrate to both the local people and international community that his regime had democratic credentials.

Although Museveni had pursued the Marxist ideas during his studies and had been entrenched much in Marxist ideas especially having bias toward the world Bank and IMF policies, he had to abandon his position by May 1987 and embraced western sponsored market and democratic reforms.[1426] Indeed it was necessary for him to take a move for he had inherited a failed state and shattered economy that needed successful reconstruction which required heavy donor support.

Perhaps, the other factor is rooted in his desire to weaken the traditional political parties in Uganda. Majority of Ugandans before and after independence had subscribed to two political parties that is UPC and DP. His new National Resistance Movement (NRM) was not recognized at all especially at the grassroots levels which proved a threat to the party's holding of power. In his wisdom, he found it wise that for NRM to penetrate the political scene and win mass support, he had to adopt the populist reforms that could attract grassroots support. Besides, two traditional parties had been formed on a tribal basis which made them sectarian. There was need to unite people at all levels and introduce them to new ideas like democratization, women emancipation and others as an

[1425]BayertJean-Francois (1993).The State in Africa: The Politics of Belly .London: Longman.
[1426]William Muhumuza. From Fundamental change to No Change.The NRM and Democratization in Uganda.

engine to rise power support for NRM.

This was to be achieved through RCs which were popular participatory and non-sectarian. These RCs attracted tremendous popular support having been witnessed as a uniting forum for a nation torn by many ears of social divisions and strife.

Lastly is the fact that NRM had been able to capture power because of its popular appeal to the rural areas where the guerilla fighters stayed or habited. Indeed, the NRA had support among the masses in areas it had libereated from Obotes forces. His ideas or populist reforms had worked out well in such liberated centers. This acted as a millor for him to adopt such for the general Uganda. These people had been organized into RCs which gave material and political support to NRA. Others reforms such as affirmative action policy also won NRM support from the women, youth and the disabled. It's this that attracted him to adopt such policies throughout Uganda. His plan was indeed a success.

It improved his image as a liberator and the father of the new Uganda. Throughout the country, he was being praised as the true definition of a leader. It won international recognition and support.

That said, it is worth noting that Museveni did not implement such populist reforms because he subscribed to democratic ethos but because he desired to hang himself on power. Uganda did not undergo an election from 1986 not until 1996 when the general elections were organized. By this time, he had spread the NRM ideologies in all points of the economy. It was indeed hard for him to lose the election because of these reforms that had manifested a sign of success in him.

MULTI-PARTYISM (A QUEST FOR NEW POLITICAL LIFE)

Political parties play an essential role in the functioning of every modern democracy and consensus almost exists that the concept of democracy is indivisibly linked to the concept of multi partyism in which effective participation and competition should be guaranteed. [1427] According to Sartori, they perform several roles critical to the functioning of a democracy as they are the central means to aggregate interests and thereby translate "mass preferences into public policy"[1428] Therefore it is now settled that in democratically restored nations, its political parties that provide fertile ground upon which participation of individual citizens in the political arenas is assured.[1429]

Political parties in Uganda were adopted during the colonial era by the elite natives at the time though interesting to note is that they were natured on a religious and tribalistic basis which made

[1427]Kuenzi, Lambright (2005). The State of Multi party democracy in Uganda Konrad Adenauer, ISBN.

[1428]. Sartori, Giovanni, Ne présidentialisme, ne palamentarismo, in Juan J. Linz and Arturo Valenzuela (eds) II fallimentodelpesidenzialism, Bologna : II Mulino,1995, pp81-200

[1429]See Perry .G,MoyorG 1994. "More Participation, More Democracy?" in Beetham, D (ed.) Defining and measuring Democracy, Sage Publication, London.

then sectarian in nature. But it must be credited that these earliest political parties had the spirit of championing people's interests. The earliest political organizations included the Uganda African Farmers Union whose primary concern among other things was to champion government policy particularly processing and marketing cash crops. Besides this there existed the Bataka Party which focused its interests on Buganda's land settlement. It had been formed by the Bataka to fight and protect their land interests.[1430]

In 1952, the Uganda National Congress was formed by Musaazi and became its first president. This party was mainly aimed at championing people's interests. However, interesting to note is that it was later to be a ground for the formation of Uganda People's Congress that later received the independence instruments in 1962. Indeed the misunderstandings between the UNC members caused a dislocation. This saw a section of the party merging with the Uganda Peoples Union a purportedly anti-Buganda political party whose main priority was to address the challenges of Buganda sub-nationalism and Buganda dominance in the independent Uganda.

The merging of the two parties led to the development and creation of Uganda People's Congress which was headed by the late Dr Apollo Milton Obote in 1960[1431]. The other political party to consider was the Democratic Party which was formed in 1954. This party was formed by the Catholic Baganda though it was mainly filled by students from Kings College Buddo. But because of its leader's neglect of some of the interests of Buganda, the Kabaka formed the Kabaka Yekka (KY) party to struggle for the interests of Buganda. Unknown to them, the alliance was soon to fail due to the tribalistic nature of two political parties and the region based formation of the parties.

These political parties remained in existence up to 1967 when they were finally banned by Dr Apollo Milton Obote. There is no doubt that the fact that these parties were Balkanized along regional, ethnic and religious lines was the rationale behind Obote halting their activities. The parties had made it difficult to achieve peace because of their anxiety to achieve the pursued interests.

When Idi Amin came to power in 197, he never had the urge to resurrect the spirits of the banned parties. Indeed he had been in Obote's government and had witnessed everything including the disastrous nature of the political parties. Besides, he was a militant who never wished to have competitive politics. His desire was to lead the country without opposition. This explains the reasoning behind the imprisonment of majority of the opposition leaders and those from the various areas that criticized his administration.

Even though in his initial stages released the political prisoners like Abu Mayanja, Grace Ibingira,

[1430]Kasozi ABK (1994). Social Violance in Uganda, Fountain Publishers, Kampala Monitor newspaper, Friday, January 2nd 2009.
[1431] Ibid

Benedicto Kiwanuka which was a step towards the observance of human rights, Prof Kanyeihamba asserts that after two years, the same people had been arrested and political persecutions had become worse. He suspended the political party activities through the political party decree number 14 of 1971.[1432]Indeed, no one had hope of witnessing democratic governance motivated by the multiparty system of politics in Uganda not until 1980 when the provisional government of Paul Muwanga allowed the parties to resume activities and participate in the 1980 general elections.

As mentioned earlier, political parties provide a linkage between government and its citizens as they present candidates for competitive elections as a manifestation of reforms and need to divert from the past experience, the provisional government organized elections based on political parties. The strong parties of UPC and DP were to compete strongly at all levels. But because of what and how Obote had treated the Baganda and acted during his reign, he had lost support at grassroots levels.

Many expected DP to win the 1980 general elections. Interesting to note is that DP won the elections but because of Obote's strength, he managed to coerce the electoral chairperson and manipulated the results declaring Obote the president of Uganda. This left many aggrieved and among these was the presidential candidate for UPM Yoweri Museveni who decided to wage a war against the Obote government for election rigging.

Perhaps it explains why he obtained a lot of support from the Baganda who had developed hatred for Obote basing on his nasty relationship with the kingdom. During this period, it was hard for political party activities to continue due to the civil or guerilla war that was lodged by Museveni in1981. It was not until the NRA took over power that the restoration of political parties was addressed by Museveni under the NRM government. Though it was hard to have them revived, the idea was finally achieved which has seen may new political parties rising to fame in the political arena such as Forum For Democratic Change (FDC), Federal Alliance, National Unity Platform (NUP) and others as will be discussed in the next chapter.

MULTI PARTYISM UNDER NRM GOVERNMENT

Oloka Onyango asserts that after taking over power, the National Resistance Movement (NRM) proclaimed an era of fundamental change based on a ten point's programme whose principles had been elaborated during the bush war. [1433]The president promised an interim period of four years for restructuring the system and creating democratic institutions and was able to initially base his rule on broad popular support. On the installation of democratic governance in Uganda in 1996, a lot of

[1432] Prof Kanyeihamba. G.W. Constitutional and Political History of Uganda.
[1433] Oloka Onyango

attention was placed on the nature and forms of political institutions that would construct a strong democratic government in the country.

Just like the previous years, on attaining political power in 1986, NRM placed a complete ban on the operation of political parties in Uganda and ended up adopting the no party political system of governance bringing about a coalition government comprising of officials from various political parties.[1434] Due to the fact that NRM government was in the restoration period of Uganda, reviving political parties would make it hard to rebuild the economy that had undergone a political dislocation, social and economic strife. The NRM government just embarked on resistance councils on the grassroots which were core in building up the NRM and core in winning it mass support.[1435]

Interesting to note is that these political parties were not completely banned but rather it was their political activities that were restrained or prohibited. The parties were allowed to stay in existence but worth to note is that they were not to hold meetings, carryout campaigns, rallies and were not to participate in elections. As already noted, this was justified by an interpretation of Uganda'spost-independence history as a spiral of violent conflicts prompted by ethnically based political parties.[1436]

This was to weaken the traditional political parties of UPC and DP which was to affect them upon revival of multipartyism. For one to contest for any office, it was through individual merit or running as an independent candidate and not rallying support basing on the political parties. Uganda ended up adopting the movement system as governing point for politics in Uganda. The question of adopting multipartyism still haunted the government and consideration was on how the state was to be after revival of the party system.

A movement Act was passed in 1997 that established country wide party like structures at different levels. But the no party thinking and the underlying notion of atomized or weekly organized politics affected the development of the new arrangement and the movement's political organization never functioned properly.

According to Muhamood Mamdan, while expanding its reach and inclusiveness, the movement evolved a very centralized and leadership oriented modus operendi that kept it heavily dependent upon its leader's personal charisma and patronage linkages. Museveni appeared to be scrupulously avoiding organization.[1437] With the process of elaboration of the new Constitution being delayed,

[1434]African Journal of Political Science and International Relations Vol. 4(3). Pp109-114; March 2010. Multi party politics dynamics in Ugnada by Kakuba Sultan Juma.
[1435]Hartmann (1999) 234
[1436]Giovanni M. Carbone, Developing Multi party Politics: Stability and Change in Ghana and Mozambique((November) 2003.
[1437] Comment made by MahmoodMamdani in 2002, quoted in GunnhildEriksen "from Opposition movement to governing party. An organizational analysis of the National Resistance Movement in Ugnada. Degree Dissertation

there was no option apart from extending the transitional period of the NRM regime and because of the uncertainties and constitutional Commission, the NRM decided to hold direct elections for a Constitutional Assembly which saw individuals run as independent candidates but not representing political parties.

Even after the adoption of the Constitution in1995, the question of the future political system was not explicitly answered in the Constitution. This meant that there was no majority in the Assembly and besides the fixation of the movement system would also not be agreed upon and because of this, it meant that there was ideally no consensus on the political system of no party government for another five years. It's after this that a referendum is organized to decide the political system in Uganda. This meant that the status quo remained making the movement system the official political system.

When the first direct elections were held in 1996, no political parties were allowed to be involved in the elections in any form. Museveni contested under the movement and the opposition consisted of DP, UPC and National Liberation Party (NLP). The opposition formed the inter-party committee and appointed Paul Ssemwogerere, chairman DP as their candidate. Museveni won the election with 74.2. This was contested by opposition and condemned Museveni for rigging elections but this was validated by the election observers.[1438]

After this success, pressure was mounted on Museveni to allow political party activities adopting the multi-party system. It's true that Museveni feared competitive politics though he stood the test of the wide support. Indeed, political parties being a veritable institution in many democracies kept being a serious subject of analysis by critical individuals and groups in the country compelling the NRM government to hold a referendum about the 2000. The 1995 Constitution had fixed a term limit of two terms which meant that Museveni would not contest for presidency in the 2006 general elections

But because he had the enthusiasm to lead the country, he prepared a referendum for the return of political parties or what is known as multiparty system as a measure for him to acquire much support from the natives. He went ahead and planned another referendum for the removal of term limits to enable him come back in 2005. In 2000, the first referendum about the future political system was upheld and over 90 percent of the poll or the majority voted for the movement system which the NRM and Museveni had massively promised.

After the general election of 2001 that saw Museveni come back to office, the situation started changing. An internal debate was started on whether to return the country to multipartyism. A

.Department of Comparative Politics, University of Bergen, 2003 pp120.

[1438]Leefers 2004: 168)

decision was finally reached to by the NRM in 2003 to open up the political system and transform the movement into a political party. As Conrad Adenauer remarks, a second referendum was organized in 2005 spearheaded by Museveni himself in favor of multipartyism and again over 90 percent voted or opted for the introduction of a multiparty system.

For the first time after over 2 decades, political parties were allowed to resume activities in Uganda. This saw a number of political parties participate in 2006 general elections. These included the newly created Forum for Democratic Change (FDC), the traditional political parties of UPC, DP, Conservative Party (CP), Progressive Party (PP), and others. But because of the NRM grassroot structures, the traditional parties had lost grassroot support and declined in the 2006 elections that saw FDC forming the strongest opposition against NRM.

THE EXECUTIVE AFTER 1986

Besides the practice that has informed and guided the composition of the Executive under the National Resistance Movement government, there have been major constitutional developments on this issue. The constitutional legitimacy of the National Resistance Movement Government from January of 1986 was established by Legal Notice No. 1 of 1986.[1439]By this Legal Notice, the National Resistance Movement government accepted the authority of the 1967 Constitution but suspended portions that granted Executive and legislative powers to the president and parliament.[1440]With regard to Executive powers, Legal Notice No. 1 declared that the National Resistance Council "shall have the supreme authority of the Government," including the power to pass laws and to choose the National President.[1441] Consequently, the Executive and legislative powers were fused into the National Resistance Council which acted as the political organ of the National Resistance Movement.

In reality, Legal Notice No.1 created the Office of the President who exercised all Executive Authority. Under Section 2, the National Resistance Council consisted of the following members: Chairman of the National Resistance Movement; Vice Chairman of the National Resistance Movement; Representatives of the National Resistance Movement; Representatives of the National Resistance Army; the National Political Commissar; the Administrative Secretary of the National Resistance Movement, and the Director of Legal Affairs of the National Resistance Movement.[1442]

[1439]Legal Notice No.1 of 1986 as Amended by Legal Notice No.1 of 1986 (Amendment) Decree, 1987 and by Legal Notice No.1 of 1986 (Amendment) (No. 2) Statute, 1989 (Statute No.9 of 1989).
[1440]Ibid, Section 1
[1441]Ibid, sections 2, 6 and 7
[1442]Section 2 also provided for the ministers, deputy ministers and assistant ministers to be members of the NRC when the Council was sitting as the Legislature. Although the proclamation provided for the representation of various "political forces or groups" and districts, it never specifies whether these would sit in the meetings of the Council when constituted as the Executive.

Legal Notice No.1 also provided room for the further expansion of the Executive and the Legislature. The proclamation provided, among others, that the size of the National Resistance Council would be increased "from time to time" by adding members from other "political forces and districts." The proclamation also empowered the President to appoint a Prime Minister, Ministers, Deputy Ministers or Assistant Ministers "after they have been vetted by the National Resistance Council or its Committee." Consequently, in addition to the National Resistance Council, the proclamation provided for the constitution of a Cabinet of Ministers comprised of the President, the Prime Minister and Ministers appointed to the Cabinet.

Like all the previous instruments, no limits were put on the optimum size of the Executive or Cabinet appointments leaving the President with an open ended mandate in this regard. Given the fusion of Executive and Legislative Authority under the 1986-1995 National Resistance Movement government, it is difficult to estimate with certainty the cost of the Executive on the public purse during this period. However, what is clear is that in 1986, the National Resistance Council had a membership of 77 people.[1443] At the same time, there was a cabinet of 48 Ministers– 30 Ministers, 6 State Ministers, and 12 Deputy Ministers.[1444] In a space of three years, the NRC had expanded by 260% to reach 277 members. On the other hand, the cabinet had expanded to 77 members – 34 ministers, 16 ministers of state and 27 deputy ministers, representing an increase of 60 per cent. By 1989, there were already concerns about the size and efficiency of the entire public service. Consequently, under Legal Notice No. 2 of 1989,[1445] the Minister of Public Service and Cabinet Affairs appointed a commission to review and reorganize the public service.[1446]

The major motivation for the reorganization of the Public Service was the concern that the service "hard become inefficient, ineffective, irresponsible and demoralized."[1447] Although the Commission focused its review on the mainstream Public Service, it made a series of significant recommendations that are directly relevant to political administration and the size of the Executive arm of the government today. The commission, for instance, observed: "… In connection with government having grown over-sized, our view is that the present number of Ministries is too large; and we recommend that the whole ministerial line up should be streamlined and reorganized to bring down the total to 20 or 21 Ministries altogether.

[1443]For the full list of the members, see Kabwegyere, Tarsis (2000). People's Choice, People's Power: Challenges and Prospects of Democracy in Uganda. Fountain Publishers, Kampala;
[1444]Ministers include the Prime Minister.
[1445]Published on 15th May 1989;
[1446]The 10 member Public Service Review and Reorganization Commission was comprised of the following persons: Nicholas T. Clerk (Chairman), Robert K. Kitariko (Vice Chairman), Sam Tulya-Muhika (Member), Joseph W. Okune (Member), Irvin D. Coker (Member), Chief Jerome Udoji (Member), James Katorobo (Member), H.K. Bigirwenkya (Member), Joseph S. Musisi (Member) and Colin Sentongo (Secretary).
[1447]Republic of Uganda (1990); Report of the Public Service Review and Reorganization Commission 1989-1990: Main Report, Vol. 1.

We also believe that the present array of Ministers (at different levels) is largely superfluous and inconsistent with efficiency. In our view, it should not be necessary to have more than one or two ministers in a ministry." The commission also noted the difficulties created by what it referred to as the "attempt at using a hybrid of a Presidential and Parliamentary System of Government." The commission was of the view that the weaknesses inherent in such hybridization can be avoided by adopting a straight presidential form of government, "with ministers picked by the president on merit and from outside parliament."

According to the Commission, "the intention is to professionalize government at that level of cabinet, undeterred by considerations of party and constituency loyalties." The reforms that followed the publication of the Commission's report not only led to some significant changes in the entire Public Service but also in the down-sizing of the Cabinet. The size of the Cabinet, then at 77 Ministers, was cut to 42.[1448]

THE NRA BUSH WAR: A TRAGEDY OR SALVATION?

From 1980 to 1986, the Ugandan Bush War, also known as the Luwero War, the Ugandan Civil War, or the Resistance War, was a civil war in Uganda fought by the Ugandan government and its armed wing, the Uganda National Liberation Army (UNLA), against a number of rebel groups, the most notable of which was the National Resistance Army (NRA).

General Idi Amin overthrew unpopular President Milton Obote in a coup d'état in 1971, establishing a military government. Amin was deposed in 1979 after the Uganda-Tanzania War, but his supporters began the Bush War in 1980 by establishing an insurrection in the West Nile region. Following subsequent elections, Obote was re-elected in a UNLA-led government. Several opposition parties alleged the elections were stolen, and on February 6, 1981, they formed the National Resistance Army (NRA) under the leadership of Yoweri Museveni to launch an armed revolt against Obote's administration. During the latter months of the war, Obote was deposed and replaced as President by his general Tito Okello. Okello formed a coalition government with his supporters and a number of armed opposition groups that agreed to a cease-fire. The NRA, on the other hand, refused to compromise with the government and, between August and December 1985, seized much of western and southern Uganda in a series of offensives.

In January 1986, the NRA took Kampala, Uganda's capital. It went on to form a new administration with Museveni as President, while the UNLA disbanded completely in March 1986. Okello and

[1448]For a detailed discussion on the changes in the public service as a result of the public service reform process, see Mwenda, A. and Tangri, R., (2005). Patronage Politics, Donor Reforms, and Regime Consolidation in Uganda; African Affairs, 104/416, 449-467. Oxford University Press; London;

Obote were exiled. Despite the civil war's ostensible end, anti-NRA rebel organizations and militias remained active and would continue to battle Museveni's administration for decades.

General Idi Amin of the Uganda Army overthrew Ugandan President Milton Obote in a coup d'état in 1971. Obote had been President since Uganda gained independence from the United Kingdom in 1962, and throughout his tenure, the country's living conditions deteriorated significantly, with extensive corruption, terrorism, and ethnic persecution. Obote's growing unpopularity led him to fear that his opponents, particularly Amin, were plotting against him, and he planned a purge while he was out of the country. The planned purge was foreshadowed by Amin, who acted first, seizing the presidency and exiling Obote to Tanzania. Despite his initial popularity, Amin swiftly devolved into authoritarianism and formed a military dictatorship, hastening Obote's downfall and damaging the country's economy and political structure.

Amin launched the Uganda–Tanzania War, declaring war on Tanzania and annexing part of the Kagera Region, in response to growing resistance to his dictatorship, anxiety that Milton Obote would return to destroy him, and conflict with Tanzanian president Julius Nyerere. Tanzanian troops and the Uganda National Liberation Front (UNLF), a political coalition created by exiled anti-Amin Ugandans led by Obote, whose military branch was known as the Uganda National Liberation Army, destroyed Amin's men and their Libyan allies (UNLA). Amin was deposed and fled Uganda after the fall of Kampala, and Tanzania installed the UNLF to take his place. From April 1979 to December 1980, the country was ruled by the insecure UNLF government. Meanwhile, Amin loyalists who had fled to Zaire and Sudan reorganized and planned to fight again to reclaim control of Uganda.

Meanwhile, Uganda's northeast was destabilized by large-scale banditry and communal violence. Karamojong gangs, Uganda Army remnants, and foreign raiders leveraged the political instability to attack cattle and other food stock. Famine broke out in Karamojong Province as a result of these occurrences.

The Amin loyalists, who staged a rebellion against the UNLF administration in the autumn of 1980, were the first to start fighting. Their 7,100-strong group was never given an official name, but was commonly referred to as the "Uganda Army" because it was mostly made up of former Uganda Army men (it was also known as "West Front" or "Western Nile Front").

The rebels were not completely united, but were divided into many gangs loyal to officers such as Emilio Mondo, Isaac Lumago, Isaac Maliyamungu, Elly Hassan, Christopher Mawadri, and Moses Ali, who had previously served under Amin. Amin arranged for the group to get funds from Saudi Arabia in advance of a large-scale attack on the West Nile sub-region across the border.

About 500 rebels crossed the border and attacked the town of Koboko on the 6th of October, one week before the invasion was to begin. The UNLA garrison, which numbered 200 men and was unarmed at the time, was killed by the rebels while on parade. Other UNLA garrisons in West Nile learned of the invasion and fled to the Nile River, leaving the Uganda Army's advance unchallenged. The local people, which had strained relations with the UNLA, greeted them warmly. The rebels largely retreated back into Sudan with a considerable amount of loot after a few days since they recognized they couldn't hold the gained region against a complete UNLA counter-offensive.

On the 12th of October, the UNLA launched a counter-offensive, backed up by Tanzanian forces. Six Tanzanians were slain in Bondo, the only substantial resistance they met. Lieutenant Colonel Elly Aseni was one of the Uganda Army fighters killed in the operation. The UNLA forces, believing the local population to be hostile, went on a destruction and looting rampage across the West Nile, despite Tanzanian authorities' best efforts to control them. They destroyed Arua, killing over 1,000 civilians and forcing over 250,000 people to flee to Sudan and Zaire. The UNLA's brutality sparked more discontent, with peasants and ex-soldiers taking up guns to defend their farms against government forces.

In December 1980, just before Uganda's national elections, the Uganda Army started its next offensive. The rebels ambushed Obote as he was touring the West Nile region in one of their most daring actions. They were on the verge of assassinating him and Tito Okello, a high-ranking UNLA leader. After retaking Koboko, the Uganda Army controlled the regions it had taken in West Nile and established a rival administration. After a month of fighting, the insurgents had taken control of the majority of West Nile, leaving only a few towns under UNLA authority. Many rebels, on the other hand, were more concerned with looting the area and transporting the booty to Zaire and Sudan than with fighting the UNLA.

Internal splits in the Uganda Army hindered the West Nile insurrection, as some soldiers stayed loyal to Idi Amin while others sought to separate themselves from the unpopular old ruler. The remaining Amin loyalists were known as the "Ugandan Army" until becoming known as the "Former Uganda National Army" after the latter part of the insurgent army split off and formed the "Uganda National Rescue Front" (UNRF) under Moses Ali, whereas the remaining Amin loyalists were still known as the "Ugandan Army" until becoming known as the "Former Uganda National Army" (FUNA). The West Nile insurgents quickly began fighting one another.

In addition, the Rwenzururu movement, which sought self-determination for the Konjo and Amba peoples, resurfaced in southwestern Uganda. The movement had been largely dormant since the 1960s, but as Amin's administration fell apart in 1979, it managed to seize control of weapon

stockpiles that had been left unprotected. As a result, they began their insurgency, and the security situation in the southwest's mountainous border territories rapidly deteriorated in 1980.

Meanwhile, the UNLF government was riven by internal strife. The various political factions worked to ensure that their own loyalists would be present and dominant in the new military as the UNLA was turned from a loose alliance of numerous anti-Amin rebel organizations into a formal army. Obote outmanoeuvred his competitors, including Yoweri Museveni, and established his 5,000-strong Kikosi Maalum group as the UNLA's nucleus. Only 4,000 of Museveni's 9,000 FRONASA warriors, on the other hand, were allowed to join the new army, and they were split among different battalions. FRONASA was also ordered to hand over its own weapons. Simultaneously, the UNLA grew dramatically, with the majority of new members coming from ethnic groupings who supported Obote. As a result, pro-Obote factions in the administration and army gained power.

Milton Obote's Uganda Peoples Congress won the December 1980 elections, effectively re-electing him as President of Uganda. Other candidates, however, vehemently disagreed with the results, escalating the conflict. Several political factions claimed electoral fraud, and when Obote initiated a campaign of political persecution, they believed they had been proven true. Because a coup was impossible because the UNLA was dominated by pro-Obote forces, the opposition turned to armed rebellions against Obote's government: Museveni's Uganda Patriotic Movement formed the Popular Resistance Army (PRA), Yusuf Lule formed the Uganda Freedom Fighters (UFF), and Andrew Kayira armed his Uganda Freedom Movement (UFM).

Hostilities in the south began on February 6, 1981, with a PRA attack on an army facility in the center Mubende District. Although the operation failed to capture the armoury, Museveni's force of 34 militants did manage to take a few firearms and six trucks before retiring. During a series of raids on police stations over the next few days, the PRA had more success. Regardless, UNLA and TPDF counter-insurgency operations put pressure on the small rebel organization, which still lacked a solid base. Museveni had fought with the Mozambican Liberation Front in Mozambique and was familiar with guerilla warfare. He also led his own Front for National Salvation against the Amin dictatorship, continuing to campaign in rural areas hostile to Obote's government, particularly in central and western Buganda, as well as the western regions of Ankole and Bunyoro. As a result, to keep his little troop engaged, he used people's war tactics. The PRA was successful in this sense, as it won over many locals in the Kampala area who saw Obote's government as a regime that only serviced the northerners. Museveni's army would have been easily crushed in 1981 if they hadn't had widespread support from sympathetic locals during their early insurrection.

Foreign backing for the PRA was likewise minimal. Some speculated that Museveni was supported by his former Mozambican connections, causing a rift between Obote's government and Mozambique. The majority of Museveni's attacks were carried out by tiny mobile groups known as "coys," which were headed by Steven Kashaka, Joram Mugume, and Pecos Kuteesa and were under the command of Fred Rwigyema and Museveni's brother, Salim Saleh. The Lutta Unit, which operated in Kapeeka, the Kabalega Unit, which operated in Kiwoko, and the Nkrumah Unit, which operated in the Ssingo districts, were the three small zonal troops. Many of the PRA's early members, including as Rwigyema and Paul Kagame, were Rwandan exiles in Uganda. Later, they formed the Rwandan Patriotic Front.

Andrew Kayira's UFM, in contrast to Museveni's army and the West Nile rebels, was largely made up of well-trained ex-soldiers and focused on high-profile urban operations. According to historians Tom Cooper and Adrien Fontanellaz, the group aimed to undermine Obote's regime through direct attacks, a plan that "doomed it to fail from the start." The UFM lacked the strength to take on the UNLA head-on, suffered from leadership disputes, had a solid organizational structure, and was vulnerable to pro-government spies.

Foreign backing became increasingly important as the war progressed, ensuring Obote's government's survival. Through the presence of roughly 10,000 Tanzania People's Defence Force soldiers and 1,000 policemen, Tanzanians initially assisted in defending his government and maintaining some order. Despite this, Tanzanian President Julius Nyerere gradually withdrew most of his troops from Uganda due to the unsustainable costs of these troops. Only 800 to 1,000 Tanzanian advisors remained in the country by June 1981. These advisors remained vital to the UNLA, but Obote's position was severely undermined by Tanzania's exit. To compensate, he attempted to attract more foreign assistance: he hired a British private military company and persuaded the Commonwealth of Nations and the US to send small teams of security experts.

North Korea was one of Obote's most important allies. In late 1981, Ugandan President Yoweri Museveni paid a visit to the country and signed a cooperation pact that included military support for his regime. At least 30 North Korean officials were then dispatched to Gulu, Uganda's northernmost city, to train UNLA soldiers and maintain military equipment. By 1984, the number of North Koreans serving as security, intelligence, and military consultants had climbed to around 50. Museveni stated that the UNLA used around 700 North Koreans, but Obote said that only roughly 170 were present in Uganda. According to one study, the North Korean officers actively participated in counter-insurgency operations for Obote, even leading them. However, according to a report from the Central Intelligence Agency, the North Koreans declined to go to the front lines. Some Ugandan officers and non-commissioned officers were also deployed to North Korea for

additional training. Obote's government also put together a number of paramilitary units to help the UNLA. The "People's Militia," which was largely loyal to UNLA chief of staff David Oyite-Ojok, was made up of Langi, Acholi, and Teso tribesmen. It grew in strength and gained a reputation as a ruthless and merciless army. The "National Young Army" (NYA), several tribal militias, and the UPC youth paramilitaries were also present.

In the meantime, the violence in the south escalated. Another rebel group, the so-called "Uganda Liberation Movement," arose, threatening to kidnap and kill UN employees if they supported Obote's efforts to restore stability in Uganda. The threats were effective, and the United Nations' training program for Ugandan police officers was halted. The PRA also maintained its hit-and-run operations, with mixed results: on 5 April 1981, it overran a UNLA station at Kakiri and acquired critical armament, but had to escape quickly when a TPDF unit retaliated. As a result, Tanzanian forces launched a counter-insurgency operation, catching a PRA column led by Elly Tumwine off guard and recapturing some of the captured firearms. Despite this, the PRA was able to recruit more volunteers, bringing the total number of fighters to over 200 by early May. Museveni traveled to Nairobi the following month to meet with Lule, and the two agreed to merge the PRA and the UFF into a single opposition party. The "National Resistance Movement" (NRM) was the umbrella organization, while the "National Resistance Army" was the armed side (NRA). Lule was named NRM Chairman in general, while Museveni was named Vice-Chairman of the National Resistance Council and Chairman of the NRA's High Command. Both sides benefited from the merger: the UFF was incredibly weak, and Lule finally obtained a true armed support, while Museveni earned vital legitimacy, as Lule was still well-liked among Uganda's southern populace. This was especially critical because Baganda dominated a strategically important region near Kampala known as the Luwero Triangle. The PRA had primarily been made up of non-Baganda until Lule gave the newly established NRA Baganda support, allowing Museveni to broaden his envisioned "people's war." The Luwero Triangle became the NRA's main operating location as a result, however the group's recruitment base remained in Ankole in the west. Museveni developed a stringent code of conduct for fighters soon after the merger, allowing the NRA to stay highly disciplined and focused despite gradually increasing in size and absorbing other insurgent organizations. The NRA had risen to roughly 900 militants by December 1981. Muammar Gaddafi, Libya's leader, also chose to assist the NRA, despite the fact that it was made up of forces that had toppled his old buddy Amin. Gaddafi believed that with the NRA, Libya might obtain more influence in Central Africa than it had previously with Amin. However, Libyan assistance was minimal, with the NRA receiving roughly 800 weapons, a few machine guns, and land mines in August 1981. To acquire more substantial support, Gaddafi asked that the NRA consolidate with

the UFM and UNRF, but the rebels remained rivals and refused to unite. As a result, Libya withdrew its support for the NRA in 1982.

While the southern rebellion grew in strength, the majority of the West Nile region remained under rebel control. The surviving UNLA garrisons had significant difficulty holding out as a local administration began to develop. The militants proved to be better-trained and more efficient combatants, seizing supply convoys from the south on several occasions. Furthermore, the UNLA garrisons were plagued by indiscipline and internal rivalries, which led to clashes in their barracks. Despite these advantages, infighting, excessive corruption, and a lack of clear strategy among the rebel leadership hampered the West Nile rebellion. As the UNRF and FUNA fought each other, the former gained the upper hand and by July 1981 had mostly ejected the latter from West Nile. Elly Hassan, the commander of the FUNA, fled to Sudan, where he was apprehended by local authorities. Regardless, the insurgents in West Nile were weakened as a result of the inter-rebel conflict. By 1981, four different guerrilla factions were operating in northeastern Uganda, all claiming no direct ties to Idi Amin. Felix Onama, a former disciple of Obote, founded the so-called "Nile Regiment" (NR), a West Nile rebel force. The UNRF progressively lost the support of local population as a result of its inability to curb corruption or establish true stability. From 1981, the Ugandan government took advantage of the rebels' divisions and confusion by mounting counter-offensives into Western Nile, where its regular troops and "People's Militia" committed several crimes. The UNLA had retaken much of West Nile by December 1981, with little resistance. In reaction to the UNLA onslaught, tens of thousands of civilians fled to Sudan. The UNLA, on the other hand, was unable to permanently evict the West Nile insurgents.

With the Rwenzururu movement, on the other hand, Obote took a more conciliatory attitude. The Ugandan government reached a peace accord with the rebel group's leadership after months of negotiations in exchange for cash and other advantages. In addition, Obote allowed the Rwenzururu region some autonomy.

The UNLA was already in a precarious position by late 1981. Because of its quick growth to over 15,000 troops by December 1981, the majority of its personnel were inexperienced, poorly armed, and frequently unpaid. Corruption became widespread, and major divisions formed among UNLA troops. Some, such as those operating in northern Uganda, were given special treatment and developed a reputation for being dependable. The Central Brigade, on the other hand, was primarily made up of untrained militias who opposed the NRA. Their own leaders referred to these troops as "cannon fodder." As a result, counter-insurgency operations against the West Nile insurgents fared far better than those against the NRA. Overall, the UNLA was already showing symptoms of strain at this point, and without Tanzanian backing, it would have most likely disintegrated by the end of

1981. Despite this, the UNLA managed to keep the rebels at bay and even gained a few key wins. UNLA fended off a large-scale raid by UFM on Kampala on February 23, 1982, and eventually managed to inflict heavy casualties on the routed militants. The UFM attempted to reconstitute but was forced to retire into NRA-controlled territory. It sought to persuade Museveni's supporters to defect. Instead, a UFM commander defected to the NRA with a large stockpile of weapons, greatly weakening the UFM.

As UNLA troops pursued rebels across the Sudanese border, fighting in the West Nile region periodically spilled over into Sudan. The first time this happened was in April 1982, when UNLA troops crossed the border near Nimule and opened fire on a Sudanese Army unit, detaining roughly 20 Ugandan soldiers. Unlike other belligerents in the region, the Sudanese Army garrisons in southern Sudan were generally well-behaved and avoided attacking civilians.

The National Resistance Army, Uganda Freedom Movement, Uganda National Rescue Front, and the Nile Regiment created the "Uganda Popular Front" in November 1982. (UPF). Godfrey Binaisa, an exiled politician, has been named the UPF's new leader. Binaisa decided to prepare an invasion from Zaire to overthrow Obote while based in London. He sought to enlist the help of white mercenaries for this plot, but his plans were foiled when he was unable to pay for the operation. Binaisa's reputation was tarnished by the entire plan. John Charles Ogole was named the new commander of the UNLA's 11th Battalion in Arua in December 1982. Ogole reformed his forces, improved morale and discipline, and launched a new counter-insurgency operation against the West Nile insurgents. Ogole's tactics were extremely effective, and most insurgents were driven out of the West Nile Region within months. Barnabas Kili, the rebel leader, was also apprehended. The UNLA, on the other side, perpetrated severe destruction and killings, prompting 260,000 people to flee the area for Zaire and Sudan. As a result, UNRF and FUNA's "insurgent infrastructure" was destroyed, further weakening them. Following Ogole's offensive, the UNRF was mostly destroyed and transferred from West Nile. The group relocated its headquarters from southern Sudan to northern Uganda, where it attempted to enlist the support of the Karamojong people. In the south, the UNLA's counter-insurgency operations against the NRA in the Luwero Triangle resulted in the "genocidal killings" of thousands of Baganda people, according to UNLA chief of staff Oyite-Ojok. Many of the government forces stationed in the Luwero Triangle were Acholi, a group that were despised by the southerners.

In 1983, the Obote government launched Operation Bonanza, a massive UNLA military operation that killed tens of thousands of people and evicted a large percentage of the population. The people of northern Uganda were blamed for the atrocities because they supported the NRA's actions, which exacerbated the country's already high regional tensions. During a synchronized counter-

insurgency campaign in 1983, the UNLA also crushed the UFM, demolishing its main camps. In July 1983, the UFM's exiled leadership was dispersed during a crackdown in Kenya, and its leader, Kirya, was deported to Uganda and imprisoned. The group was never able to recover. The Federal Democratic Movement of Uganda was created by remnants of the UFM, maybe a few hundred militants strong (FEDEMU).

Thanks to the efforts of Obote's chief of staff David Oyite-Ojok, Obote's government remained relatively secure and in control of most of Uganda until late 1983. The military was able to contain the NRA despite not being able to vanquish it. Despite this, tribalism, corruption, and internal strife plagued Obote's army. In an attempt to quell the rebellion, the UNLA and its allied militias had grown too quickly: by 1984, Obote had 35,000 to 40,000 men under arms, but only 15,000 had received basic training. As a result of the lack of sufficient pay and supplies, the soldiers became undisciplined, unreliable, and prone to harassing, stealing from, and murdering civilians. Despite the fact that the Ugandan government knew it couldn't even feed its enormous army, let alone adequately train or arm it, Obote refused to demobilize troops for fear of the soldiers behaving even worse if they weren't employed.

With Oyite-death Ojok's in a plane crash under dubious circumstances in December 1983, the situation began to shift. People initially suspected that the chief of staff had been assassinated by insurgents, who then took blame. The loyal forces of Oyite-Ojok, particularly the People's Militia and National Youth Army, retaliated by murdering suspected rebel supporters. However, within a week, rumors began to circulate among the military that Obote had orchestrated the death of his chief of staff due to growing rifts between them. Despite the fact that Obote's guilt could not be established, the rumors harmed Obote's military reputation. According to the CIA, Oyite-Ojok was instrumental in keeping Uganda's administration afloat, as well as "maintaining some semblance of security and order" in the country. The UNLA began to fall apart when he left. A growing number of Acholi soldiers suspected Obote of exploiting them as cannon fodder while instilling Langi in the country's leadership. At the same time, the NRA improved its propaganda distribution and attracted disgruntled Acholi army commanders to their cause. Obote's international support had also dwindled. Apart from the ongoing North Korean assistance, just 50 Tanzanian, 12 British, and six American advisors remained in the nation.

However, the government was initially effective in combating the insurgents. With Oyite-Ojok no longer alive, Obote named Ogole as the new commander of anti-NRA activities in the Luwero Triangle. Ogole enhanced his troops' training and expanded his anti-rebel campaign to encompass other security and civil institutions. He mostly drove the NRA out of the region in a series of operations, forcing it to retreat west into the Rwenzori Mountains and Zaire. However, in June

1985, when Acholi troops mutinied in Jinja and other locations, the UNLA's turmoil became more serious. Rifts arose in the government as a result, and certain political parties, such as the Democratic Party, attempted to take advantage of the disarray by seizing control of the military. Lieutenant General Bazilio Olara-Okello, an Acholi, was stationed in Gulu when the news arrived. He revolted because he was afraid that a new government in Kampala would eradicate the Acholi. Olara-Okello recruited an army headed by Acholi rebels, as well as ex-Amin supporters from the West Nile and Sudan. He took Lira and then marched on Kampala with his men. In July 1985, the city fell after a brief struggle, although Obote had already escaped to Tanzania. Later, he moved to Kenya and then ZambiaGeneral Tito Okello was installed as President following the successful revolution; this was the first time in Uganda's history that Acholi had acquired governmental power. The UNLA suffered devastating effects as a result of the coup. The new Acholi leadership quickly used their new status to marginalize and exploit other ethnic groups, especially the Langi, causing many military units to lose discipline and order. The UNLA gradually deteriorated into "marauding bands" after that, and by late 1985, its ranks had dropped to around 15,000 troops. Some commanders, such as Ogole, were forced to flee the country. The UNLA's 196 North Korean military advisers were flown out of Uganda on August 23.

Regardless, Okello's government was successful in beginning talks with a number of rebel factions, claiming that Obote, their mutual foe, had been deposed. The FUNA, UNRF (I), FEDEMU, and the revitalized UFM all achieved an accord with the administration. These rebel factions agreed to join the new National Unity administration, with their militias being officially absorbed into the government army and their commanders becoming members of the ruling military council. Despite this, the ex-insurgents retained their independence. The governing coalition split Kampala into three parts: UNLA in the center, FEDEMU in the south, and FUNA in the north. As a result, the situation remained turbulent, with the government proving frail and troops and other insurgents operating freely in the capital. Furthermore, Okello's government was despised by Uganda's elite, as the majority of his members were ignorant and ill-prepared to run the country.

Unlike the other insurgents, the NRA refused to make concessions to Okello's regime due to ideological differences. It only agreed to peace talks in Nairobi as a result of international pressure, but it had no intention of following through on any ceasefire or power-sharing agreement. The NRA acquired full control of the Luwero Triangle, as well as most of Uganda's west and south, taking advantage of the instability that followed Obote's demise. Fresh arms shipments from Libya and Tanzania were also received. Museveni's group was thus in a strong position, and it took advantage of the Nairobi peace talks to buy time. It even appeared to agree to a power-sharing arrangement. The NRA, on the other hand, had readied their force for a decisive onslaught.

The NRA launched a coordinated onslaught in August 1985 that resulted in the conquest of considerable territory in central and western Uganda. The UNLA was severely weakened after it besieged and seized the key garrison cities of Masaka and Mbarara. The NRA grew significantly as a result of these activities, recruiting new fighters in seized territory and integrating defected government soldiers. It enlisted over 9,000 warriors in a matter of months, bringing the total number of troops to around 10,000 by December 1985. Okello's government and the NRA signed a peace agreement that month, but it fell apart almost immediately when both parties broke the truce. The UNLA was beginning to crumble by January 1986, as the rebels gained ground in the south and south-west. When the NRA conquered Kampala on January 26, 1986, Okello's rule came to an end. On 29 January, Yoweri Museveni was sworn in as president, and the NRA became Uganda's new regular army. Tito Okello took refuge in Sudan. Despite this humiliating defeat, the UNLA attempted to regroup and defend its residual holdings in northern Uganda.

Bazilio Olara-Okello, the leader of the holdouts, commanded a large mobilization in Gulu and Kitgum. Women and girls, as well as everyone else who could wield a weapon, were equipped and given impromptu training. Meanwhile, the NRA kept pushing forward, taking Jinja in late January and Tororo in early February. The UNLA attempted one last time to halt the rebel advance at this location. It launched a counter-offensive at Tororo, but was repulsed. The NRA then attacked the Nile's defended crossings, encountering particularly fierce resistance from the UNLA and allied West Nile militias at Karuma and Kamdini. The NRA defeated the UNLA's fortifications after a bloody battle, inflicting "catastrophic losses" on the Acholi men. The UNLA collapsed when effective resistance became impossible, and its survivors, along with many former government leaders, withdrew into exile. In March 1986, the NRA took Gulu and Kitgum, while the defeated Acholi soldiers generally withdrew to their villages. The conflict appeared to be coming to an end.

The Ugandan Bush War is thought to have killed between 100,000 and 500,000 people across the country, including both fighters and civilians. Overall, Obote's administration was far more cruel than Amin's, killing more people.

The NRM's ascension to power was initially greeted with apprehension and perplexity by a huge segment of Uganda's people. Most people had never heard of the NRM, and it was feared that the new administration would be just as inept and chaotic as the previous ones. After a few months, however, many Ugandans began to approve of the NRM, as the party had genuinely succeeded in restoring stability and order in many parts of the country. Museveni's government, however, rapidly encountered substantial armed opposition. Despite the fact that the NRA had formally won the civil war, fighting continued in the north. Various anti-NRA rebel organizations and UNLA remnants remained active, wreaking havoc in Acholiland and West Nile in particular. The Acholi troops of

the UNLA had never been disarmed, and many of them had become accustomed to life as soldiers. They were no longer willing to live as peasants, and they were unhappy with both the new government and the tribe elders' customary rule. Many were impoverished, and in the aftermath of the Bush War, economic and political turmoil reigned supreme in northern Uganda. Ex-soldiers began to band together as bandits as time went on, and warfare in the north became increasingly violent. The problem was mishandled by some NRA garrisons in the region, who reacted with severe brutality. The army's unruly members harmed Museveni's government's credibility, despite the fact that many NRA personnel acted honorably. Rumors began to circulate that the government intended to execute all male Acholi. Many Acholi believed the NRA was seeking vengeance for the horrific murders committed in the Luwero Triangle during the Bush War. In fact, many southerners blamed the Acholi for not just the carnage of the Bush War, but also the terrible government of Idi Amin — despite the fact that Amin had ostracized the Acholi. This disturbance aided in the resumption of open warfare in northern Uganda. Over time, the NRM-led government would confront more rebellions than both the Amin and Obote governments combined, but it would survive them all.

Despite frequent allegations that he planned to return to Ugandan politics after his second ouster and exile, Milton Obote never did. Shortly before his death on October 10, 2005, in South Africa, Obote resigned as leader of the Ugandan Peoples Congress and was succeeded by his wife, Miria Obote. Tito Okello lived in exile in Kenya until 1993, when Museveni awarded him amnesty and allowed him to return to Uganda, where he died in 1996 in Kampala.

North Korea swiftly established friendly relations with Museveni's government, despite its support for Obote during the civil war. Cooperation was re-established as early as 1986, and the new Ugandan military got hardware and training from North Korea as a result. However, North Korean engagement in the Bush War had additional long-term consequences, as the country became a symbol of magical military prowess in northern Uganda. As a result, rebel organizations such as the Holy Spirit Movement claimed that North Korean spirits supported them in their fight against Museveni's regime.

Many ethnic Acholi and Langi were among the UNLA's ranks, having been victims of Idi Amin's genocidal purges in northern Uganda. Despite this, Obote's UNLA, like Amin's, targeted and abused civilians. The forced transfer of 750,000 residents from the then-Luweero District, which encompassed present-day Kiboga, Kyankwanzi, Nakaseke, and other areas, was one of these injustices. They were relocated to military-controlled refugee camps. Outside the camps, in what became known as the "Luweero triangle," several citizens were repeatedly humiliated as "guerrilla

supporters." According to the International Committee of the Red Cross, the Obote dictatorship was responsible for more than 300,000 civilian deaths in Uganda by July 1985.

The NRA was also guilty of atrocities, such as the use of land mines against civilians and the presence of child soldiers in the ranks of the NRA, which persisted even after the NRA became the regular Ugandan army.

THE OLD GHOSTS IN CONTEMPORARY UGANDA

Introduction.

On October 9th, 1962, Uganda declared independence. Since 1894, she has been a British protectorate made up of well-organized kingdoms and chieftaincies that occupied central Africa's lake regions. Dr. Milton Apollo Obote, the first Prime Minister and head of the government, was also the leader of the Uganda People's Congress (UPC) at the time of independence.

The Republican-leaning UPC came to power through a "unholy" coalition with the Kabaka Yekka (KY), a pro-mornarchy party whose stated goal was to protect the kingdom of Buganda's institution and authority. The UPC had previously lost the first ever general election to the Democratic Party (DP) one year before independence, and now needed the strategic alliance of allies to avert another setback.

In November 1963, Kabaka Mutesa II King of Buganda was elected ceremonial President of Uganda thus seemingly solidifying the political coalition of UPC and KY. However, this marriage of political convenience was short lived since both Obote and Mutesa and their following had differing agendas.

In 1964, Obote championed a motion in Parliament that called for a referendum on the ownership of the counties of Buyaga, Bugangaizi, and Buwekula, which were once part of Buganda but are now claimed by Bunyoro. Two of the counties chose to secede from Buganda and return to the Bunyoro Kingdom as a result of this. Sir Edward Mutesa II, as Kabaka of Buganda and President of Uganda, was placed in the unenviable position of signing the two statutes concerning the "lost counties." On February 22, 1966, Obote suspended the 1962 constitution and assumed all state powers, sparking the 1966 Crisis.

On the 15th of April 1966, in a Parliament surrounded by troops, Obote announced a new constitution without warning, which was to be adopted on the same day. It was passed without debate, and the Prime Minister told MPs that their copies will be waiting for them in their pigeonholes. The Pigeonhole Constitution was the name given to this constitution. The federal constitutional status of kingdoms was abolished, the Prime Minister's office was amalgamated with

that of the President, and all executive powers were transferred to Obote. Uganda has been designated as a republic.

The Kabaka and his kingdom establishment at Mengo refused to acknowledge the new constitution's supremacy, insisting on the 1962 version instead. The Uganda army, under the direction of General Idi Amin, stormed Kabaka's palace on the 24th of May 1966, on the instructions of Obote. Despite his escape, the Kabaka was deported to Britain, where he died later.

All monarchies were abolished by Obote in 1967. Except for the UPC, Parliament was renamed the Constituent Assembly, and all political parties were outlawed. Uganda became a one-party state in a leftward shift.

Idi Amin led a disaffected portion of the army to depose Obote on January 25, 1971, against this backdrop. This coup was greeted with much joy, but it was to usher in a period of horror and enormous misery for the Ugandan people. This gloomy time would linger for eight years. All Asians, primarily Indians, were also expelled from Uganda during this time. As a result, Uganda's economy was severely harmed. The subsequent financial mismanagement and insecurity did not help the issue.

During Idi Amin's reign, an estimated 300,000 Ugandans were killed in indiscriminate extrajudicial killings. In April 1979, a coalition of Ugandan exiles led by the Uganda National Liberation Army (UNLF) and the Tanzania Peoples Defense Force (TPDF) toppled Idi Amin's administration.

The UNLF was founded at the Moshi Conference under the sponsorship of Tanzanian President Julius Nyerere. It brought together a diverse mix of Ugandan groups and individuals who shared the goal of overthrowing the Amin administration. Prof. Yusuf Lule served as President of the UNLF's first government, which lasted only 68 days despite being well-liked.

President Lule was succeeded by President Godfrey Binaisa and subsequently Paulo Muwanga, who chaired the ruling Military Commission that oversaw the general elections in December 1980. The UPC was declared the winner of those elections, despite the fact that they were marred by numerous irregularities and were widely seen as manipulated. Obote was elected President of Uganda for the second time.

During Obote's second tenure as president, Ugandans went through a very trying period. Insecurity, fuelled by the government's own security organs as well as an ongoing liberation struggle devastated the country. An estimated 500,000 Ugandans lost their lives in just 5 years of Obote's reign. The economy was shattered and so was the people's faith in government.

Yoweri Kaguta Museveni, then Vice Chairman of the Military Commission and President of the Uganda Patriotic Movement, launched a liberation movement in direct response to the tainted 1980

elections. The independence war began on February 6th, 1981, with only 26 countrymen formed under the flag of the National Resistance Army (NRA).

On July 26th, 1985, sections of the UNLA deposed Obote in a bid to find stronger negotiating ground as the NRA made startling advances into Kampala, having already divided the country off into two administrative zones. Obote II's government was ousted by the Military Junta of Generals Bazilio and Tito Okello. By February 26th, 1986, the "Okellos Junta" had fallen, and the NRA had taken control of the entire country.

For the first time in post-colonial Africa, a homegrown insurrection with no rear bases in a neighboring country and little external help was ultimately victorious. It was primarily a revolt of Ugandans who had been oppressed.

President of the Republic of Uganda Yoweri Kaguta Museveni was sworn in. The arduous process of completely rebuilding the country and its human fabric began. Political parties were suspended and Uganda was ruled by an all-inclusive Movement system to enable this mission. Over the next eight to ten years, a lot was expected to be accomplished.

A new constitution was adopted in 1995, establishing a non-partisan, all-inclusive Movement System of governance. Political parties remained dormant under this regime. The majority of political posts were elected by universal suffrage. Women, the disabled, the youth, and workers, among other marginalized groups, were given specific slots in all government administrative units. The military was also given a seat in the legislature. The feature of preserving this system was that it would be revisited every four years by referendum.

Under the Movement System, general elections were held in 1996, and Yoweri Museveni was re-elected President of Uganda. He was the first Ugandan to be directly elected to the position by universal suffrage in this election. In 2001, he was re-elected to the presidency by popular vote for the second time.

A countrywide referendum was held in July 2005, in which Ugandans decided to return to multi-party politics. The referendum votes effectively put an end to the Movement System of government. Multi-party elections for both the presidency and parliament were conducted on February 23, 2006. The National Resistance Movement (NRM) President's Yoweri Museveni won the presidential election, while the NRM won the most seats in parliament.

THE SEED OF THE 20TH CENTURY TAKING ROOT IN THE 21ST CENTURY.

Introduction.

The NRM government reinstated kingdoms with the promulgation of the 1995 Constitution of the Republic of Uganda.[1449]

For decades, Uganda's political organization was centered on the regional kingdoms of Buganda, Toro, Bunyoro, and Ankole. The Buganda kingdom was regarded as the most powerful and important of all. When the institution of kingship was abolished in the 1960s, the kingdoms' political strength was stripped away. Soon after, the Baganda people of Buganda demanded the restoration of their traditional monarch and the restoration of the kingdom's political status. When the current National Resistance Movement (NRM) administration decided to reinstall traditional rulers in 1993, their demands were partially met. As a result, the Buganda kingdom was the first to be rebuilt. The restored institution of kingship was defined to cultural functions, as opposed to the political character of the institution in the past. This meant that the institution transitioned from being a functional state within the Ugandan state to becoming a separate entity from the political realm and formal state structure. Nonetheless, Uganda's political discourse has been dominated by the kingdom's demand for a federal state structure with executive powers.[1450]

Long before the actual restoration in 1993, the process of reinstating the Buganda kingdom began. The five-year guerrilla struggle waged by the NRM against the second Obote regime was particularly significant. The guerrilla war was fought mostly in Northern Buganda, in the Luwero Triangle, close to the capital Kampala. Despite the fact that the NRA's leadership came from Western Uganda, the NRA was able to create a positive rapport with the local community, resulting in the recruitment of soldiers from Buganda.[1451]

One of the terms of the Baganda's aid throughout the war was that if the NRA won, the institution of kingship would be reinstated.[1452] The call for the return of the monarchy, on the other hand, left the NRA in a difficult position. The NRA required Baganda support, but if the NRA reached an arrangement with the Baganda, it risked alienating the army's non-Baganda members. Museveni agreed to reinstate the monarchy in a speech during the conflict, according to unsubstantiated

[1449] Article 246 of the Constitution of Uganda, 1995, as amended.
[1450] Kayunga, Sallie Simba. 2001. The no-party system of democracy and the management of ethnic conflicts in Uganda. Ph.D. thesis, Graduate School of International Development Studies, Roskilde University, Roskilde.
[1451] Karlström, Mikael Bo. 1999. The cultural kingdom in Uganda: popular royalism and the restoration of the Buganda kingship. Ph.D. thesis, Department of Anthropology, The University of Chicago, Chicago, Illinois.
[1452] Johannessen, Cathrine. 2003. The Restoration of kingship in Uganda: a comparative study of Buganda and Ankole. MA thesis, Department of Comparative Politics, University of Bergen.

accounts.[1453] Buganda's voices requested that Museveni and the NRM keep the promises made during the guerrilla struggle and restore the monarchy shortly after the NRM took power. As a result, the NRM denied making any commitments to restore the monarchy, stating that the NRA did not fight to restore the monarchy. As a result, the NRM denied making any commitments to restore the monarchy, stating that the NRA did not fight to restore the monarchy. The NRM's hostility to monarchy was reflected in the Ten Point program, the party's ideological underpinning, which emphasized the importance of preserving national unity by eradicating sectarianism.[1454] As a result, the NRM maintained that the return of kingship would exacerbate sectarianism by removing politics based on religious, linguistic, and ethnic factional concerns.

During the battle, the NRA received backing from more than only Buganda's peasants. Professionals in Uganda, as well as those in exile, contributed financially to the guerrilla movement.[1455] In addition, numerous proclaimed royalists and members with ties to the Buganda royal family were NRA activists. The involvement of Prince Mutebi, the heir to the Buganda kingdom, was particularly significant. Prince Mutebi, who was living in the United Kingdom at the time, visited Uganda and the liberated districts of Buganda near the end of the war.[1456] Proponents of monarchism contend that Prince Mutebi's visit reinforced the NRA's support in Buganda and boosted military morale at a time when the NRM was in a win-or-lose situation. On the other side, Museveni claims that the NRA would have won the war with or without Mutebi's help. Nonetheless, Mutebi's journey to the liberated areas signified some recognition of Mutebi's role in bolstering and legitimizing the struggle among his people, and the visit highlighted the NRM-Buganda relationship.

Once in power, the NRM's challenge was to keep Buganda's political support without becoming overly reliant on it, while also expanding the NRM's social base outside of Buganda and the Western area. As a result, the NRM included a number of well-known Buganda royalists in the first NRM administration to assure support for the new authority.[1457] A number of people who had backed the NRM during the war were also promoted to top civil service positions. The Baganda once again had high hopes that the NRM would reclaim Buganda's position.

[1453] Kasfir, Nelson. 1976. The shrinking political arena. Participation and ethnicity in African politics, with a case study of Uganda. Berkeley, California: University of California Press.
[1454] Museveni, Yoweri Kaguta. 1997. Sowing the mustard seed: the struggle for freedom and democracy in Uganda. London and Oxford: Macmilla Education Ltd.
[1455] Sathyamurthy, T. V. 1986. The political development of Uganda 1900-1986. Aldershot: Gower Publishing Ltd
[1456] Oloka-Onyango, J. 1997. The question of Buganda in contemporary Ugandan politics. Journal of Contemporary African Studies 15 (2):173-189.
[1457] Englebert, Pierre. 2002. Born-again Buganda or the limits of traditional resurgence in Africa. Journal of Modern African Studies 40 (3):345-368

The reinstatement of the institution of kingship and the restitution of the properties confiscated by the central government when the kingdoms were abolished were the two most important demands that dominated the public agenda. Second, the restoration of Buganda's post-independence federal status, which would provide the kingdom with significant administrative authority. The royalists also requested the administrative unity of Buganda's nine districts, as well as the restoration of the country's old administrative framework. The royalists began to seek the first goal since it posed less of a threat to the NRM than the call for federalism, or 'federo' as it became known.

The political elite calling for restoration was split into two groups: moderates and radicals. During the early years of the NRM's leadership, the first faction called for the restoration of a cultural institution, while the latter requested a king with constitutional powers. Kirimuttu was founded by the extremist faction of the pro-monarchists. However, immediately after the NRM took power, numerous Baganda cabinet members and other Democratic Party (DP)-affiliated Baganda officials, all of whom were linked to Kirimuttu, were arrested and charged with treason for advocating for the restoration of the kingdom. Since then, the hardline branch of the Buganda monarchists has been linked to a group known as Bazzukulu ba Buganda, or The Grandsons of Buganda. The group was small, with just about 40 members, and it did not attract any well-known politicians. Despite this, the organization was able to set the tone for a large portion of the public discourse. The organization wanted a full restoration of the Buganda kingdom's federal status, which was granted in the 1962 independence constitution, as well as the appointment of a Kabaka with constitutional powers. The Bazzakulu ba Buganda argued that restoring a cultural king would be pointless, and they opposed the idea of Ssabataka serving as a cultural leader who was not involved in politics. They were gradually marginalized by a more moderate set of monarchists as time went. The group, however, still exists today, and its adherents have consistently wanted a monarch with political authority.[1458]

In contrast to the radicals, the moderate pro-monarchists emphasized that the institution should play a cultural role in order to avoid disputes like the ones that existed in the 1960s between the central government and the Buganda kingdom. Some clan elders, Members of Parliament from Buganda, some lawyers, and university faculty members were among the moderate monarchists who attracted more people than the radicals.

The demands of the monarchists were strengthened in the early 1990s as more people openly backed the agenda, and the demands became more radical in general. Increased unhappiness with

[1458] Cathrine Johannessen, 2006. Kingship in Uganda: The Role of the Buganda Kingdom in Ugandan Politics, Working Paper 2006:8

the NRM government as a result of economic hardship prompted this development. The NRM's unwillingness to contemplate the restoration of kingship in Buganda added to the dissatisfaction. During this time, Prince Mutebi came to Uganda and established a permanent residence in 1990. Soon after his return, Mutebi enlarged the monarchical pressure group by appointing an executive committee and a Supreme Council to serve as his official counsellors. As the connection between the NRM and the DP deteriorated, the monarchists consolidated even more. The two parties had originally agreed to prohibit political parties for a four-year transition period. When the interim period came to an end, the NRM attempted to extend it, and as a result, numerous members of the DP joined the royalists.

The royal problem became entwined with the NRM's desire to prolong the Movement system when the NRM wanted to extend the initial interim period. The NRM opposed the establishment of multipartyism since a continuation of the Movement system indicated a continued restriction on political party activity. The role of political parties was designated as one of the matters to be considered in the Constituent Assembly (CA), and the NRM need support in the CA in order to maintain the ban on party politics. The NRM contacted Buganda, the area with the highest percentage of voters, in search of a collaborating force in the CA. The question of kingship was the most major factor that could aid the NRM in gaining increasing support from Buganda in the CA. As a result, when considering why the NRM changed its stance on the kingship problem, the NRM's desire to maintain power as well as the NRM's views on political parties must be taken into account.[1459] By examining the CA's debates, it becomes clear that by yielding to the Baganda and allowing the restoration of kingship, the NRM was able to create a collaborating force against the Movement's opponents.

The Uganda Constitutional Commission, or Odoki-commission, was founded in 1989 with the goal of drafting a new constitution for Uganda. Traditional rulers, the role of political parties, and the future structure of government were among the constitutional problems highlighted, and they dominated public debate and CA debates. When the problem of traditional rulers was argued in the CA, it was largely linked to the topic of the future form of government. The royalists argued that a federal government was the best way to accommodate restored traditional authorities. As a result, the royalists began to pursue their second ambition, and federalism became a hot topic in the CA.

The royalists now possessed the organizational foundation they needed to demand the rebirth of a federal system of government, thanks to the successful restoration. Federalism, they contended, would provide the restored kingdom with a political role as well as a financial foundation. Despite

[1459] Oloka-Onyango, J. 1996. Thirthy years after the (B)Uganda crisis: are we heading for another? Paper read at The annual Faculty of Law symposium, at Makerere University, Kampala.

the government's willingness to allow the coronation, the NRM stood to lose more in the dispute over the future system of government. Despite this, monarchists believed that the NRM would reconsider restoring Buganda's former federal status, and their hopes were bolstered by the government's cooperation on the restoration problem and the NRM's need to maintain support in Buganda.

When political parties such as the Uganda People's Congress (UPC) and the Democratic Party (DP) endorsed the notion of a federal system in front of the CA, the campaign for a federal system took a new turn. In the general election of 1980, the CP took a federal stance and advocated the restoration of traditional institutions, whereas the DP and the UPC argued for a unitary, republican government. In addition, new political parties, such as the Fe-party, have developed that want federalism (Federalist Party). The DP's leader, Paul K. Ssemogerere, confirmed that the UPC and the DP had formed the Caucus for Multiparty Democracy (CMD) before the CA. They made two demands at the same time: political pluralism and federalism. The monarchists and proponents of multipartyism now joined forces in calling for federalism, putting pressure on the NRM. The NRM believed that the two groups would form a pact and vote for a federal system over the Movement system, jeopardizing the NRM's viability. As a result, an alliance between monarchists and proponents of multipartyism could put the NRM's position in jeopardy. In this sense, the fight between Movement supporters and multiparty politics proponents made the third group, Buganda's monarchists and pro-federalists, a logical ally for both. As a result, Buganda re-emerged as a major player in national politics.

The NRM formed an alliance with the monarchists because the parties were too weak to pursue their goals on their own. As previously stated, the Buganda monarchy has long resisted political parties, which explains why the NRM and monarchists formed an alliance. The NRM promised that the restored Buganda kingship would be awarded federalism in exchange for Buganda's support in the CA for the continuation of the prohibition on political party activity and the Movement system for another five years. In this view, Buganda's antipathy toward political parties meant a participating force in the CA to ensure the prolongation of the NRM authority, and it became an opportunity for the royalists to achieve federalism. When the royalists proposed that party politics be banned for at least five years after the new constitution took effect, the NRM had secured the sufficient majority in the CA to overcome any objections. The NRM modified their position in the dispute over the future structure of governance after the extension of the Movement system was secured in the CA. They called for a unitary government with decentralization rather than federalism, which was a prerequisite of the alliance with Buganda. Decentralisation, according to

the NRM, would ensure the transfer of authority to communities and that power would be transferred to the people.

The royalists felt betrayed when the NRM advocated for decentralisation in a unitary system as the future system of governance, and as a result, alliances shifted. Monarchists collaborated with multiparty proponents to put pressure on the NRM. The argument for federalism gained a stronger territorial footing as a result of the new coalition. Buganda had initially pushed for federalism, but the new alliance broadened support and expanded the demand for national character. The fight for hegemony between federalism and multipartyism, on the other hand, resulted in the disintegration of both groups. In this way, the new partnership served the NRM's interests by diminishing threats to the Movement's system.

So far, I've argued that the NRM used Buganda's long-standing desires for a restored kingship and a federal state structure in order to avoid the adoption of multipartyism and earn Buganda's support. This action, however, ran counter to the NRM's anti-monarchical and anti-federalist stance.

Despite the fact that traditional rulers were re-instated in their individual capacities, the Buganda kingship has gone a long way in re-constructing its prior organisational structures. Although the power vested in the institution has changed significantly after the restoration of the institution, the organisational structure of the post-restored institution of kingship in Buganda remains more or less identical with the institution before its dissolution. Buganda has rebuilt itself as a quasi-state since the restoration, suggesting that the restored cultural kingdom has put in place effective institutions, financial methods, and policy tools. The restored Buganda king created a parliament consisting of clan chiefs and delegates from each district shortly after the restoration in 1993. A government with a chief minister and ministers, similar to those of a modern cabinet, was established. A network of county and sub-county chiefs has also been re-established as part of the local administrative structure. This system overlaps the formal state structure, which is based on districts and local councils, to a great extent. The overall impression of the institutional rebuilding is that of a modern governmental entity.

The Buganda kingdom has a shaky economic foundation. Traditional rulers are prohibited from levying taxes under the 1995 constitution, and there are currently no regular transfers from the central government. The institution is heavily reliant on public support in the form of donations. To support the kingdom's expenses, the institution now relies on rental money from properties, corporate donations, and citizens being pushed to buy certificates. One of the key reasons why supporters of the restored kingship have demanded a federal status for the institution, anticipating that the institution will be granted fiscal powers, is the kingdom's shaky economy.

In 1996 and 2001, presidential and legislative elections refocused attention on federalism and Buganda's aspiration for autonomy. Despite their cultural roles, numerous members of the royal family and a segment of the Buganda government's ministries campaigned for the opposition candidate, Paul K. Ssemogerere (DP), in the 1996 election to help him defeat Museveni. In the 2001 presidential election, ministers in the Buganda government officially endorsed Col. Dr. Kizza Besigye's candidacy. This was seen by the media as a sign that the Buganda administration, including the king and chief minister, supported the opposition and hence encouraged Baganda voters to vote against Museveni. The region's aspiration for federalism was a prominent campaign issue emphasized by opposition candidates in order to attract support from Buganda in both the 1996 and 2001 elections. In this way, federalism was a tool used by the opposition to overthrow Museveni. They were not successful, and Museveni won the elections in Buganda in 1996 and 2001.

Museveni's Constitutional Review Commission (CRC), which he established prior to the presidential election in 2001, helped to bring federalism to the forefront of public debate. Federalism, traditional leader funding, and traditional leader's future position were among the subjects the commission outlined for consideration. The executive leaders of the restored kingships of Toro, Bunyoro, Busoga, and Buganda convened in reaction to the CRC's founding to build a common stance on problems connected to traditional institutions and federalism. Following this, the Buganda kingdom organized a procession that drew a crowd of almost 200 000 people to deliver their proposal to the commission, which demanded a federal system of rule. Outside of Buganda, this increasing focus on federalism has sparked worry. Although many people favoured the idea of increased regional autonomy, many were concerned that granting Buganda federal status would allow it to control the rest of the country. There was also concern that a federal state would keep a large portion of the national revenue, depriving other regions access to growth.

The cabinet issued a white paper presenting suggested constitutional revisions based on the CRC's work. In response to Buganda's desire for autonomy, the cabinet recommended a regional tier system, which means that instead of adopting a federal state structure, districts can form regional governments. Following this, representatives from the federal government and the government of Buganda met to examine the country's stance. According to Ugandan newspapers, the meeting resulted in an accord in which the monarchy agreed to establish a regional government based on districts. As previously stated, one of the key arguments for federal status has been Buganda's demand for fiscal authority. In light of this, the proposed regional government has a number of flaws. The regional government, for example, will be financially dependent on the federal government, and it is unclear how the regional government will interact with municipal

governments. As a result, hard-line federalists have criticized the Buganda government, claiming that the accord is another hollow promise from the central government. On his side, the chief minister asked the Baganda not to reject the accord, calling it as a first step toward true federalism. Later, the Buganda government argued that they should have the authority to create their own laws without the consent of parliament. However, the MPs' support for regional governance means that Buganda's demand for federalism would-be put-on hold for the time being.

The attempt to reach an agreement with Buganda has been regarded in the media as a strategy by Museveni to solidify his largest vote bloc ahead of the 2006 elections, as well as a way to prevent the opposition from using one of their most popular campaign techniques to attract support from Buganda. Museveni has also been accused of enticing the Baganda with a form of federalism in order to get support for a third term. The suggestion to change the constitution to remove presidential term limits was the most contentious subject in the white paper. Museveni would be able to run for a third term as a result of this. Some opposition parties urged the Buganda kingdom to sign an agreement with the government in exchange for support for a third term, and the kingdom finally decided in a closed meeting that it would not support President Museveni for a third term, even if the cabinet changed its mind and promised Buganda federalism. The lifting of presidential terms was approved by a public referendum on July 28, 2005, and a vote of Parliament in August 2005. As a result, Museveni is eligible to run for re-election in the 2006 presidential election.

WHAT THE NRM HAS DONE IN TERMS OF GUARANTING PRESIDENTIAL MANDATE VERSUS CONSTITUTIONAL MANDATE

The National Resistance Movement (NRM) has been the ruling political party in Uganda since 1986. The party’s leader, Yoweri Museveni was involved in the war that disposed Idi Amin, ending his rule in 1979, and in the rebellion that subsequently led to the demise of the Milton Obote regime in 1985; however, parallels have been drawn between the NRM and its predecessors. For instance, the NRM sponsored public order management bill is strikingly similar to the 1967 public order and security Act, codified by the Obote regime, in that both bills “seek to gag dissenting views” Museveni’s statements are also reminiscent of Uganda’s dictatorial past: “whoever tries to cause problems, we finish them. Besigye [an opposition leader] tried to organize Kampala and we gave him a little tear gas and he calmed down. He didn’t need a bullet, just a teargas.” Further, as he once stated that “the problem of Africa in general and Uganda in particular is not the people but leaders who want to overstay in power,” some have viewed his move to abolish presidential term

limits as hypocritical. In the past, the NRM has been praised for bringing relative stability and economic growth to a country that has endured decades of government mismanagement, rebel activity, and civil war; however, with an unemployment rate of 62 percent among the youth, his economic effectiveness has seriously come into question. His tenure has witnessed one of the most effective national responses to HIV/AIDS in Africa.

In the mid-to-late 1990s, Museveni was lauded by the west as part of a new generation of African leaders. His presidency has been marred, however, by invading and occupying Congo during the second Congo War (the war in the Democratic Republic of the Congo which has resulted in an estimated 5.4million deaths since 1998) and other conflicts in the Great Lakes region. Recent developments, including the abolition of presidential term limits before the 2006 elections, Museveni's confirmation of the NRM- sponsored public order management bill- a bill which severely limits freedom of assembly- NRM media censorship and the persecution of democratic opposition (i.e. general intimidation of voters by security forces; arresting opposition candidates; extrajudicial killings) have attracted concern from domestic and foreign commentators. Most recently, indicators of an alleged succession to the president's son, Muhoozi Kainerugaba, have increased tensions.

Allegations regarding significant corruption have also shaped criticism of the NRM government. According to the U.S state Department's 2012 human rights report on Uganda, "the World Bank's most recent worldwide Governance Indicators reflected corruption was a severe problem" and that "the country annually loses 768.9 billion shillings to corruption."

Understandably, Uganda was ranked 140th out of 176 nations on the corruption perceptions index. A specific scandal, which had significant international consequences and highlighted the presence of corruption in high level government offices, was the embezzlement in donor funds from the office of the prime minister in 2012. These funds were "earmarked as crucial support for rebuilding northern Uganda, ravaged by a 20-year war, and Karamoja, Uganda's poorest region." This scandal prompted the E.U., the U.K., Germany, Denmark, Ireland and Norway to suspend aid. What may compound this problem- as it does in many developing nations (resource curse) – is an abundance of oil.

The petroleum bill-passed by Ugandan Parliament in 2012- which was touted by the NRM as bringing transparency to the oil sector has, failed to please domestic and international political commentators and economists. For instance, Angelo Izama, a Ugandan energy analyst at the U.S. -based open society foundation said the new law was tantamount to "handing over an ATM (cash) machine" to Museveni and his regime. According to Global witness, an international law NGO, Uganda now has "oil reserves that have the potential to double the government's revenue within six

to ten years"

Other contentious bills have been sponsored, passed and confirmed by the NRM government during his tenure. For example, the non-governmental organizations (Amendment) Act, passed in 2006, gas stifled the productivity of NGOs through erecting barriers to entry, activity, funding and assembly within the sector. Burdensome and corrupt registration procedures (i.e. requiring recommendations from government officials; annual re-registration), unreasonable regulation of operations (i.e. requiring government notification prior to making contact with individuals in NGOs, area of interest), and the precondition that all foreign funds be passed through the Bank of Uganda, among other things, are severely limiting the output of the NGO sector. Furthermore, the sector's freedom of speech has been continually infringed upon through the use of intimidation, and the recent Public Order Management Bill (severely limiting freedom of assembly) will only add to the government's stockpile of ammunition.

THE EXECUTIVE UNDER THE 1995 CONSTITUTIONAL FRAMEWORK

At the time the Public Service Review Commission was doing its work, a separate process of formulating a new national constitution was underway.[1460] The Uganda Constitutional Commission which commenced its work in 1989 sought to review Uganda's constitutional framework and make proposals for a new constitution. It carried out countrywide consultations and addressed a range of issues including the structure, composition and size of the Executive.[1461] An analysis of the Commission's conclusions is important in understanding the outcomes of the Constituent Assembly debates and, the trends in the size and cost of the Executive in the post1995 constitutional order.

One of the key issues that dominated the work of the Constitutional Commission was how to strike a balance in the powers exercised by the three traditional arms of the State: The Executive, the Legislature and the Judiciary. As the Commission generally observed, a central focus of the discussions throughout the consultation process was on the President's powers and how they should be exercised. Scholars, commentators and politicians alike attribute Uganda's political crisis and its attendant outcomes to the ambiguity in the powers of the President and the Prime Minister under the 1962 Constitution on the one hand, and the excessive constitutional powers granted to the President under the 1967 Constitution.[1462]

[1460]The Constitutional Commission under the Chairmanship of Justice Benjamin Odoki was established under the Uganda Constitutional Commission Statute, No.5 of 1988. The Commission presented its report to the President of Uganda on December 31, 1992 and a final constitution was discussed by a Constituent Assembly and promulgated on October 8, 1995.

[1461]For detailed background discussions on the Executive, see Republic of Uganda (1993). Report of the Proceedings of the Uganda Constitutional Commission: Analysis and Recommendations. Kampala.

[1462]See for example, Okello, G. (1991). The 1967 Constitution and the Contemporary Political Problems of Uganda (Unpublished presentation available at the ACODE Library of Law and Public Policy;

In its analysis of the consultations and memoranda before it, the Constitutional Commission observed that there was an overwhelming desire to ensure "greater Separation of Powers between the Executive and the Legislature, and an effective system of checks and balances."[1463] The Commission further stated thus: "According to the people, [such Separation of Powers] would help in removing what they perceived to be pressures exerted on the Legislature by the Executive to approve the decisions of the Executive." In the end, the Commission decided to recommend what it referred to as "some separation of powers."[1464]

The fundamental question therefore is: What is the nature of "some Separation of Powers" that the Commission considered to be appropriate in the context of Uganda's Constitutional history?

First, the Commission recommended that the President should be directly elected and should not be a Member of Parliament. The President would also have Executive Powers as the Head of Government.[1465]The following Presidential Powers would be exercised subject to a wide range of checks and balances: major constitutional appointments; senior appointments in the state services; exercise of the prerogative of mercy; command of the armed forces; and declaration of war. The Commission also recommended a series of checks and balances to the powers and functions of the President with respect to the Legislature,[1466] including impeachment of the President by the Legislature.[1467]

Second, the Commission made wide-ranging recommendations that would in many ways have an impact on the size of the Executive. It recommended the creation of the Office of the Vice President, including a proposal that any Presidential candidate should choose a running mate for the post "so that people can pass a verdict on both" through the electoral process.[1468] The Commission further recommended the abolition of the post of Prime Minister which had been re-established at the time the National Resistance Movement Government came to power in 1986.

It observed that because the majority of Ugandans had proposed an Executive President with a Vice President and in order to avoid duplicity of work, duties and potential conflicts, there should be no post of Prime Minister or Deputy Prime Minister.[1469] Perhaps one of the most contentious issues is a direct impact on the size of the Cabinet which has been whether Ministers should be appointed from amongst the Members of Parliament. The Constitutional Commission observed in its report

[1463]Supra, note 63, pg. 321, Para 12.45
[1464]Supra, note 63, pg. 321, Para, 12.45
[1465]Supra, note 63, pg. 321, para12.46
[1466]For example, the Commission provided a series of recommendations to address potential interference of the President in the legislative process by stipulating timelines within which a Bill should be assented to or the Parliament bypassing the presidential assent where such assent is withheld.
[1467]Supra, note 63, pg. 333, Para 12.96. The Constituent Assembly did not take this recommendation and therefore the President appoints the Vice President after the elections.
[1468]Supra, note 63, pg. 336, Para 12.102 and 12.106
[1469]Supra, note 63, pg. 337, Para 12.109.

that "a substantial number [of people] are opposed to Ministers being members of the Legislature. They argue that once a representative of the people is chosen to be a Minister, his or her position is compromised by the President and the Cabinet under the principle of collective responsibility." However, having regard to the various proposals, the Commission recommended that the constitution should allow the President to appoint Ministers either from within Parliament or from elsewhere. It further recommended that Ministers should not exceed 21 and that the maximum number of Deputy Ministers ("other Ministers") should be 21.

As part of the checks and balances, the Commission recommended that ministerial appointments should be subject to approval by Parliament or its committee. Evidently, the Commission was also hostage to Uganda's history and the increasing ethnicization of political appointments. It recommended that "Ministerial appointments should take account of expertise, gender, regional and religious balance."[1470]Like many of the recommendations that are subject to abuse, this proposal found itself in the final constitution and, in a fundamental way, largely accounts for why appointments to Cabinet have increasingly become some form of tribal or ethno religious negotiating conferences.

It is therefore clear that Uganda's Constitutional history weighed heavily on the constitutional discourse that was triggered off by the inauguration of the Constitutional Commission in 1989. By May 1994 when the Constituent Assembly convened, the question of Separation of Powers and the exercise of executive authority was one of the fundamental issues that needed to be resolved.[1471] Consequently, drawing on the recommendations of the Constitutional Commission, the 1995 Constitution sought to establish broad contours of a new constitutional order that would; entrench People's Power, create appropriate boundaries for the exercise of Executive, Legislative and Judicial Authority and generally scale back on the excessive powers enjoyed by the President as originally enshrined in the 1967 Constitution.

Indeed, the 1995 Constitution clearly demonstrates the attempt by the Constituent Assembly to create appropriate restraint on the exercise of executive authority by the President. Chapter 7 of the 1995 Constitution covers constitutional issues relating to the Executive. Article 98 establishes the Office of the President and provides that "there shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defense Forces and the Fountain of Honor."

[1470]Supra, note 63, pg. 340, Para 12.119

[1471]Discussions regarding the Executive were conducted in Select Committee II which also discussed the Legislature and the Judiciary. The committee was chaired by Hon. Joseph Mulenga with Hon. Sam Ringwegi and Mr. D.M. Byakutaga as Vice Chairman and Clerk respectively. See the Constituent Assembly Report (April, 1994 – November, 1995 (Report publisher not indicated. The Report was accessed from Stanford University Auxiliary Library under reference KTW 171 A11995 U33 1995).

Like the 1967 Constitution, the 1995 Constitution provides that the president takes precedence over all persons in Uganda and shall not be liable to any proceedings in court while holding office.[1472]Among other things, Article 99 of the Constitution provides that "the Executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda." The constitution obliges the President to "execute and maintain this Constitution and all laws made under or continued in force" under it. In addition, the constitution imposes a duty on the President to "abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda."[1473]Other specific powers or functions of the President include: assent to Bills; approval of the budget; appointments to constitutional offices; declaration of a state of war; foreign deployment of the Uganda Peoples Defense Forces; declaration of a state of emergency; and negotiation of treaties and agreements. However, the Constitution also introduced a set of restraints intended to regulate the powers of the President in the exercise of executive authority.

In general, these powers include requirement for approval of key appointments; an annual State of the Nation Address; provisions regarding impeachment of the President for abuse of office, misconduct or misbehavior, and physical or mental incapacity. For the first time in Uganda's Constitutional history, the 1995 Constitution sought to create restraint on Presidential Powers regarding appointments. Most important, the Constitution introduced a Cap on the number of Ministers that could be appointed. Article 113 provides in part that "the total number of Cabinet Ministers shall not exceed twenty-one except with the approval of Parliament".

Article 114 provides for the position of 'other Ministers' stating that "the total number of Ministers appointed under this Article shall not exceed twenty-one except with the approval of Parliament." The specification of the number of Cabinet Ministers that could be appointed was essentially dictated by the concern that Presidents can abuse their appointing authority.

The adoption of the 1995 Constitution 33 years after independence may be fairly described as the epitome of Uganda's torturous three-decade journey to creating a perfect state where the people and the rule of law reign supreme. It had been a journey characterized by dictatorships, political cronyism, economic breakdown and inefficiency in government. As already alluded to, the constitutional restraints on the exercise of executive authority including powers on the appointment of the Cabinet were intended as safeguards to the sanctity of the Constitution and the supremacy of

[1472]According to Article 98(5), the president can be subject to criminal or civil proceedings "in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person." For purposes of this Article, "any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was president."

[1473]Constitution of Uganda 1995, Article 98

the people.

However, since 1995, the President and the Parliament have conspired in an unholy alliance to re-write the relevant constitutional safeguards regarding executive appointments which almost tantamount to re-enacting the scenario under the 1967 Constitution. During this period, the Cabinet has been continuously expanded through resolutions of Parliament modifying Articles 113 and 114 of the Constitution. Both in 1996 and 2001, the increase in the size of the cabinet was achieved by the Members of Parliament conspiring with the Executive to amend Articles 113 and 114 of the 1995 Constitution. The debate on the relevant motions teaches us two key lessons that will shape the discourse on the size and cost of the Executive. First, the requirement for parliamentary approval to vary the number of Ministers clearly amounted to a form of "constitutional nuisance" for President Museveni. This explains why in the Constitutional reform process that followed the 2001 elections, the National Resistance Movement government sought to amend the Constitution to remove the Cap on ministerial appointments.[1474]

Second, the ease with which the resolutions passed through Parliament seems to have emboldened President Museveni to solve this "constitutional nuisance" once and for all thereby "liberating" the powers to appoint any number of Cabinet Ministers as he sees fit. This is exactly the position that obtained under the 1967 Constitution. The Constitutional Review Commission, also referred to as the Sempebwa Commission, which was established immediately after the 2001 Presidential and Parliamentary Elections,[1475] provided the main vehicle for reviewing the constitutional restraint on the appointment of the Cabinet by the President.

Although the Commission was given a broad mandate to review the 1995 Constitution, it is the outcome of the process and the debate surrounding its report that clearly shows that the argument over big government is likely to intensify especially in the run up to the next general elections. The Constitutional Review Commission addressed a number of major issues – the Office of Prime Minister; the constitutional limitations on the size of the cabinet; and the dual mandates (Ministers as members of the Executive and Members of Parliament) of Ministers – that have direct implications on the size of the Executive.

In particular, the Constitutional Review Commission addressed the issue of the size of the Cabinet. According to the commission's report,[1476] the majority of the citizens consulted expressed a desire for a small Cabinet largely on account of the need to cut down the costs associated with running a

[1474]Government White Paper on the Report of the Commission of Inquiry (Constitutional Review); Chapter 4, Para 4.3(c)(ii)
[1475]Commission of Inquiry (Constitutional Review), Legal Notice No. 1 of 2001
[1476]Republic of Uganda (2003); Report of the Commission of Inquiry (Constitutional Review) Findings and Recommendations, December 2003, Kampala

big government.[1477] This finding is clearly consistent with the proposals presented to the 1989 Constitutional (Odoki) Commission. Based on its observations, the Constitutional Review Commission recommended that the number of Cabinet Ministers, including the Prime Minister, be capped at 22. Ministers of State would also be capped at 22.

The Commission further recommended that Ministers should not be Members of Parliament.[1478]The more intriguing question, however, is the relationship between what obtains in constitutional terms vis-à-vis the practice. As already discussed in the foregoing section, in theory, the executive encompasses the various constitutional offices including the following: the Presidency, the Cabinet, the Office of Prime Minister and a host of other agencies and offices created through executive discretion. However, in practice, the Presidency has expanded to include a powerful State House, a host of Presidential Advisors and Assistants, Quasi-Public Service Officers such as the Resident District Commissioners and a number of "Special Officers" including in the Military and intelligence services.

It can be concluded, therefore, that the flexibilities built into the 1995 Constitution and a Parliament that has failed to assert its own powers and authority vis-à-vis those of the Executive have combined to create room for "strategic political opportunism" that the framers of the 1995 Constitution sought to mitigate. In effect, "strategic political opportunism" has been achieved through legal reforms and targeted administrative actions facilitated by those who believe that they are positioned to benefit from the resulting political opportunities. Given the consistency in the practice over the last decade, it is legitimate to argue that "strategic political opportunism" rather than judicious governance has become the new political ball game for achieving consensus among the governing political elite.

THE FINANCIAL COST OF AN OVER STUFFED EXECUTIVE

Since 1986, there have been deliberate attempts to reconfigure the Executive and create the necessary balance and Separation of Powers between the three traditional Arms of Government. However, the gains that were made through the constitution making process are progressively being eroded by an overzealous Presidency. The outcome of this overzealousness has been the reconstruction of a bloated executive that translates into substantial costs on the taxpayers in particular and the citizens in general. The costs imposed by this bloated Executive can be discussed from two standpoints: financial and governance.

Ascertaining the trends and full financial cost of Public Administration expenditure in general and

[1477]Id, p.5-51

[1478]For details on the Government of Uganda response to the Commission's proposals, see Government White Paper, Supra, note 77.

the executive in particular is a painstaking undertaking given the scantiness or unavailability, but most important the undue secrecy, of the relevant financial information. The alternative, therefore, is to build on some of the previous work that has been undertaken in the recent past. For example, 2004 edition of the Poverty Eradication Action Plan estimates that the combined cost of Public Administration covering the Legislature and the Executive is in the range of USh34 Billion per month.[1479]

In aggregate terms, the impact of a bloated political bureaucracy on the budget and the taxpaying public is significant. Public Administration expenditure continues to claim the biggest share of the National GDP rising from 2.7% in 1988/99 to 3.2% in 2001/2002. The total share of Public Administration accounted for 20.2% of the budget out-turn by 2000/2001. This may be compared with a mere 7.3% for health where rates of infant and maternal mortality from preventable diseases such as malaria remain at obscene levels.

However, to get a better account of the cost burden imposed on Ugandan taxpayers, it is important to examine the cost of running some of the segments of the Executive. The Cabinet is one of the segments of the Executive that has expanded and become bloated over the last decade. Following the Public Service review exercise of 1990, the size of the Cabinet was reduced to 22 Ministers by 1994. However, after the first Presidential Elections in 1996, President Museveni sought the authority of Parliament to increase the size of Cabinet from the constitutionally mandated 21 Ministers and 21 Ministers of State hence raising the combined number of ministers to 56 and then to 67 after the 2001 Elections.

Today, the number of Cabinet Ministers stands at 32 and Ministers of State at 50.[1480] Before delving into an analysis of the cost of the Cabinet, it is important to examine the legal basis for determining the emoluments of Ministers. This is important because of the dual personality (being a Member of Parliament and Minister at the same time) that they possess. Ordinarily, Ministers as members of the Executive should be remunerated from funds appropriated for the functioning of the Executive or the Public Service. This seems to have been the case until 1997.

In June 1997 when Parliament considered a resolution to determine the remuneration of its members, the issue as to whether Ministers should be paid the salary and allowances of Members of Parliament was one of the hotly debated ones. Even if one were to consider the Ministers who are also Members of Parliament as clearly falling within the scope of the Administration of Parliament Act, it is apparent that the remuneration of Ministers who are not Members of

[1479]Republic of Uganda (2004); Poverty Eradication Action Plan (2004/5-2007/8); Ministry of Finance and Economic Planning; Kampala; pg. 139

[1480]Each ministry is considered in its own right and therefore where a minister holds two positions, such as 2nd Deputy Prime Minister and Minister for Public Service, these are treated as two ministries.

Parliament including the Prime Minister raises a prima facie legal question.

Remuneration of Members of Parliament is provided for under Article 85(i) which states thus: "A Member of Parliament shall be paid such emoluments and such gratuity and shall be provided with such facilities as may be determined by Parliament."[1481]Article 82(8) provides for the remuneration of the Speaker and Deputy Speaker. However, the motion for the resolution to determine the emoluments of Members of Parliament included a proposal for the payment of salaries and allowances for Ministers.[1482] Consequently, on top of the remuneration of UShs1.1 million for Members of Parliament, Members of Parliament who are Ministers would be paid an additional monthly consolidated allowance of UShs1.8 million by virtue of their positions as Ministers. This motion, therefore, raises two inter-related legal questions: First, why should the Parliament budget be used to pay for the services of a member who is exercising the functions of the Executive?

Second, although the Vice President and Ministers who are not Members of Parliament are considered ex-officio Members of Parliament by virtue of Article 78 (1) (d), their being in Parliament is purely to perform their duties as members of the Executive branch. This interpretation, adopted by Parliament, is clearly suspect because of the doctrine of Separation of Powers. It is suggested here that this position is a gross misrepresentation of the law, one of the many cases where Parliament continues to abuse its authority to accommodate the interests of its members and those of the Executive at the expense of the rule of law.[1483]

THE INCREASE OF STATE MINISTERS AND CABINET MINISTERS TO 82 MEMBERS AS AN ACT OF A PRESIDENTIAL POWER OVER REACH AND THEREFORE AN ABUSE OF THE EXECUTIVE AUTHORITY

The promulgation of the Uganda Constitution in 1995 shone as a path across the horizon. The Constituent Assembly declared in the preamble to the constitution that;

"WE THE PEOPLE OF UGANDA … committed to building a better future by establishing a socioeconomic and political order through a popular and durable national constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress ..."

This declaration of triumph was based on a sustained Growth Domestic Product record averaging about 6% per annum over a number of years, the entrenchment of local governance structures through the decentralization process and, most importantly, the confidence generated through the public consultations and debates that culminated in the promulgation of the new supreme law of the land. Little did "**THE PEOPLE OF UGANDA"** know that the new Constitution would be a

[1481]See also Administration of Parliament Act, Cap 257, Laws of Uganda
[1482]Parliament of Uganda (1997); Hansards, June 10, 1997, Pg. 1841
[1483]For a detailed discussion on this issue, see Id, pg. 1844-1853.

stillbirth; In spite of their declaration to establish a "durable" constitutional order, the 1995 Constitution was amended in 1997 to increase the number of people that could be appointed to the Cabinet.

In the effect, the freehand given to the President to appoint any number of Ministers opened a Pandora's box as similar appointments are made for Presidential Advisors, Presidential Assistants and Resident District Commissioners, without the oversight of the Parliament or the Public Service Commission. It is this expanded political bureaucracy that partly accounts for the growing increase in public administration expenditure. To begin with, this political bureaucracy has led to significant diversion of public funds and resources from critical social and economic sectors.

Its bloated nature has blurred the lines of accountability and responsibility hence breeding unprecedented corruption and mismanagement. The statistical evidence of this is overwhelming. In less than a decade, the size of the Cabinet increased from 42 Ministers originally provided for under the constitution to now approximately 82. The number of Presidential Advisors increased from 4 in 1994 to 71 in 2003. Different reports suggest that there are more than 278 Presidential Advisors, Presidential Assistants and Presidential Secretaries.

The central argument is that an over-size cabinet, and a growing Executive bureaucracy built around the Office of the President and State House, is the single most important threat to governance, and efforts to eradicate poverty and achieve economic transformation in Uganda today. In the beginning, the fear that a President as head of the Executive would abuse the appointing authority vested in his or her Office by the Constitution is the very reason why Articles 113 and 114 sought to put a Cap on the number of Ministers to be appointed to Cabinet. President Museveni, with the acquiescence of parliament, yielded to ethnic and religious pressures that have remained the under-current of Uganda's politics since independence. **By the single act of passing a resolution to increase the size of the Cabinet, the President and the Parliament failed the "durability" litmus test of the 1995 Constitution.**

But most importantly, the two institutions that were mandated to safeguard the sanctity of the Constitution set off a "**Chain Reaction**" that is threatening to wreck the new Constitutional order. The majority of these Ministers are voting Members of Parliament. The fact that Ministers sit in Cabinet meetings, formulate policy or legislation and then vote on it in Parliament is clearly a subversion of the checks and balances in the legislative process. In its report to the plenary on the **Onapito Ekomoloit Motion** to bar Ministers from doubling as Members of Parliament, the Committee on Legal and Parliamentary Affairs emphasized the fact that the current position promotes intrigue and opportunism as Members of Parliament are compromised by the desire to become Ministers.

Both the theory on Separation of Powers and the empirical evidence on the role of Uganda's Cabinet in undermining the Authority and autonomy of the Legislature mean that separating the two Institutions serves democracy better and Ugandans would be winners from improved efficiency and accountability of both the Executive and the Legislature. Besides governance, the uncontrolled expansion of the Executive is imposing a toll on the national budget. Expenditure on the Office of the President and State House has skyrocketed.

Expenditure on the Office of the President increased from approximately UShs6.6 billion in 1989 to an estimated UShs18.5 billion in 2008. Expenditure on State House, the official residence of the President increased from UShs14.8 billion in 1994 to UShs67 billion in 2008. The actual expenditure on Ministers, Presidential Advisors and Assistants, and Resident District Commissioners cannot be easily ascertained because much of the relevant information is held secret by government. Since the 1995 Constitution mandates the appointment of 42 ministers, it is argued that the extra 40 Ministers are an unnecessary cost on the taxpayer.

Over a five-year presidential term, taxpayers spend at least UShs13.95 Billion in salaries, selected allowances and vehicles for the 40 excess Ministers. Considering the 2008 tuition structure for Makerere University, this money is sufficient to cover the training of 930 doctors through a five-year course in human medicine. The cost of employing a single Presidential Advisor over a year is estimated at UShs48 million, an amount sufficient to construct a running health care center serving at least 5,000 people. An expenditure of approximately UShs1.9 billion on the salaries of 80 Resident District Commissioners per year is enough to provide malaria treatment to at least 63,333 children over the same period.

The main conclusion of the research is that the current bloated Public Administration in Uganda is a direct consequence of President Museveni's regime survival strategy built around six core elements: ethnic political pluralism; political mobilization camouflaged as political supervision of government programs; championing the representation of special interest groups; shifting actual legislative authority from Parliament to cabinet and the National Resistance Movement Caucus; implementing a set of welfare programs; and, for lack of a better phrase, what is referred to here as "strategic political opportunism."

Four specific recommendations are made as a contribution to address this complex problem.

a. First, parliament must reinstate the restraints on the exercise of Executive powers of appointment. In particular, the cabinet must be trimmed back to the constitutionally mandated 42 ministers. Parliament can take at least three actions to implement this recommendation. First, any future constitutional amendment should seek to limit the powers

of parliament to increase the size of cabinet by setting special conditions on the basis of which such increase may be considered legitimate.

Secondly, it is clearly out of the ordinary that a nation's Constitution can be amended or even modified by a mere resolution of Parliament. To avoid future mutilation of the Constitution through unwarranted modifications, it should be required that any such amendments be executed through an Act of Parliament.

Thirdly, to create more accountability in the cabinet appointment process, it is important that parliament opens the vetting process so that the public can participate in the process and furnish information that may assist in the vetting.

b. Second, it is fundamental that Cabinet Ministers should not be Members of Parliament. The fact that a Minister formulates legislation, adopts it in Cabinet and then goes to vote on it in Parliament defeats any logic or rational reasoning. Parliament is clearly being held hostage as individual members perform unprecedented maneuvers to secure their spots in Cabinet. There is no evidence to show or even suggest that the appointment of Members of Parliament as Cabinet Ministers has served any positive role in the Legislature. On the contrary, this process is being used to reconstruct a strong Executive and subvert legislative authority, autonomy and accountability.

c. Third, to create discipline in future parliaments, the law should prohibit Members of Parliament from benefiting from any decisions that they make which may confer to them directly or indirectly any pecuniary benefits. In principle, it is important that Parliament determines its emoluments and hence avoid being subjected to other authorities. However, the actions of the Members of Parliament from the 6thParliament have showed that self-interest rather than public interests are likely to drive such determinations.

To mitigate such self-interests and ensure the integrity of the MPs in the face of the voters, it is recommended that any decision that results into pecuniary benefits should not benefit the sitting Members of Parliament. Such decisions should become effective upon the election of a new Parliament. Like in the case of other key offices such as the President and the Vice President, changes in the emoluments of legislators should be effected through an Act of Parliament rather than a resolution.

d. Fourth, the proliferation of political and public administration institutions and diversion of key financial and other resources from critical areas such as health, education and

agriculture is a fundamental challenge for government. There is need for a full functional analysis of the government so that unnecessary institutions can been weeded out and relevant ones resourced appropriately to deal with the social and economic challenges facing ordinary Ugandans.

e. Finally, the issue of public administration expenditure and the associated expenditure touches on the power of vested interests. There should be no illusion that achieving reform in this area is an easy task. The major challenge is how to create opportunities for reform without threatening the survival of a sitting government. It has been argued that the positive gains in terms of financial resources saved and the enhanced delivery of goods and services achieved through government efficiency and effectiveness are the major incentives for reform. This then calls for civil society organizations to take the initiative to build an all-encompassing platform together with members of Parliament and supportive members of the Executive to push for these reforms.

To his credit, President Yoweri Museveni, more than any other President in Uganda's post-independence history, helped bring about tremendous economic progress, political stability and significant improvement in human development indicators; since his ascendance to power in 1986. However, no matter his good intentions, it is argued that a burgeoning Public Administration expenditure fueled by a growing political bureaucracy is one of the key factors inhibiting policy actions to bring about more robust economic growth and dramatic changes in the socio-economic conditions of the majority of the population.

In a space of 2½ decades, the number of persons employed in the Executive at Ministerial level positions increased from 53 to more than 100. From 1981 to 1985, this number included 30 Cabinet Ministers, 8Ministers of state, 11 Deputy Ministers and 4 others.[1484]Today, persons employed in the Executive at Ministerial level include 32 Cabinet ministers,[1485] 50Ministers of State and more than 200 Presidential Advisors. Besides, the Executive now encompasses a range of other Constitutional and Administrative appointees to the extent that it now constitutes one of the most extensive Executive bureaucracies in contemporary Africa.

While the expansion in the size of the Executive could pass off as a routine way of running government business, there is a legitimate debate to be had over the desirability of an ever-increasing size of the government, the associated cost burden on Ugandan taxpayers and, the implications of such a structure on governance trends in the country. The debate over the cost of the

[1484]These included the Leader of the House, Government Chief Whip, Leader of Opposition and Opposition Whip.
[1485]This includes one minister without portfolio, the ruling party Chief Whip and the Leader of Opposition.

burgeoning size of the Executive has gained momentum over the last decade. First, what is the legal and administrative framework that provides the basis for the composition of the Executive and how has this framework changed over time?

Second, what is the cost of an oversize Executive to the taxpayer and the citizens in terms of both money and governance? The evidence shows troubling but consistent trends. In just a period of 10 years, starting in 1986 when President Museveni and the National Resistance Movement Government came to power, the Executive Arm of the State in both its narrow and broad sense expanded exponentially. During the first decade of the Museveni Presidency (1986- 1996), there were compelling political reasons for a political broad-baseness to allow political accommodation.

This accommodation was necessary to mobilize different opposition and fighting groups and the goodwill of citizens required to lift the country out of the political and economic quagmire that the past governments had created. In the absence of agreed rules and consensus, the obtaining political and economic conditions allowed President Museveni to engage in a continuous experiment in running the government. However, the promulgation of the 1995 Constitution established new contours of governance and a new national consensus upon which the people of Uganda wanted to be governed.

The Constitution also established new criteria upon which any form of political accommodation was to be based. Consequently, the apparent attempt to "mutilate" the 1995 Constitution is a major indictment on the durability of the impressive political and economic gains made by the National Resistance Movement Government over the last decades. The retreat into a new form of political broad-baseness premised on ethno-religious accommodation and clientalism constructed around a powerful Executive presidency undermines the very political foundation required to sustain a modern state and economy.

The relationship between public expenditure and public policy in Uganda has gained significant attraction over the last decades. Questions have emerged as to why, in spite of the tremendous economic achievements registered under Museveni's administration, poverty levels have remained high, socioeconomic indicators have stagnated and very limited investments have been made in public physical infrastructure, social infrastructure such as schools, hospitals and productive sectors of the economy such as agriculture and industry.

The Gross Domestic Product has averaged approximately 6 per cent per annum for more than a decade. Domestic revenue had increased dramatically from US$44 million in 1986 to approximately US$3 billion by 2007. Over the same period, inflows of international financing

through aid and loans averaged to US$600 million per annum.[1486] By any measure, while the National Resistance Movement government was confronted by overwhelming social, economic and political problems, it is also reasonable to assert that it has had the biggest resource envelop compared to any previous government.

Yet, stagnation in key human development indicators and apparent democracy inertia has cast a shadow of pessimism about the success story that had begun to emerge at the promulgation of the 1995 Constitution. For example, while poverty levels were brought down from 56% in 1992 to 35% in 2002, the number of people living in poverty increased to 38% (approximately 14.4 million people) in 2004. Since then, though, the Uganda Bureau of Statistics suggests that poverty levels have declined again to 31%.[1487] While school enrollment statistics have gone up as a result of the introduction of Universal Primary Education[1488]and Universal Secondary Education, concerns have grown over issues of standards and quality as well as lack of investment in appropriate education infrastructure. For example, it is estimated that of the 2 million children who enrolled in Primary One when Universal Primary Education was introduced in 1997, only 406,000 sat Primary Leaving Examinations in 2003.[1489]

Of the 463,631 children who sat Primary Leaving Examinations in 2008, only 17,021 children, representing 3.7 percent, passed in Grade 1.[1490] While the government can be applauded for pursuing policies that brought about significant improvements in infant mortality and maternal mortality rates during the period 1990-2005, the indicators have stagnated in the last three years. For example, reduction in infant mortality has stagnated at around 69 per 1000 children since 2005 in spite of having three Ministers deployed in the Ministry of Health,[1491] or increased budget allocation to the Health Sector.

Although it is difficult to find accurate mortality rate figures and, those that exist are considered controversial, it is estimated that between 6,500 – 13,500 women and girls die each year due to

[1486]ACODE data sets on foreign aid flows to Uganda for the period 1962-2004 (unpublished).

[1487]Republic of Uganda (2008); Statistical Abstract; Uganda Bureau of Statistics, Kampala

[1488]Total primary school enrollment increased from 3 million pupils in 1997 to 7.6 million in 2003. See Republic of Uganda (2004).Poverty Eradication Action Plan (2004/5-2007/08). Ministry of Finance, Planning and Economic Development; Kampala; Pg.155

[1489]USAID, 2005; USAID/Uganda Annual Report, 2005

[1490]The Ministry of Education has 1 full Cabinet Minister and two Ministers of State, one for primary and the other for higher education. The fact that with only 3.7 per cent of the primary school children passing in Grade 1, and neither the minister nor the deputy minister responsible for primary education takes responsibility and resigns demonstrates the lack of accountability for poor performance of government. In a cabinet reshuffle, announced on February 14, 2009, less than a month after the release of the PLE results, Minister Namirembe Bitamazire was retained in her position while State Minister for Primary Education Peter Lokeris was transferred to be Minister of State for minerals.

[1491]In the cabinet reshuffle referred to in note 9, Steven Malinga was retained as Minister of Health and Richard Nduhuura as State Minister for general duties. James Kakooza was brought in to replace Emmanuel Otala as the State Minister for primary health care.

pregnancy-related complications.[1492] In 2004, the United Nations Fund for Population Activities estimated that Uganda loses 505 women out of every 100,000 live births, ranking as the 8th country with the worst maternal death rates in the world.[1493]The number of stunted children of less than five years increased from 38% in 1995 to 39% in 2001.

Equally disturbing trends exist in key sectors like agriculture where output has declined consistently over the last decade notwithstanding the number of Ministers deployed in the Ministry of Agriculture. Even in the areas of governance, key indicators show emergence of inertia evidenced by increasing corruption and bureaucratic inefficiency.[1494] Indeed, the apparent stagnation in socio-economic indicators and apparent democratization inertia make the present debate on the cost of public administration expenditure, economic growth and governance one of the most legitimate public policy concerns in contemporary Uganda. Unfortunately, the debate has been less helpful in informing public policy because it lacks conceptual clarity and is largely based on anecdotal evidence. For example, there is apparent conceptual confusion between public expenditure and public administration expenditure. Although the budget process has attempted to draw this important distinction, it is apparent that the distinction has not filtered into the ongoing debate.

Equally unclear is what constitutes the "Executive" for purposes of establishing the full extent of the cost of the Executive branch of government on the taxpayer. Consequently, the challenge is to identify and distinguish between these key concepts and set appropriate conceptual boundaries to enable a more focused and policy relevant analysis and debate. The starting point to providing a conceptual framework for this paper is to define the concept of public administration. Public Administration is used to refer to the segment of the state that is responsible for the delivery of public goods and services.

It is mainly comprised of the Public Service and other Quasi-Public Service institutions such as public enterprises, constitutionally mandated agencies[1495] and statutory bodies.[1496]It is also important to note that while there can be a debate about the size and cost of these institutions to the taxpayer, their desirability is generally not contested. For example, the desirability of Judicial Officers, or Teachers or a National Police Force is accepted as having socially optimal tangible

[1492]Futures Group (undated); Maternal and Neonatal Program Effort Index: Uganda. Glastonbury, USA.
[1493]Reported in The New Vision, July 7, 2004
[1494]ICPSR (2005); Afrobarometer Round 3: The Quality of Democracy and Governance in Uganda, 2005.
[1495]This includes agencies created under the Constitution such as the Inspectorate of Government, Uganda Peoples Defense Forces (Articles 208-210), Uganda Police Force (Articles 211-214), Uganda Prisons Services (Articles 215-217) and the intelligence services (Article 218), etc.
[1496]Statutory bodies are created by the Legislature and charged with specific mandates for the effective governance of the country. Some of the major statutory agencies in Uganda include: National Planning Authority (NPA), Uganda Revenue Authority (URA), Uganda Investment Authority (URA), National Environment Management Authority (NEMA).

benefits to society. In effect, the size and quality of Public Service in these areas is likely to lead to optimization of certain social outcomes.

For example, the net social gain of recruiting an extra judge or magistrate may be the increased number of detainees that may be prosecuted annually. Or the recruitment of one extra teacher could lead to a reduction in teacher-student ratio and hence lead to improvements in the quality of education. And when such changes in the size of the service are considered in aggregate terms, the optimization of social outcomes can be dramatic and compelling to justify public expenditure on these institutions. However, there is another segment of governmental administration that falls outside the mainstream public service. For the purposes of this paper, we call this segment "political administration".

Political administration is used here to denote the segment of governmental administration that is mainly political because of the way the institutions that operate in that space are constituted and their staff selected, or appointed. Ministers, Members of Parliament, Presidential Advisors, Presidential Assistants, and Resident District Commissioners are just but examples of the segment of the Public Service that falls under Political Administration. If Political Parties were funded from the Consolidated Fund, their staff would also be included under this category.

Institutions that fall under the Political Administration segment of the Public Service differ from the mainstream Public Service in some fundamental ways. First, their composition and structure can be altered without affecting the exercise of their aggregate mandate and potential impact on the delivery of public goods and services in the country. For example, selection of Members of Parliament could shift from the present county-based constituency structure to sub-county-based or district-based constituency structure without the aggregate mandate of Parliament changing. Or the composition, structure or numerical strength of the Cabinet can change but its aggregate constitutional mandate would remain intact.[1497]

Second and most importantly, because of the aggregate nature of their functions, the marginal value of increasing or decreasing the numerical strength of these institutions is almost zero. Consequently, their optimum numerical strength is more of a political question rather than a function of social optimization or rationalization in logic. For example, increasing the number of Prosecutors or Judges or Teachers or Doctors is predicated upon the desire to optimize certain social or economic outcomes. In this regard, society benefits directly from reduced crime, better student performance or efficiency in the delivery of health services.

On the contrary, the marginal utility of having an additional Minister for Justice or Education or Health is statistically insignificant or zero. In other cases, such an increase in the number of

[1497]Article 111(2) of the 1995 Constitution (as amended) provides for the functions of the Cabinet.

Ministers could even be in the negative especially where a big number of Ministers in one Ministry leads to tension, conflict and overlap. Thirdly, in the case of non-elective offices, appointments into Political Administration Institutions or positions are at the absolute pleasure and discretion of the appointing authority. Political loyalty is the standard criterion, no formal interviewing is required and generally meritocracy becomes a secondary consideration or is completely ignored.

This is so notwithstanding the fact that Political Institutions or positions are established by law or by Administrative discretion. In the case of Uganda, the best examples are the positions of Resident District Commissioners[1498] and Presidential Advisors where recruitment is made at the pleasure of the President and loyalty is far more important than merit.[1499] The other two key concepts employed in this paper are "public expenditure" and "public administration expenditure". The term "public expenditure" is generally used to denote "the dispensation by the state [government], on non-market criteria, of economic resources"[1500] that it has acquired from taxpayers and other public sources of finance.

The traditional reference to public expenditure generally applies to public investments in key infrastructure and sectors that directly result into the production of public goods and services. In this regard, physical infrastructure such as highways and bridges, schools or hospitals, defense installations or public buildings such as courts fall under public expenditure. This is also true of investments in key productive sectors of the economy such as agriculture, industry or services. On the other hand, "public administration expenditure" covers the administrative costs associated with the functioning of both public administration and political administration. Public policy concerns about public administration expenditure are, therefore, concerns about economic rationale, cost, efficiency and political accountability associated with the performance of public administration institutions.

Finally, this study focuses on public administration expenditure on the Executive arm of the state. This raises the question as to the appropriate boundaries of "the Executive" as a unit of analysis. The term "executive" is often used in different contexts but practice shows that it is often used at three levels. First, the term is used in a very narrow sense to refer to the President or Prime Minister of a country. Hence, reference to an Executive President or Executive Prime Minister exercising all Executive powers of the state. In this narrow sense, the Executive includes the public officials

[1498]The office of RDC is established under Article 203 of the Constitution.

[1499]It is important to recognize that many of the men and women who serve in these positions are in fact highly qualified. However, in the absence of formal recruitment procedures including interviews, it is tenable to assert that their loyalty to the president or appointing authority rather than qualification is the primary consideration for their appointment.

[1500]David Heald and Alasdair McLeod (2002), "Public Expenditure", in Constitutional Law, 2002, the Laws of Scotland: Stair Memorial Encyclopedia, Edinburgh, Betterworths, Para 482.

immediately surrounding the President including Cabinet ministers, presidential advisors and assistants and other similar officials.

In a second sense, the term is used to refer to the President or Prime Minister together with the whole body of public servants in the civil and military service. In this case, the institution of public service together with the coercive instruments of state power – the army, the police and the prisons – all fall within the ambit of the Executive. Finally, when considered in the context of the doctrine of separation of powers, the term Executive assumes its broadest meaning hence referring to all governmental officials capable of exercising Executive authority either in their official capacities or on behalf of the chief executive, hence excluding those acting in a legislative or judicial capacity.

For the purposes of this paper, the term "executive" is used in its narrow sense. This study is therefore mainly concerned with the composition, structure and numerical strength of the Office of the President, the Office of the Vice President, the Office of Prime Minister, State House, the Cabinet, and the various officials that form the core of the Executive in this narrow sense. Our analysis of public administration expenditure thus focuses on the costs of these institutions to the Ugandan taxpayers and the economy on the one hand and the implications for governance on the other.

PRESIDENTIAL ADVISORS, PRESIDENTIAL ASSISTANTS AND RESIDENT DISTRICT COMMISSIONERS

Consistent with the tendency towards building political patrimony through Cabinet appointments, the Museveni Government has sought to use other forms of politically based appointments to reward regime supporters or manage political dissent. This has been achieved through appointments of a network of Presidential Advisors, Presidential Assistants and Resident District Commissioners[1501] since the numbers and roles of these appointees defy any possible rationalization. In 1994, Uganda had only 4 known Presidential Advisors.

In 1997, their number was reported to have increased to 18. During the debate on the motion to determine the emoluments of Members of Parliament, a Member of Parliament Winnie Byanyima suggested that this was a redundant group of political elites and observed that the government could save money if the President load-shedded this "political excess baggage."[1502] By 2003, the number of Presidential Advisors (excluding Presidential Assistants) had increased to 71. Although it is difficult to ascertain the current number because of the secrecy of the information surrounding these offices, an official list published by the Office of the President showed that President

[1501]Although the office of RDC is provided for in the Constitution under Article 203, appointment of RDCs is largely based on political loyalty and does not follow standard public service recruitment procedures.

[1502]Hansards, June 10, 1997. Pg. 1845

Museveni had a combined 200 and plus Presidential Advisors and Presidential Assistants as of now. Writing in "Inside Politics" section of The Daily Monitor newspaper in 2006, Angelo Izama estimated that these Advisors and Assistants cost the Ugandan taxpayer at least USh2.6 billion every year, which translates into approximately USh13 billion over a five-year presidential term.[1503] The "obscenity" of the number of Presidential Advisors and Assistants is not only in terms of the cost to the taxpayer but also in terms of the structure and hence the areas where a President requires advice and assistance.

According to the official list published by the Office of the President, the President has Advisors or Assistants on a range of mundane issues such as religious affairs, literary affairs, household and presidential farms. These issues are mundane from the perspective of the taxpayer because they are either outside the ambit of areas that require public investment or simply there is no marginal value or utility to the taxpayer in having persons specifically designated to advise the President on those issues. In any case, the fact that the President maintains a bloated Cabinet designed around similar issues clearly shows that the Ugandan taxpayer is being short-changed through double payment and lack of value for money.

As already pointed out, the marginal gain to the taxpayer of an additional advisor is clearly non-existent. On the contrary, the marginal loss to the taxpayer can be computed in the form of shillings lost or goods and services forgone. For example, it is estimated that the cost of a single Presidential Advisor at USh48 million (salary plus benefits) per year is equivalent to the cost of constructing a running health care center providing services to at least 5,000 people.[1504] An analysis of the cost of the Executive on the public purse is incomplete without analyzing the cost implications of the position of Resident District Commissioners.

The office is created under Article 203 of the Constitution as amended. Accordingly, the functions of Resident District Commissioners are to: coordinate the administration of government services in the district; advise the district chairperson on matters of a national nature that may affect the district or its plans and programs and particularly the relationship between the district and the government and to carry out such other functions as may be assigned by the President or prescribed by Parliament. Like the Cabinet and Presidential Advisors, the number of Resident District Commissioners has continued to grow both by design and by default. By design, the positions have been increased through the creation of numerous offices of Deputy Resident District

[1503]The monthly salary of a presidential advisor, excluding allowances and other privileges, is estimated by the Public Service at UShs2 million.

[1504]Mugasha F., C. Kassami, B. Van Arkadie and A-M; Berger, 2002; Final Report of the Committee to Advise the President on More Effective Public Administration Budgeting, Kampala: Office of the Prime Minister and Ministry of Finance, Planning and Economic Development.

Commissioners and Assistant Resident District Commissioners. By default, the number of Resident District Commissioners has increased as a result of the increase in the number of districts. In 2003, there were at least 56 Resident District Commissioners, 48 Deputy Resident District Commissioners and 38 Assistant Resident District Commissioners representing the 56 districts that existed at the time. A 2008 list announcing the appointment of Resident District Commissioners showed that taxpayers were paying for the services of 80 Resident District Commissioners and 59 Deputy Resident District Commissioners.

The financial cost of Resident District Commissioners to the taxpayer can also be examined in the light of the amount of public funds expended on their salaries and other operational expenses, as well as the desirability or relevance of the office. From the outset, it may be argued that the poor functioning of key government institutions at the local level has made the presence of the Resident District Commissioners office necessary. Beyond the constitutional functions outlined above, Resident District Commissioners cover up for key institutions such as the police and community development offices because these institutions are either malfunctional or are not properly facilitated to discharge their duties.

Considered from this perspective, it is possible to sympathize with those who argue that Resident District Commissioners play an important role in the delivery of public goods and services. However, given that there are already public institutions mandated to perform these functions, the presence of Resident District Commissioners and more so in terms of the current numbers, creates an unjustifiable expenditure burden on the taxpayer. Independent analysis of public service pay shows that a Resident District Commissioner earns at least three times the gross monthly salary of a newly recruited doctor, or 10 times the gross monthly salary of the men and women who serve in the military at the rank of private or 11.5 times the gross monthly salary of a police constable.

The bloatedness of the Executive is also reflected in the growing expenditure on the Office of the President and State House over the last two decades. For example, expenditure on State House – the official residence of the President – has increased from UShs14.8 billion in 1994 and was projected to reach an estimated UShs58.8 billion by 2008.

CONCLUSION

This research has examined the financial and governance implications of a bloated Executive that has emerged since the ascendance to power of the National Resistance Movement government in 1986. It has been argued that despite the Constitutional restraints on the appointing powers of the President, the Executive and the Legislature have over the years conspired in a mutually beneficial relationship to remove those restrictions and allow the sitting President to construct one of the most

extensive executive bureaucracies ever in Uganda's History.

Firstly, a bloated executive epitomized by an oversize cabinet, an extensive network of Presidential Advisors and Presidential Assistants and a host of quasi-public service appointments such as Resident District Commissioners is undermining good governance and cost-efficient government. Unrestrained appointments are used to construct an embedded political patrimony network, while mandate overlaps and diffusion of institutional responsibility have clearly undermined efficiency, accountability and fiscal discipline.

Secondly, although the National Resistance Movement Government brought about a rebound in the economy maintaining an average growth of 6% over the last decade, the increased government revenue has mainly gone into sustaining networks of political patronage instead of improving socio-economic conditions of the ordinary Ugandans. As argued in the paper, this is evident from the fact that socio-economic indicators have stagnated over the last decade, payroll taxes for people employed in the public sector have not reduced and, corruption has grown into a cancer that is consuming the fabric of society.

Thirdly, there is still a window of opportunity to change course and reverse the current trends. However, this is largely achievable if the sitting government focuses on the strategic long-term transformation of the country rather than short-term regime survival considerations. It is important to recognize that President Museveni, the National Resistance Movement party and Parliament have consistently expressed commitment to good governance and efficient government. However, tapping this potential goodwill requires the participation of third parties. In this case, organized civil society will be essential in creating the momentum for reform.

Finally, the issue of public administration expenditure is not only associated with the executive. There are a number of other areas that should be studied to provide evidence that can support necessary actions and reforms. Future studies should focus on enhancing the understanding of public administration expenditure at the local government level and the cost of key processes such as commissions of inquiry.

NRM INTERNAL PARTY CRISIS (ENEMY WITHIN)

No one could think at one point movement system of the NRM government could face challenges within the house. But as usual, the parties were merely seen by staunch supporters as a means of acquiring political power and wealth often for private interests but not as a mechanism to transform society. Perhaps this is the major cause of internal political crisis's. Many of the guerilla fighters in NRM started to see Museveni as a selfish person and an opportunist who did not want to hand over power to the natives yet this had been the idea of them all which was to be done in 4 years.

Many had hope that returning power to citizens would give them an opportunity to get involved in Uganda's politics and perhaps lead the country. Because of these varying interests, clashes occurred in NRM which led to movement of individuals from NRM and among these was Col Dr Kizza Besigye a leading exponent and one of the founding fighters of NRM.[1505] This was to form the basis for the disintegration of NRM which worsened after the adoption of multipartyism in Uganda.

DR KIZZA BESIGYE DROPS NRM "AN INSIDER'S VIEW OF HOW NRM LOST THE BROAD BASE"

In November 1999, the country was shocked when one of the strong fighters of NRM Col Dr Kizza Besigye authored a document **"an insider's view of how NRM lost the broad base"** This document drew a line between him and Museveni and eventually painted them political rivals.[1506] Indeed it was a lengthy missive against the establishment that was in power for 13 years. Museveni and the allies were infuriated and warned Besigye of misconduct by washing a dirty linen in public. His argument was that the movement philosophy and governance had been manipulated by those seeking to gain or retain political power in the same way that political parties in Uganda were manipulated.

The end result was loss of faith in the system, corruption and insecurity. To him, the main notion of NRM was to hold power for four years and then hand over power to the people. He stated that when Museveni started to manipulate the movement system, then he had betrayed the guerilla fighters.[1507]In his reaction, Museveni stated that Besigye could be court martialed for airing out his views in a wrong forum. But this seemed to be nothing. Besigye had opened doors for the many that were silent.

General David Tinyefunza now known as David Sejusa during the constituent Assembly also opposed the automatic extension of movement for another five years. He was left humiliated and forced to apologize and retract his comments during a meeting of the movement caucus a situation that he declined. As if this was not enough. In 2000, après conference was called for where Besigye declared his intentions to challenge Mr. Museveni on October 28th. This a bit confused Museveni who decided to leave the venue in Ntare where he was with Kagame celebrating its anniversary.

On 1st November 2000, Mr. Museveni issued a statement in which he lashed out at him for unilaterally declaring himself a candidate. "Besigye has gone about his intentions in an

[1505]Kakuba Sultan Juma.Multiparty Politics dynamics in Uganda.African Journal of Political Science and International Relations Vol 4(3) pp109-114 March 2010.
[1506] Paul Mugume. July 7th 2017, Why Besigye left Museveni and NRM. National Politics. The Tower Post.
[1507] Col Dr Kizza Besigye November 1999.

indisciplined and disruptive way. He has without consulting any organ of the movement launched himself as a movement candidate although it I well known that he is in loose collaboration with multi partists. Let us however assume that col Besigye is not in cahoots with multipartists."[1508]

It seems that the president was defending himself. Besigye had started to obtain support from some of the insiders and masses as well as those that desired multi-party system. This increased and turned the movement system which started to affect its mass grassroots support. In 200 elections, though he lost to Museveni, it was clear to understand that NRM had created a strong grassroots structure which was hard for Besigye to dismantle. In her words, Proscovia Salaam Musumba remarked **that "for 2001 race, Besigye was in the political laboratory, he was testing the system that they had built along way and he realized it had been hijacked."**

When the elections were done, Besigye ran in exile in South Africa. When the room for multipartyism was created, the FDC was built in 2004 by him and others and begun its activities and forming the strongest opposition against Museveni replacing UPC and DP that had dominated the politics post-independence period. It became another force to reckon and in 2006, it is alleged that FDC won the presidential elections though they were rigged by NRM of Yoweri Museveni.[1509]

OTHERS DESSERT NRM (THE ENEMY WITHIN)

As the country thought issues had been settled in the NRM after Besigye, another veteran and strong legal puritan left the movement. Miria Rukuza Koborunga Matembe who was an ethics and integrity minister decided to drop off the bus in 2003. [1510]She was one of the many so loyal to Yoweri Museveni. She had previously been part of the Constitution Commission that oversaw the drafting of the 1995 Constitution. It is said that as a token of appreciation, she was made the ethics and integrity minister.

Her misunderstandings with NRM boss arose in 2003 when she started to oppose the removal of the **"Presidential Term Limits"** to aid Museveni contest for another term. She was part of the framers of the constitution and could not see this stand as it could be a violation of people's interests since they are the sovereign[1511]. In her 250 paged Memoir, she asserts that there was a lot of corruption and the more she fought corruption is the more she was fought by those close to the president. Perhaps her interests were different from those of the NRM staunch carders.[1512]

This was a manifestation that whatever Besigye had said was reality. There was no longer doubt

[15081508] Gen Yoweri Kaguta Museveni Nov 1st 2001
[1509] Dr Kizza Besigye. Portrait of a fighter by Guest Writer. Feb 17th, 2021. A look at the twenty years of Political action of the four time presidential candidate.
[1510]The Observer: Matembe: My time in MusevenisCabinet.Reported by Baker Batte Sept 18th 2009.
[1511] 1995 Constitution of Republic of Uganda, Article 1.
[1512] The Struggle for Freedom and Democracy betrayed : Memoir by Miria Matembe an Insider in Musevenis government.

that Museveni's government had been infected by the notorious vices of every government. The next group was to leave NRM within days.

In the same year, while at Kyakwanzi, the next was Bidandi Ssali then a powerful minister and member of president Museveni's inner sanctum. During the meeting, he questioned the president of when he would quit. Bidandi had led Museveni's campaign team in 2001 where he had asked masses to give him another chance. He was really going to feel betrayed if Museveni came back in 2006. It seems quite clear that he also had plans of contesting for presidency after Museveni but this seemed impossible. In Reply, Museveni banned him together with Augustine Ruzindwa and Eria Kategaya from the party.

After this move, many other strong heads that were frustrated decided to dessert the party. Among these was the former army commander Gen Mugisha Muntu, Augustine Ruzindana, Jack Sabiiti, Sam Njuba, Patrick Musinguzi and Amanya Mushega. In his address, Mr. Museveni informed the world that the NRM could do without them since they were a **"mere spoke in the wheel"** of the party.[1513]The conflicts and misunderstandings in NRM intensified and many continued to dessert the party.

Many thought the party was at the verge of collapse but surprisingly it has remained strong by recruiting many young politicians who have been inculcated into the party ideologies in Kyakwanzi to maintain the party strength. But worth to note is that though all this has been done the conflicts have continued to shake the party's strength and perhaps many claim it's the selfish interest of the big men in the party administration.

THE NRM REBEL MEMBERS OF PARLIAMENT "THE REBEL MPS"

As already seen, ever since NRM started the stewardship of Uganda, it has been battling with conflicts within its confines. Many of these are staged by those that illusion themselves as staunch members but have different interests. In 2013, NRM party as a party underwent another stage of misunderstandings and class among its carders. Surprisingly these were the promising men in the fulcrum of the party that it held a lot of hope in them.

These were the famous "rebel MPs." These included Muhammad Nsereko, Barnabas Tinkasimire, Theodore Ssekikubo and Wilfred Nuwagaba. These continued to roar and protest loudly each time their party strayed politically not until the party decided to expelled them.

[1513]The Independent.Quitting NRM.Story by Haggai Matsiko.Retrieved 3rd June 2021.

M U H A M M A D N S E R E K O

The ruling party had struggled to make its make way in Kampala and when Muhammad Nsereko won the Kampala central members of parliament seat, the party thought it would now rest easy, sit back on its helms and enjoy some much needed peace because finally, one of their own was representing the most constituency in the Capital. Shockingly, it seems that all his intents and purposes fell on the silver plate for the opposition. He was an opposition politician donning an NRM tag.

One time, when he was arrested, he was seen brandishing a V-sign well known for FDC. He once announced that he would resign from NRM and re-run on another platform and went father to announce that he would start his own political party.[1514] This was right reflection of his opposition soul covered by the yellow color of NRM which hurt the NRM secretary general and Chairperson Mr. Museveni.

Despite warnings from the party, he was not willing to relax his moves against NRM. It's on record that when a bye election was organized in Bukoto South, Nsereko campaigned against NRMs Alintuma Nsamba something that made it bluntly clear that he had become a liability to the party.[1515]

B A R N A B A S I T I N K A S I M I R E

Just like Nsereko, Barnabasi Tinkasimire was yet another Judas in the realms of NRM. He was the Member of Parliament for Buyaga Constituency a seat that he had acquired as an NRM flag bearer. His career in the party was full of confrontation with some officials especially ministers that had been appointed by the chairperson of the party doubling as the president of Uganda. He had earlier confronted the late Dr Stephen Mallinga when he accused him of being too old to be a minister. The other was the state minister for Relief and Disaster Preparedness Musa Ecweru whom he constantly accused of defilement.

This did not appease the chairperson of the party and other henchmen of the party that enjoy its policies. The question was on what could be next for him but Barnabas was a hard rock indeed. He went on to raise ideas of need to revive the term limits and calling upon the president to resign and perhaps not to stand for presidency come 2016.[1516] This under looking of the party dogs left them with no option but to close doors for him.

[1514]Muhammad Nsereko while having an interview with The Observer a well knownnews paper in Uganda.
[1515]Daily Monitor. "Who are the Rebel MPs." Monday April 15,2013 Reported by John K Abimanya and retrieved on 6th June 2021.
[1516] Despite warnnings from CEC and NEC of NRM, he was not willing to halt his moves which eventually accelerated his dismissal from the party.

THEODORE SSEKIKUBO

One can largely say that his ideas were a reflection of Barnabasis ideas. At the time, he was the Member of Parliament for Rwemiyaga Constituent which he acquired as an NRM flag bearer. Despite the other two, Ssekikubo lived a life of close proximity with Museveni since childhood. He was a son of Sam Mwagala who was a close friend to Amos Kaguta the father to the president of Uganda.

Despite the history, he was never concerned and continued to blame the president for the poor governance and long stay in power. He attributed this to his removal of the term limits something that he always referred to as opportunitism. He went on to advise him to denounce his ambition to stand for presidency in 2016. This left many NRM officials wondering his conduct which they could not withhold.

DISMISSAL OF THE MPS

The president, who chairs NRMs Central Executive Committee, presided over the expulsion of the group on grounds of indiscipline resulting from differences in opinion. This development gave the public a face of a simmering conflict within a ruling party. Mr. Nsereko was accused of appearing on radio stations where he allegedly denounced president Museveni and vowed to fight his re-election in 2016.[1517] He was further accused willfully and intentionally disseminating false and malicious allegations that those who are not relatives of the president would remain beggers.

Theodore Ssekikubo was on accused of appearing on a radio station where he became over political. While appearing on Capital FM, he was quoted stating that Museveni was a lawyer for the corrupt and went further to give example of Temangalo and CHOGM scandals. Barnabasi was accused of forming clique factions and intrigue with others contrary to Rule 4(a) of the NRM code and acting contrary to rule 4(j) of the NRM Code. On that basis they were expelled from the party.

Upon their dismissal, the angry MPs continued to threaten on how they were to unseat Museveni Yoweri and some of his henchmen in 2016**. "They will see us in 2016 general elections. We shall show them that we are not simple people. We will ensure that we take over leadership."[1518]**

The Ugandan laws provide that if a legislator leaves the party from which he acquired a seat, then the party should write to the speaker advising that the said MP has been withdrawn and a vacancy will be declared**.[1519]**This meant that the rebels were to cease being members of Parliament which they declined.

[1517] It was alleged that he stated this while appearing on Radio stations shows on Dec 30th 2011 and Feb 1st 2012.
[1518]Barnabasi Tinkasimire while addressing journalists after being expelled.
[1519]Article 83(1) (g) of the 1995 Constitution of Uganda.

They went defiant against vacating Parliament, Ssekikubo, Nuwagaba and Tinkasimire turned up to the Legislature on Wednesday 17th April 2013 claiming that they were still members of Parliament. "We are still valid MPs and we still continue attending Parliament in our capacity as elected legislators despite NRM threats against us."[1520] They continued to acquire support from the public with the NRM being accused of failing to address corruption. The secretary general of NRM wrote to the speaker Right Honorable Rebecca Kadaga informing her of the expelled MPs requesting her to have them sent out of the August House.

In her letter still, the Secretary General demanded that the Speaker informs that Clarke to write to the electoral commission to organize a bye election for the vacancies. All their demands expressly stated were turned down by the Speaker when she declined. This meant that NRM had to divert and take another route if they were to succeed. The party petitioned the Constitutional Court to dismiss the MPs from Parliament. In his judgment, Richard Buteera ordered that the MPs should leave the House and not to receive any allowances because their continued stay was unconstitutional.

Being in discontent with the judgment, the parties decided to appeal the decision and the Supreme Court indeed overturned it. It ordered that the parties remain in Parliament for the word "leave" within the intent of the framers meant leaving the party willfully without being expelled or forced.[1521] This left the MPs jubilating. NRM had lost the battle and the MPs vowed to continue challenging NRM policies.

During the debate for the removal of the age limit in 2017, a bill that was introduced by Raphael Magyezi, a section of these angry MPs promised to undertake whatever is possible to prevent the amendment of Article 102(b). The provision barred any person beyond the age of 75 from contesting for presidency. This move was done to weaken the party for its amendment meant that Museveni was to contest in 2021 general elections.

These were later joined by John Baptist Nambeshe and Felix Ogong to challenge the move. They had spent year's fiercely opposing the NRM way of doing things and threatened to unseat Museveni a decision they were not to decline. [1522] The hard boys continued to storm NRM and voted for **"No"** in the Age Limit debate. This continued to torn NRM and increased support for the opposition. It seemed quite evident that NRM is full of wrangles though they are covered by its chairperson.

[1520] Ssekikubo said this before storming Parliament in 2013.
[1521] Supreme Court Constitutional Appeal No 1 of 2015.
[1522] Uganda: "Sacked rebel MPs insist they are still MPs." The africa report by Godfrey Olukya.

MONOLITHIC NRM AND THE DECEPTIVE RACE FOR SPEAKER OF PARLIAMENT

THE KADAGA-NAMUGANZA & OULANYA FEUD

For long, no one could narrate the center of curvature for the conflict between the Minister of State for Lands Persis Namuganza and the Speaker of Parliament Rebecca Kadaga. Namuganza had allegedly mounted a verbal war against the speaker and she had gone an extra mile to ask her voters of Bukono County, Namutumba district to boycott all activities organized by the speaker. She accused her of rebelling against the Kyabazinga. Their wrangles went viral on social media and perhaps were irritating requiring an explanation.

The conflict between the two started in the early March of 2018 at a function in Bukono. The function was organized to launch boreholes as a way of solving the water issues in the great Busoga region. At the function, Namuganza reportedly told off Kadaga and Busoga king Gabula Nadiope to concentrate on fighting jiggers in Kamuli which to her were serious threats than poking their noses into Namutumba affairs.

Besides, that Kadaga and the Kyabazinga had earlier gone to Namuganza's Bukono Constituency and installed a chief without her knowledge which the latter called an insult. In an angry manner, Namuganza rallied all her voters in Bukono to use stones and sticks to chase and dismiss Kadaga and the Kyabazinga if they over pope their noses in Bukono without her awareness.

> "Kadaga should have declared war on the famine and drought that has hit Busoga. She would have declared war on the jiggers that attacked Kamuli. But for her to Come and declare war on me, I will also declare war on her because she isn't immune from death" [1523]

Kadaga's political wing went ahead to threaten and warn Namuganza of her conduct. Her language was really alarming and this raised concern as to whether she was suit for the ministerial position and some went further to threaten a vote of censure in the minister if she could not control her conduct. For days, the misunderstanding could not be settled and cold war continued among the two. It was indeed irritating of how the speaker and the minister both of which were NRM carders could conflict to such an extent.

This forced the Deputy Speaker Jacob Oulanyah to ask the committee on Rules, Privileges and Discipline to investigate the conflict between Namuganza and Kadaga. In his words, he remarked that "the issues raised before affecting the speaker of the House, affect her as a member of

[1523] Hon. Persis Namuganza the State Minister for land while addressing a press conference.

Parliament whose privileges are also guaranteed by our own rules and laws of this country including the Constitution."[1524]

The committee had to immediately commence its activities. It called upon Persis Namuganza to turn up and explain the hidden journey of the conflict.

While appearing before the committee on Rules, Discipline and Privileges, she remarked that ever since the passing away of the late Bukono chief Christopher Mutyaba who was her father, Kadaga and the Kyabazinga were planning a succession which left her family divided. She continued that she was hit to learn of a move by Kadaga who flew to Bukono just a day after the president halted the process and installed a chief which sparked the violence.

The wrangle between the two went on and did not spare the cultural leaders of Busoga. Though Namuganza is from one of the royal clans of Busoga, the tension between her and Kadaga points to a section of royals falling out with her to align themselves with Kadaga.

These cultural leaders from Kigulu chiefdom led by Princess Ruth Nakayima Nakidodo held prayers and handed over a spear and shield to Ms. Kadaga to enable her gain support and success over Persis Namuganza in the elections of Second National Vice Chairperson NRM(female) a post which the two were competing for. Though this was the case, it's worth noting that the conflicts between the two are noted to have begun in 2015 from the NRM party primaries and the 2016 elections in which Princess Persis Namuganza accused Kadaga of political interference in the affairs of her constituency Bukono.[1525]

In her final remarks while shading tears before the committee, Namuganza stated that the speaker should desist from politically interfering in the delicate matters of the royals in Busoga since she is not a royal.[1526]It seemed the war was not to end unless the parties had been called together to have a dialogue. Even after the committee, the parties continue to threaten each other. They were on headlines of every newspaper formed the talk shows of every television and radio show. This was so shameful to the party and the country at large as such learned and big people continued to portray such a nasty character in society.

Most of the officials called upon the president also doubling as the chairperson of the ruling party NRM to mediate two and if not another method should be adopted to solve the issues between the parties.

[1524]Mr. Jacob Oulanyah while addressing Parliament on the Conflict. Also see Daily Monitor March 15th 2018: Oulanyah direst rules committee to probe Kadaga-Namuganza conflict .

[1525] Kadaga camp plots attacking Namuganza suppoters outside Busoga. Timothy Sibasi..political risk analyst..africandussier.press

[1526]Persis Namuganza to Kadaga. " Leave the issues of the royals to the royals"

THE KADAGA-OULANYAH FEUD

The conflicts between the party candidates have continued to directly affect the cohesion of the ruling party. Perhaps one can argue that the party has failed to discipline its big dogs due to fear that they dessert the party which may weaken it. As the party was looking forward to masking the conflict between Persis Namuganza and Kadaga, another feud raised out between Kadaga and Oulanyah.

The misunderstanding between the two arose from the desire for stewardship of the legislative assembly or the August House of Uganda. In the aftermath of the 2021 general elections which were won by NRM with majority in Parliament, the question that remained un answered was on who was to become the speaker of the 11th Parliament. FDC presented Ibrahim Ssemuju Nganda, National Unity Platform was still holding meetings on who to bring as their flag bearer.

Challenges had befallen the ruling party over the conflict between Oulanyah and Rebecca Kadaga. Kadaga had served for speakership for a period of 10 years being deputized by Oulanyah who served the same period. But it seemed clear that Kadaga was not willing to give up despite the continued information she received from NRM that she was to give up and leave the floor for Jacob Oulanyah.

Indeed, there feud dominated both the formal and informal media for over two months. While there were many candidates, the race and the bitter contest was between the two and ended up leaving many parliamentarians divided over this matter. This brought about cracks among the different NRM regional Parliament caucuses such as those in Buganda, Acholi and Busoga over who they are to support for speakership.

It's worth noting that though it sprung after the 2021 general elections, it had been simmering since 2016. After the 2016 general elections, Oulanyah wanted to stand for speakership however the Central Executive Committee (CEC) resolved that Ms. Kadaga was to serve only 10 years and pass on the baton to Mr. Oulanyah.[1527]On several occasions after this decision, the two disagreed on who should chair the plenary sittings and taking trips abroad.

In an unprecedented move in June, Oulanyah attended a plenary session to demand that a displeasure motion against him is expunged from the records of Parliament. He said that the motion was passed in bad taste and handled in contravention of rules of procedure. When they met the president in Entebbe at State House, the two were pointing each other being responsible for the chaos.[1528]

It's the CEC to endorse the Speaker and Deputy speaker. Throughout the party's administration, the

[1527] Daily Monitor of March 28th 2021. CEC must resolve Kadaga, Oulanyah feud. Retrieved on 4th June 2021
[1528]Ministerial team mediating Kadaga, Oulanya conflict. The Independent Retrieved on 7th June 2021.

speaker and deputy speaker have always been coming from NRM. Mr. Kiwanda Ssuubi remarked that "indeed it is the duty of the CEC to provide candidates for the speaker and deputy speaker jobs" [1529]While using its mandate through the lengthy deliberations on 23rd May 2021, the NRM CEC members decided to back Mr. Oulanyah to be their flag bearer.

Kadaga had lost the support. The whole country was silent on what Kadaga was to do next. She surprisingly had a press conference where she declared that she would contest as an independent. It seems she was not willing to stop her move. This was being violent and disrespectful to the CEC. She remarked that "it was undemocratic for CEC members to pre determine the party's flag bearer in the speakership and deputy speaker.[1530]

Her decision was not welcomed by officials in NRM but applauded by the opposition who expressed support for her. The final result was to be obtained from Kololo which saw Oulanyah become speaker with a total number of 310 votes. This proved how Museveni was; that whoever he endorses through CEC becomes the chair. Though practically she lost to Oulanyah, ideologically, she had lost to Museveni whose order she had defied.

In conclusion, no one can ideally understand whether the misunderstandings will ever end in NRM. This perhaps paints a picture that the party may not be able to stand if its chairperson happens to cease office.

UNLOCKING THE GATES FOR LIFE PRESIDENCY:THE HIDDEN AMBITION OF MUSEVENI

In the initial years of his leadership, the move for fundamental change was given life. This was witnessed by the creation of Ministry of Constitutional Affairs and later the Constitutional commission to draft a new Constitution which was a light against the past. This was later to face unprecedented amendments to favor the head of state.

The idea of creating a new constitution under NRM commenced from the creation of the Ministry of Constitutional Affairs in 1986. Its activities were however very slow not until 1989 when a Constitutional Commission was formed.[1531] The selection of members to the commission was ad hoc and was done in batches. Some appointed by the president were not approved by the minister for Constitutional Affairs and those appointed by the minister were not approved by the president. There was no nomination process allowing anyone else to suggest names.[1532]But nonetheless, its activities were to commence soon in what can be termed as constitutional making process. The

[1529]Mr. Kiwanda Ssuubi on a talk show at NBS TV. See also Uganda Speaker Race. Kadaga, Oulanyah moment of truth. The Monitor (Kampala)
[1530]Daily Monitor.Kadaga to run as independent in the speakership.Reported by Faith Amongin.
[1531] J. Katorobo, "Electoral choice in the Constituent Assembly Elections" in from Chaos to Order p.117.
[1532] Furley and Katalikawe, " Constitutional Reform in Uganda," pp 247-51.

commission was to be headed by Justice Ben Odoki under the direction of the minister for Constitutional Affairs.

The commission carried out popular engagements of the citizens in education seminars, debates, media discussions and submission of opinion memoranda that evidenced over constitutional making. At least 25,547 separate submissions of various views were sent to the commission. [1533] These submissions included Local Council Memoranda (10,134); essay competitions (5,544), seminars reports from district, Sub County and various other institutions (899), newspaper opinion Articles (290) and individual memoranda (2,553) and others.[1534] That is how Ugandans actively expressed their wish.

At the climax of its activities, the commission produced a draft constitution to the Constituent Assembly which saw many caucuses formed to deliberate on the draft. These included NRM caucus, the Buganda caucus, National caucus for democracy and Women's caucus.

The Constituent Assembly deliberations lasted that lasted for 29 months from the time the Assembly opened on February 16 1993 to its conclusion on August 25th 1995, when the 284 member Assembly adopted the new Constitution. The Constitution was enacted on September 22nd and promulgated on October 8th 1995 by the president. Finally, Uganda obtained a people based Constitution. [1535]

That said, important to note is the expression of people's ambitions under the Preamble which was later to be undermined by the father of the Supreme law. It states that **" We the people of Uganda recalling our history which has been characterized by political and constitutional instability, struggles against forces of tyranny, oppression and exploitation and committed to build a better future by establishing a socioeconomic and political order, exercising our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution making process, do hereby in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda."**

The hope for the many Ugandans was expressed in those few wordings which they hoped to witness given the history of Uganda but unknown to them, they were to be betrayed by their own son; the war lord.

[1533] Republic of Uganda, Constituent Assembly Proceedings.
[1534] Mukholi, A Complete Guide 30.
[1535] The Politics of Constitutional Making in Uganda by Ali MaRI Tripp.

AMENDING THE CONSTITUTION (A BETRAYAL BY MUSEVENI)

Just like many African leaders, the ghost of staying in power for life as well haunted Mr. Museveni. In the beginning, it was silent among the few henchmen of the president not until he called for a meeting at the National Leadership Institute "Kyakwanzi" where he made it loud to others that he desired to have the constitution amended to allow him run for the third term in office. S0ome supported the idea while others opposed the move. These were some of the guerilla fighters that looked at it as a betrayal of the natives by them.

At the end of the meeting, those that opposed the idea were dismissed by Museveni out of his cabinet. They had become idiots. These included first Deputy Prime Minister Eriya Kategaya, Miria Matembe, Mugisha Muntu and Bidandi Ssali. As expressed in the preamble, the Constitution under Article 105(2) provided for a limit on the office of the president to two terms. Museveni was at the serving his second and final five year elective term. This meant that he was not eligible to contest for another term which was opposed to him.

Being disappointed in his ambitions, many of the dismissed carders started to express their opinion about this and among these were Museveni's longtime friend and almost a brother Eriya Kategaya. His words were few but expressed concern about the amendment. While attending a Parliamentary Advocacy Forum (PAFO) at Hotel Africana, He presented a paper titled "Political Transition in Uganda: The Stakes for Regional Integration in East Africa," he remarked that;

"I would like to deal with this transition under what is now popularly called third term or according to Salaam Musumba "sad term." What is referred to here is the vigorous attempts to amend Article 105(2) of the Constitution to remove the term limits on presidency…. In 2001 the promise made in writing that H.E President Museveni was going for his last and final term. What we need is the cool analysis of those who are trying to get jobs or trying to save what they have. These types of people are always compromised in their analysis."[1536] Eriya just like other citizens had seen this as a return to the dictatorial regime since one of its breeding places is long stay in power. As guerrilla fighters and nationalists, Museveni had betrayed them. They had wasted and risked their lives for nothing.

During an interview, Eriya said, **"I never thought that the Museveni I knew would be involved in this type of games lam seeing, not at all. This is totally the opposite of what I knew of the man…One of the things you have to treasure is your credibility. The moment people begin doubting your credibility, there is a problem. President Museveni now has a problem of credibility. He may think he is popular but am not sure myself. He does not have the same credibility before."**[1537]

[1536] Eriya Kategaya during a speech at Hotel Africana in Kampala. Nov 7th 2003
[1537] Eriya Kategaya during an interview with The Observer May 2004.

His words were not to halt the president's plans of amending the constitution. He and his allies orchestrated a successful political campaign which led to the removal of the presidential term limits in 2005. The removal of the term limit to give the president unlimited terms in power were launched in March 2003 during a Movement National Executive Committee (NEC) [1538] When the bill was tabled before Parliament, it was supported by Members of Parliament who had received a share of five million to support it. They were selling the nation to in favor of one person. The constitution was finally amended and the term limits buried in the dust. Museveni and his supporters had their way to success in what came to be known as a pro- Museveni project.

One can acknowledge the fact that removing the term limits was a mistake ever made by the legislators and those in other capacities that supported the move. In his words, Justice Owiny Dollo regrets the removal of the term limits and asserts that it was a mistake made that saw Uganda lose it all.

He one remarked, "I don't think this thing of the age limit was a big issue; but what I wept for this country was for the removal of the presidential term limits. That is where we lost it. The mistake we made in the Constituent Assembly was not to entrench, not to make it difficult for anyone to amend the provisions of the term limits."[1539]

In a further discussion, he noted that "I take responsibility and anybody else who was in the Constituent Assembly; that we should have secured, entrenched that provision so that if you want to amend that particular Article, you would go back to the people. We failed the people of Uganda as a consequence."

Truth be told, the removal of the presidential term limits opened flood gates for the current atrocities committed by the government where the country has witnessed arrest of political opposition members, trial of civilians in the court martial which is a reflection of the military decree number 12 of 1973 that mandated the military to arrest civilians and charge them in the military court martial, violation of separation of powers and increased assassination of political opponents. Such and many others are a reflection to the post-independence regimes that Ugandans desired to remedy under Article 105(2) of the constitution.

[1538] The Observer. How Term Limits were kicked out in 2005. May 13, 2012 by joomlasupport.
[1539] Justice Owiny Dollo during an interview with Daily Monitor at his Chambers in Kampala Tuesday October 13th, 2020.

CONSTITUTIONAL ABUSES AND THE 1995 CONSTITUTION

The new 1995 constitution was not made on a *tabula rasa*, but emanated out of a deeply rooted consciousness of a turbulent political past characterized by unlimited and costly abuse of powers. This time, the process of formulating the constitution involved wide consultation, participation and a specially elected Constituent Assembly (CA), hence 'a people's constitution'[1540]. Through a meticulous process guided by consensus, the delegates started with the preamble that succinctly reflect the tumultuous past as its point of departure. There was a general desire to entrench specific parameters and mechanisms for the operation of government against the backdrop of daunting past experiences[1541]. To ensure legitimacy and sustainability of the new constitution, the major task was to 'create viable political institutions that will ensure maximum consensus and orderly secession of government'[1542].

Ever since the abrogation of the independence constitution in 1966, the executive had exercised arbitrary power through repression and extermination. Accordingly, the ultimate motif of the new constitution was the enshrinement of people's desire to restrain executive power. The new constitution sought to entrench a strong Bill of Rights and mechanisms for their enforcement and democracy-promoting and horizontal institutions for good and accountable governance. Furthermore, the new constitution reflected the need for popular representation and aspirations that transcended mere abstraction and documentary value of a constitution. But to what extent was the new constitution a guarantee for stability and transformation of state-society relations in Uganda?

In 2005, the NRM government fundamentally amended the constitution to satisfy the narrow power interests of the ruling elite, yet the population did not defend 'their' constitution. In this regard, Moehler's study noted that citizens who were active in the process of constitution-making were no more supportive of the constitution than those who stayed at home, and stressed the importance of the political elite in shaping the constitutional perceptions of the citizens[1543]. Had constitutionalism, therefore, permeated the state and the socio-political fabric of Ugandan society? I argue that Ugandans are not passive victims, but actors with agency, challenging misrule and unconstitutionalism. However, the character of the state and political machinations often shaped their strategies of engagement. In this case, the population did not have much faith in the legalistic character of the constitution as a guarantee of a new constitutional and political order in Uganda.

[1540] Furley, Oliver and James Katarikawe, 1997, 'Constitutional Reform in Uganda: TheNew Approach', African Affairs, 96: 243-260.
[1541] Bazaara, Nyangabyaki, 2001, 'Mixed Results in Uganda's Constitutional Development: An Assessment'; Nassali, Maria, 2004, 'Constitutional Transition and the Movement System in Uganda',
[1542] Odoki, Benjamin, 2005, The Search for a National Consensus: The Making of the1995 Uganda Constitution, Kampala: Fountain.
[1543] Moehler, C. Devra, 2006, 'Participation and support for the Constitution inUganda', The Journal of Modern African Studies, 44: 275-308.

THE 1995 CONSTITUTION MIRAGE ON A TABULA RASA

On September 27, 1995, the Constituent Assembly adopted the new constitution. The 1995 constitution, establishes a quasi-parliamentary system of government, consisting of a President, Prime Minster, Cabinet, unicameral Parliament, Supreme Court and Constitutional Court. The preamble states that the constitution shall be based on the "principles of unity, peace, quality, democracy, social justice and progress" and includes a long chapter on "National Objectives and Directive Principles of State Policy". Moreover, Article 1 of the constitution proclaims the sovereignty of the people and according to Article 2[1544], the constitution "shall have binding force on all authorities and persons throughout Uganda". The constitution stresses the importance of the protection of human rights by stating that "fundamental rights and freedoms of the individual are inherent and not granted by the State" and guarantees specific rights and freedoms like, amongst others, the freedom from discrimination, freedom of religion, the prohibition of torture and slavery, the right to privacy, assembly and association.

In opposition to the Constitution of 1967, the current constitution contains a whole range of powers that are shared between the President, Parliament and other constitutional bodies. Amongst others, the presidential power of appointment regarding the Vice President and Ministers is subject to the approval of the Parliament and the appointment of Permanent Secretaries and heads of departments have to be made upon recommendation of the Public Service Commission. The Public Service Commission moreover has the power to appoint all other civil servants and judicial officers other than Judges of the High Court, Court of Appeal and the Supreme Court are appointed by the Judicial Service Commission. Also in other areas the power of the executive has been cut down extremely: The President no longer has the power to dissolve Parliament and in the area of legislation the Parliament can over-ride the presidential veto by two-thirds majority. The executive's powers to borrow money are also limited since Parliament now first has to approve borrowing.

In 2000 and 2005, important referenda on the system of government took place: The first referendum favored a "no-party" system of government but was invalidated by a court ruling some years after because of procedural shortcomings, whilst the second referendum approved a multiparty system and abolished the two-term limitation on the presidency.

[1544] Constitution of Republic of Uganda, 1995 (As amended)

A FAULTY CONSITUTIONAL PROMISE

Matovu[1545] hangs like a spectre over Uganda's 1995 Constitution. It exemplifies the century-long ideology of judges that legitimised the spread of state law outwards in concentric circles from Kampala. Appellate court judges continue to interpret written state laws with great deference to the executive despite constitutional directives to the contrary. Only two reported cases challenged family law statutes a century old. In Buganda, as elsewhere, judges upheld a rigid divide between geocentric laws, customary or civil, applicable to rural "natives" and city-dwelling Kampalans, respectively. Yet Uganda's diverse Islamic laws have largely escaped effective codification by the archaic Marriage and Divorce of Mohammedans Act and unimplemented provisions in the 1995 Constitution. At the periphery, rebels face state-sanctioned violence or military rule. The near total absence of judicial infrastructure in the north belies the promised constitutional rights. For the Karamojong, successive colonial and nationalist governments have dispatched an administrator-warlord to introduce the "rule of law". This "lawless" frontier is really only the furthest reaches of state law where an ideology of uniform territorial validity justifies arbitrary force against a people bounded by an orality that is a distinct form of life.

Oloka-Onyango sums up the post-1962 legal history of Uganda as, "a dearth of constitutional cases - reflecting the fact that few litigants have sought redress for the excessive use of state power that has deprived them of their rights.

But as we have seen, this is not quite right. Few Ugandans had legal rights they could hold against the state until the 1995 Constitution. Instead they were segregated by customary laws outside the urban writ of civil laws. This continues to the present day as civil laws govern the property and marriage relations of few Ugandans, even if the Domestic Relations Bill had been passed. Few Muslim, for example, would engage with it if the courts continued their positivist interpretation of an ideal set of Islamic rules. Moreover, the General Court Martial creates a new, opaque state legal order. The few times political opposition leaders challenged the General Court Martial in the appellate courts, most judges appealed to an ideology that saw all state-sanctioned law as valid law, regardless of the de facto military tyranny enveloping civilians in the north. The greatest failure of the post- 1995 Constitution judiciary is to re-examine their interpretive presumptions.

AMENDMENT OF THE CONSTITUTION

This is a sole responsibility of the legislature. The Constitution is the Supreme law of the land with guidance from Article 2. Prof Kanyeihamba defines a Constitution as the basic fundamental laws which the inhabitants of the state consider to be essential for their governance and

[1545] Ex Parte Matovu: Uganda v. Commissioner of Prisons [1967] E.A.L.R. 514 (H.C.).

wellbeing.[1546]Uganda has generally had four Constitutions that is the 1962 Constitution, the 1966 Constitution, the 1967 Pigeon Hall Constitution and the 1995 Constitution of the Republic of Uganda that was promulgated by the constituent assembly under the NRA Government of Y.K Museveni in 1986. This Constitution was a unique innovation in the political history of Uganda as it was adopted after consultations from the people.

It was basically adopted to eradicate our sad and nasty experience characterized by political and constitutional instability struggles against the forces of tyranny, oppression and exploitation. The greatest desire or aim was to build a better future by establishing socio economic and political order through a popular and durable National Constitution based on the principles of unity, peace, equality. Democracy, freedom, social justice and progress.[1547].

The only better way of achieving this was through providing for a durable and rigid constitution that could not easily be amended. In their wisdom, the framers found it wise to as well include **Article 3 which is a limitation to the unconstitutional change of government though it is not an absolute limitation.** However because law evolves as society evolves and because there is need to serve the current and future generation, the framers found it wise to provide for clear procedure for the amendment of the Constitution whose mandate was only placed in the hands of the Legislature it being law making body to avoid the nasty past political history. Its amendment is provided for under Chapter eighteen. **Article 259(1)**[1548]gives mandate to the Legislature as the only organ to amend the Constitution. It provides that;

"Subject to the provisions of this constitution, Parliament may amend by way of addition, variation or repeal, any provisions of this Constitution in accordance with the procedure laid down in this Chapter"

The provision as well requires the amendment to be only through an Act of parliament whose sole purpose of which is to amend the constitution and that that Act must be passed in accordance with the law or chapter eighteen. The framers went ahead to prescribe the various ways in which parliament or legislature can amend the constitution. This is in three categories that is amendment under Article 260 which requires parliament to carry out a referendum. This mainly concerns provisions that are entrenched or that form the basic structure of the constitution. The second category is under Article 261 which requires approval by the district councils and lastly amendments under Article 262 whose amendments can be done by Parliament alone.

The constitution does not in any single line or any provision or under any chapter mandate any

[1546]Kanyeihamba, G.W. Constitutional Law and Government 1975. East Africa Literature Bereau Publishers.
[1547] See the preamble of the 1995 Constitution of the Republic of Uganda.
[1548] 1995 Constitution of Republic of Uganda

other organ of the government to amend it. The Judiciary is only empowered to check on the legality of the amendment, that is whether the legislature in amending the constitution complied with the required legal procedure. Any non-compliance to that leads to nullification of the amendment[1549].The judiciary can also intervene where parliament or legislature in the amendment of the constitution ended up amending the basic structure of the constitution. By this I mean the provisions that form the basic features of the supreme law. It is because of the need to protect the spirit of the constitution and granting it recognition from the citizens[1550]

Due to the fact that at most times the ruling party tends to use the majority seats in the house to enforce amendments that favor its prolonged administration, the judiciary can shut down such amendments if they do form part of the basic structure and in particular where there has been noncompliance with the procedure.[1551]. The only express mandate pertaining the constitution granted to the judiciary to interpret the constitution and no any other organ has been mandated to do this. This authority is conferred under Article137 and it is done through the Constitutional Court. This Article is clear to the effect that any question as to the interpretation of the constitution shall be determined by the court of Appeal sitting as a Constitutional Court. It's therefore prima facie that the judiciary cannot amend the constitution but rather interpret it.

Any attempt by the executive to amend the constitution connotes an overthrow of the constitution and its legal order. The executive has no mandate in whatever sense to draw near the constitution in any matter concerning its amendment and if it does so, that is enough to suffice overthrow of the constitution. In 1966, Dr Apollo Milton Obote overthrew the 1962 constitution simply by removing the office of the president and vice president in order to deny them of authority and their offices. This alone was enough in his wisdom Justice Udo Udoma to affirm that it amounted to an overthrow of the 1962 Independence making the 1966 constitution valid[1552]. Therefore, the executive arm being responsible for the administration of the country, its responsibility is to preserve and protect as well as promoting the constitution and fulfilling its objectives rather than abrogating it.

It is important to write that because of its uniqueness as a statute that has to serve not only the current generation but over the coming generation it is supposed to be accorded respect for reason being its continuous amendment may lead to erosion of the basic structure of the Constitution

[1549] Justice Kanyeihamba in Paul Ssemwogerere and others v Attorney Genral General
[1550]Kenya supreme court in Njoya v Attorney General and others (2004) AHRLR 157. See also the decision in KesavanandaBharati v State of K erala AIR 1973 SC.
[1551] Male H.K.Mabiriziand Others v Attorney General Constitutiona;l Appeal No 2 of 2018
[1552]UdoUdoma in Uganda v Commissioner of Prisons ExparteMatovu [1967] EA 514

THE AGE LIMIT AMENDMENT.

Another block on the life presidency mission was knocked by NRM. This was the age limit. It was provided for under Article 102(b) of the constitution. This provision was a stumbling block to Museveni's administration. Proper steps had to be taken to amend such a provision if the mission was to be concluded. The provision prohibited any one above the age of 75 from running for presidency and well noted was the fact that Museveni was soon clocking 75 years of age which meant that he could not be eligible for the next general elections.

Out of the blue, in 2017, a bill was moved by way of motion by Mr. Raphael Magyezi an NRM carder and Member of Parliament for Igara west Constituency seeking the removal of the 75 year age limit for presidency. Mr. Museveni was due to turn the age. Having the majority in Parliament, the NRM used its position and other resources in terms of finance to enforce the success of the bill. The Bill was voted for and Article 102(b) was amended. This meant that the age limit ad been weakened. Every one that wished to contest for presidency was free so long as they were of an adult age of 18 years and above. This opened gets for many including John Katumba a 22-year-old that contested for presidency in the 2021 general elections.

A group of MPs and civil society members petitioned the Constitutional Court chaired by Owiny Dollo, the then deputy chief Justice but a majority verdict, the court upheld the amendment.[1553] The petition appealed to the Supreme Court but the verdict was the same.[1554] Uganda lost it for the second time. This was to prolong the administration of Museveni something that the natives had never desired.

This was a return to the past. It had opened gates for life presidency of Museveni which was a return to the reign of Idi Amin who declared himself the life president of Uganda. In 1976, he made it clear that he was to be the life president of Uganda, stepped up his suppression of various ethnic groups and political opponents in the military and elsewhere. [1555]This was what Museveni came to eradicate and perhaps which the framers wanted to remedy but unfortunately he was captured in the ponds of selfish interests which failed the fundamental change hope among natives looking at him as a traitor and hypocrite.

[1553] Male H.K Mabirizi and Others v Attorney General Constitutional Petition No 49 of 2017
[1554] Male Mabirizi and Others v Attorney General Supreme Court Constitution Appeal No 2 of 2018.
[1555] Idi Amin Takes power in Uganda. 1971 February 2nd. History.com editors. A&E Television Networks.

SCRAPPING OF TERM LIMITS

Article 105 of the 1995 Constitution (As amended) had clearly ring-fenced the five-year term limits for the office of a President, owing to Uganda's experience of personality cult presidents and totalitarianism. The Article 105, 1 & 2 succinctly stated thus:

1. A person elected President under this Constitution shall, subject to clause
2. Of this Article, hold office for a term of five years.
3. A person shall not be elected under this Constitution to hold office as President for more than two terms as prescribed by this Article.

Repeal of Article 105 (2)[1556] so as to give the president a third term (*kisanja*) and open-ended tenure was the most controversial and contentious amendment of Uganda's young constitution. The *kisanja* amendment proposal generated heated debates, protests, despondency and a deep sense of betrayal. Conversely, advocates of *kisanja* and open-ended tenure harped on the need for Museveni's continued stewardship and his 'progressive and visionary leadership' for the transformation of Uganda and for unity in East Africa.[1557]

To opponents, Museveni, the celebrated revolutionary fighter of past dictatorships, architect of the new constitution and on record for identifying Africa's problem being leaders overstaying in power [1558] was back-tracking to manipulate the constitution. But the proponents of lifting the term limits espoused the concept of a constitution as a 'living tree' that grows and adapts to contemporary dynamics, rather than that 'cast in stone' of textual rigidities like executive term limits that were not even in the Magna Carta. Bunya West MP William Kiwapama, for instance, reported that 'his people' saw in President Museveni a 'redeemer', hence the need to waive the restrictive term limits. Opponents like Betty Among (MP Apac women) retorted that MPs needed to transcend the simplistic reasoning of their rural constituents and contemplate why term limits were enshrined in the constitution[1559]. Advocates replied that *wanainchi* (citizens) should exercise their constitutional power to retain or change a leader, provided there were regular 'free and fair elections'. Museveni reiterated that: 'The issues of who leads Uganda is up to the people in regular elections'.[1560]

Parliamentary contestations over the removal of presidential term limits were bolstered by internal civil society and external pressures. On 23 March 2005, opposition groups organized a protest against the Third Term Bill, appealing to donor countries to exert pressure on the NRM government, which was accused of attempting to establish a 'dictatorial presidential monarchy'.

[1556] Constitution of Republic of Uganda, 1995 (As amended)
[1557] *Sunday Vision*, 6 February 2005
[1558] (Museveni 1989)
[1559] (*The New Vision* 10 February 2005:5)
[1560] *The Daily Monitor* 4 July 2005).

Foreign criticism mounted and Ugandans in the Diaspora Organized conferences and demonstrations against lifting presidential term limits. There were conferences in London, Sweden (27 August 2005) and North America (*The Daily Monitor* 27 September 2005). The US warned that: 'Democratization could suffer a setback if the NRM succeeds in removing presidential term limits from the constitution' (US State Department, Report, 2004/2005). The US Ambassador to Uganda, Jimmy Kolker, reportedly pointed out that President Bush had advised President Museveni about the Third Term and the need for a peaceful political transition in Uganda.

Before the British and Germans contended for control over the territory, Uganda had three different indigenous political systems: the Hima caste system, the Bunyoro royal clan system and the Buganda kingship system. In 1894, the British succeeded in establishing a protectorate and made the Buganda, also called the people of Buganda, administrators competent to collect taxes. A British-style high court of Uganda and an appeals court for all eastern African protectorates were established in 1902. At the same time, a special commissioner was installed to perform executive, legislative and judicial powers. In 1955, a constitutional monarchy with a ministerial government based on the British model and in 1957 political parties emerged and direct elections were held.

Uganda became an independent Commonwealth nation on October 9, 1962 under a constitution much influenced by the British. The constitution distributed powers between the centre and the regions, albeit disproportionately. The Buganda kingdom was given more powers at the expense of the other three kingdoms, namely the Ankole, Toro and Bunyoro, and the other districts. The powers granted to the four kingdoms also handicapped the Parliament, which was elected by direct universal suffrage, except for parliamentarians from Buganda who were indirectly elected through the Council of Buganda. Apart from the periodically elected Parliament, the constitution provided for a Cabinet, drawn from and responsible to Parliament, and defined the powers of major government organs, civil service and judiciary. One year later, an amendment introduced a ceremonial President to replace the Governor General as a head of state and Kabaka Mutesa became the first elected president on 9 October 1963.

The 1962 constitution was abrogated by Prime Minister Milton Obote in 1966, who declared himself President under an Interim Constitution of 1966. The Parliament was constituted into a Constituent Assembly and given a mandate to draft a new constitution for Uganda. On September 8, 1967, the new constitution came into force. It extended the life of the Parliament, declared the President then in office the President of Uganda for a term of 5 years. Other major changes by this constitution were the abolishment of the kingdoms and the introduction of a more centralized system of government. The election of Members of Parliament remained by direct universal suffrage across the entire country but the President was now elected indirectly by the Parliament.

Although the system of government had some democratic semblance, democratic principles were hardly observed in practice, and Obote ruled basically with army support. Shortly after the constitution of 1967, a state of emergency was declared and Uganda slowly shifted to one-party-rule under the Uganda People's Congress.

In 1971, General Idi Amin Dada seized power. Amin ruled the country through constitutional decrees and used the army as the main instrument of government. In 1979, Amin, too, was overthrown by a combination of Ugandan and Tanzanian forces. In the following years, the Ugandan military continued to participate actively in Ugandan political processes. In 1985 Obote was again elected president, but only to be deposed a year later by the Museveni-led National Resistance Movement – a rebel movement that had been fighting the regime for years.

On 21 December 1988 the National Resistance Council (NRC) enacted Statute No.5 of 1988 which established the Uganda Constitutional Commission and gave it responsibility to start the process of developing a new Constitution. The mandate of the Commission was to consult the people and make proposals for a democratic permanent constitution based on national consensus. In its final report of December 1992, the Commission stated that the majority of Ugandans preferred a Constituent Assembly directly elected by the people in order to be as full representative as possible and provide greater legitimacy. It proposed that an Assembly should be composed mainly of directly elected delegates plus representatives of some interest groups. The proposal was accepted by government and thus the Constituent Assembly consisted of 284 delegates elected by universal suffrage representing 214 electoral areas designated plus additional representatives of specific stakeholders. Nevertheless, some people feared that the delegates to the Constituent Assembly might tailor the constitution to suit their future political ambitions.

The elections to the Constituent Assembly took place in March 1994. Every registered voter who did not have a criminal record and could afford the required nominators and financial deposit was able to run for office. Apart from the decisions relating to national language, land, federalism and the political system, all provisions of the draft constitution were reached by consensus. The land question in Uganda emerged when the British took land away from the communities and gave it to a few individuals and was not resolved by the Constituent Assembly. The debate about the political system, on the other hand, was rooted in the bad experience of Ugandans with political parties in the post-independence era. On this basis, a "no party" politics, also known as "movement politics", was proposed. In this system, no one is denied the right to run for any political office of his or her choice. The stress is on personal merit and political parties are permitted to exist but are forbidden from electoral campaigning and sponsoring candidates. Movement politics were strictly opposed by multiparty supporters. As a compromise, the movement type of governance was agreed to be

extended for another 5 years but at the end of 3 years a public debate should be held and after 4 years, the people of Uganda should choose between the two systems in a referendum. On the whole, the constitution making process in Uganda was highly participatory and an exercise to reconcile the society, reinstitute democracy, the rule of law and to place limits on misuse of state power.

E N T R E N C H E D P R O V I S I O N S

It's not in dispute that the 20th day of December 2017 marked the amendment of Article 102(b) of the Constitution releasing the chained hands of the Age limit. This followed the decision of Justices of the Constitution court that sat in Mbale. Before this court, there were a number of petitions made by various parties following parliamentary amendment of the above stated provision of the Constitution. The court sitting on 26th July 2018 dismissed the petitions. Having concluded their judgment, many appeals were submitted in the Supreme Court.

These were filed by Male H. K Mabirizi, Gerald karuhanga and 5 others and the appeal made by Uganda Law Society. It worth noting that these appeals were culminated and consolidated into one appeal which was Constitution Appeal No 2 of 2018 and all the grounds of Appeal presented in their memorandum of appeal were all merged an engulfed into six issues which were to be determined by Court. In all these appeals, the most adjoining point was on the validity of amendment following the procedure adopted by parliament and the circumstances that happened prior to the amendment not forgetting the historical developments of the military and other security agencies that invaded Parliament during the course of the debate on the Age limit bill natured and presented by Hon Rapheal Magyezi.

"The main issue was whether the learned justices of the constitution court miss directed themselves on the application of the basic structure doctrine."

It's on this point that I shall deal with the basic structured doctrine in line with the entrenched provisions of the constitution in its entirety relating to its importance limitation and manifestation in Uganda's 1995 Constitution born by the Constituent assembly in 1986 led by Justice Benjamin Odoki as he then was. Basically, my emphasis shall be placed on Article 260 which shall be the basis for other provisions which are entrenched in this Constitution.

CHAPTER SEVENTEEN

THE QUESTION OF POLITICAL REPRESENTATION: UGANDA'S TROUBLED HISTORY

The import of representation is the direct and indirect participation of citizens in the political and civic activities of their society. The principle of representation is stated in abstract and theoretical terms in Article 2 of the Constitution which stipulates that the power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. In effect representation means the rights of people to choose their representatives who shall represent them at all levels of government i.e. from LC (Local Councils) at the grassroots to the election of President and MP's at national level.

Representation also imports the existence of popular will. The issue of representation entails a number of elements of both participatory and elective rights as well as the choice of modalities and processes for determining representation. Participating and elective rights are often covered under human rights and fundamental freedom which include:

i) The right to freedom of Assembly and Association under Article 29(1) paragraphs (d) and
ii) The right to participate directly or indirectly in the affairs of government under Article 38.
iii) The right to vote under Article 59.

The modalities of representation will invariably be elections and referendum by which the individual and the people chose those who will represent them in government and how they shall be governed.

Representation in Uganda has undergone dramatic changes since 1986. Prior to 1986, representation and election to public office was based on political parties platform and in effect representation and government was founded on candidature based on affiliation to political parties. However, since 1986, representation has been grounded or premised on the non-partisan principle in which the idea of individual merit is emphasized. Under the initial political system provided for under the Constitution and affirmed in 2000 by the referendum, the Movement political system is primarily premised on the principle of individual merit on the basis for the election to political office. This is stipulated in Article 70(1) (d) as the major attribute of the Movement political system. In effect, the individual merit principle was for many years the basis of representation in Uganda until subsequent events that altered it. Since its inception as the basis of representation however, the individual merit principle was under attack not just in political debates but also in

petitions before the Courts of law.

It appears that from the very early years, the Movement government was to be the victim of court challenges. One of the earliest cases was Dr.Rwanyarare & 2 Ors V AG[1561]. In this case the Constituent Assembly Statute 6/1993 was unsuccessfully challenged. This was a constitutional petition by the UPC who sought to argue that the provisions adversely affected the right to free expression because campaigns on the basis of political parties or any other sectarian ground were outlawed and criminalized. Additionally, it was argued that the public would be deprived of the opportunity of hearing views except those considered right by government. It was argued that this violated the rights of assembly and association of the Petitioners which were guaranteed by Article 8 of the 1967 Constitution since they could not stand on individual merit as they belonged to their respective political parties. The Constitutional court held however, that the provisions were validly made by the NRC under LN No. 1/1986 and as such the Legal Notice was superior to the 1967 constitution and that rules made by the NRC to adapt the 1967 to the Legal Notice were valid. It was further held that the rules were temporary and part of an unusual and peculiar political process that would end with the promulgation of the new constitution. The court therefore expressed hope that at the end of the period, fresh considerations would arise and most likely during the debate of the draft constitution, all the burning issues would be resolved. Court also noted that the rights of the Petitioners of assembly and association were not absolute and could be restricted in the public interest. Mpagi Bahigeine J considered that the public interest in this case lay in the election of delegates to the Constituent Assembly to debate the Constitution for the good governance of the country and that this restriction was only transient and not permanent. The net effect was to facilitate the elections of Movement candidates to the CA.

Under the 1995 Constitution, it remained the basic argument that the individual merit principle remained a major factor of the restriction on multi-party activity especially given the provisions of Article 69, 70, 72, 269 and 271. This concern was raised in the case of Dr. Rwanyarare & Anor V AG[1562] in which the petitioners argued that the provisions of Article 69, 70, 72, 74, 269 and 271 were in contravention of their Constitutional rights to assembly and association under Article 29(i)(d) and (e) and 38 of the Constitution. In essence the argument was that since the elections had taken place on basis of the Movement system and specifically under the individual merit principle, this barred candidates based on political parties and therefore the right to association and assembly had been infringed upon. Court dismissed the petition on several grounds but the most significant was that the petition was incompetent since it purported to challenge the

[1561] MISC. APPLN. NO. 85 of 1993
[1562] Constitutional Petition 11/97

constitutionality of provisions of the Constitution.

The individual merit principle as the basic foundation of the Movement system has been used in the election of the president and therefore replacing the quasi Westminster system that was previously in place for the president to be the leader of the party winning majority seats in parliament it has also been used for election of MP's and representatives at all levels of the local councils. In effect, the principle has become the basis for representation in present day Uganda.

There was always a question as to the effect and genuineness of the individual merit principle as a basis for representation and participation in the affairs of government even within the Movement camp itself. The first observation was that while the principle is stated in the Constitution it was sometimes sidelined in practice as illustrated in a number of instances.

i) election of Movement Chairman
ii) 2001 Presidential elections
iii) Candidatures for 2001 parliamentary election.
iv) 2001 Presidential elections.

The 2001 Presidential Elections

When Dr. Kiiza Besigye stood for the presidential 2001 elections, it was contended that the Movement was only supposed to field a single candidate in the personality of the incumbent Museveni in the Movement Delegates Conference. The arguments raised were that fielding 2 candidates was detrimental for the Movement system. It was not substantiated what this actual detriment was or would be. This was a great test to the principle of individual merit. As a result of the attempt to endorse a single candidate for the 2001 elections, a petition was filed before the Constitutional Court to challenge that attempt i.e. Onyango Odongo V AG CP 1/2000.This new development put the principle at stake and for the first time led the public to believe that the Movement did not itself subscribe to the very system it had so much endeavored to give publicity as being the better alternative to political parties.

Candidature for 2001 parliamentary elections.

The contention here was that in a constituency where 2 movement candidates were standing, one of them should stand down for the other who has better chances of winning. The issue of fielding a single candidate once again resurfaced and once again the principle of individual merit was not only tested, it was equally tremendously abused.

The other reason why it was thought that the principle could not work was that the politics in the country had now become polarized into Movementism Vs Multipartism replacing the previous polarization that was primarily between the political parties i.e. DP, UPC etc. The effect of this new polarization was that candidature for representation would eventually be understood in terms

of whether the candidate ascribed to the Movement ideologies or was a staunch multipartist. The implication was that the individual merit principle was virtually rendered irrelevant and inconsequential in the electoral process and as a basis of representation

The principle of individual merit was this notwithstanding the foundation for the election of representatives since 1986 and became a fundamental principle of the Movement political system under Article 70(1)(d). The principle required that the individual competence or personal merit of the individual rather than political affiliation. On the other hand, it was considered that the principle of individual merit was inimical to freedoms of association and assembly as a basis for representation. This particular contention was raised by the petitioners in the Rwanyarare 1 case in 1994 on the election of delegates and representation to the CA and in Rwanyarare 2 in 1997 as regards the election of MPs and representation in parliament.

Uganda has also had several referendums which appeared to many to be sources of near political anarchy. One of the most important referendum cases was the case of Paul Kawanga Ssemogerere & Anor. V AG.[1563] The Referendum and Other Provisions Act No.2 of 1999 was challenged in this case. The AG raised a number of preliminary objections to its hearing on the merit. The Constitutional court upheld the objections and dismissed the Petition. The Petitioners appealed to the Supreme Court which reversed the ruling of the constitutional court and ordered that the petitioners be heard on the merits. The petition was eventually heard by the constitutional court. In a unanimous argument, it was held that the Referendum and Other Provisions Act, 1999 was passed in a manner inconsistent with Articles 88 and 89 of the constitution and was therefore null and void. That the Act was passed without the necessary quorum. The court added that the voice voting method of shouting 'ayes' or 'no' as applied in parliament contravened section 89 (1) of the constitution. This case indicated that the courts were increasingly standing up to the Executive and Legislature and it abuses of power.

NB: However, amidst the hearing another referendum law was passed before the challenged law was declared null and void. The new referendum law called The New Referendum (Political Systems) Act 9 of 2000 was presented to Parliament on June 7th 2000 and within 2 hours debated, read three times and passed into law. Under section 29 of the Act, all actions taken or purported to be taken in good faith for purposes of the referendum required to be held under Article 271 of the constitution but before publication of the Act in the gazette were deemed to have been taken or made under the Act. The new law was in substance a replica of the old one.

This new referendum law was immediately challenged by the case of James Rwanyarare And

[1563] Constitutional Appeal No. 3 of 1999

Badru Wegulo V AG[1564] The petitioners sought an interim order to prohibit the holding of an interim order to prohibit the holding of the referendum until the final disposal of the case. The background was that on July 2, 1999 parliament passed the Referendum and Other Provisions At in accordance with Article 271 (4) of the constitution. On June 7, 2000 it passed the Referendum (Political Systems) Act. On June 29th 2000, the second respondent organized and conducted a referendum. The petition was however not heard until the referendum was completed and was eventually dismissed in November, 2000. In the judgment of the Constitutional Court held inter alia that the enactment of 9 of 2000 did not contravene Article 79 (1) and (3) of the Constitution. Good governance required that since the legislation originally passed to cover the referendum was being challenged in Court, a specific Act had to be enacted for the holding of a referendum on political systems within the time limits set by the Constitution.

The political scene was also kept busier by the case of Ssemogerere & Zachary Olum V AG[1565]

In this case, the Petitioners sought a number of declarations and orders with respect to the constitutionality of the referendum on political systems and the Referendum and Other Provisions Act No.2 of 1999. Particularly, they contested the choice of a 'political system' through a referendum or an election under Article 69 of the Constitution as being inconsistent with and in contravention of Article 20, 21, 29 (1) (a), (b), (d), (e), 38 (2), 70 (f), 72 (1) and 75 of the Constitution. At the hearing of the petition, the AG raised several objections amongst which was that the constitutional court had no jurisdiction to interprete conflicting provisions such as Articles 269 and 29 and to reconcile them. The majority of their Lordships agreed with the objection. 2 of their Lordships dissented arguing that the Constitutional court has powers to interprete and harmonize the constitution which responsibility could not be abdicated from in the vain hope that other authorities will amend the Constitution and harmonize it. By a majority of 2 to 3, the Petition was dismissed. The majority view was that the Referendum provided for a free and fair contest that enabled both the multiparty and movement system advocates to organize as individuals or groups under referendum committees for purposes of canvassing for the referendum.

The 2 dissenting Justices, Twnomujuni and Okello argued that the critical point was not whether both sides had constituted their national referendum committees but whether the law as it stood provided both sides equal opportunity to constitute their campaign machinery and the national referendum committee. In their considered opinion, political parties were legally incapable of participating in any exercise to form the referendum committees and would so remain so long as Article 269 remained an interim provision for their bondage. To them, the framers of the

[1564] Constitutional Petition No. 4 of 2000.
[1565] Constitutional Petition No.6 Of 1999

constitution could not have intended such a monstrous result. They also noted that the Constitutional Court had powers and responsibilities to interpret and harmonize the Constitution and could not abdicate from this duty in the vain hope that other authorities will amend the Constitution or harmonize it.

On August 31st 200, following the June 29th 2000 referendum, the Constitutional (Amendment) Act 2000 was passed to make legal the legislation under which the referendum was held i.e. The Referendum (Political) Systems) Act, 2000. The Democratic Party petitioned the Constitutional Court in Ssemogerere & Anor. V AG[1566] challenging the new Act but lost on a majority of 3 to 2. The court pronounced itself only on procedural issues and declared that it did not have jurisdiction to interpret one provision of the Constitution as against the other. The Democratic Party then appealed to the Supreme Court which on January 29th 2004 in Ssemogerere & Anor. V AG[1567] held that the Constitutional (Amendment) Act, 2000 was unconstitutional because of the procedures followed when it was enacted.

Thereafter, government claimed that the decision had been based on false information and that the Court should review its decision. Government claimed that the Constitutional (Amendment) Bill, 200 was not passed and assented to on the same day and that the certificate of the bill existed and further that the number of votes was physically counted rather than relying on a voice vote. Thus on August 3rd 2004, the government made an application to the Supreme Court to submit this additional evidence. The Supreme Court unanimously dismissed the application.

This decision in turn laid the ground for an unprecedented challenge against the Movement system. On June 22nd 2002, 2 weeks after the Act authorizing the June 29th referendum was passed, the high ranking leaders of DP again petitioned the Constitutional Court. Their contention was that the Act violated the constitution. On 17th October 2000 when the petition came up for hearing it was mutually agreed that that the parties should await a pronouncement on the constitutionality of the Constitutional (Amendment) Act, 2000. This decision however was not handed down by the Supreme Court until 29th January, 2004. Then on 25th June 2004, the Constitutional Court unanimously held that the Referendum Act 2000 violated numerous provisions of the 1995 Constitution. Accordingly, anything which had been done or which had purported to be done under the Authority of that Act was invalid. That to rule otherwise would amount to authorizing the stampeding of Parliament as the case was to pass kangaroo style legislation oblivious to the requirements of the Constitution and to perform unconstitutional acts under the authority of such legislation. This the Court found unacceptable.

[1566] Constitutional Petition No. 7 of 1999
[1567] Constitutional Petition No. 4 of 2002

The decision caused stampede in government circles because its ultimate effect was that the Act being invalid the referendum held under it was also invalid. Accordingly, no political system was put into place by the said referendum and ultimately the current government was illegally in power.
After the decision, President Museveni again publicly showed his anger at the decision and at the Justices. He vowed to disregard the decision and promised to deal with judges who were taking it upon themselves to usurp the power of the people granted to them by the constitution. This was followed by a demonstration by supporters of the Movement government. On the other hand, the Chief Justice called upon the government together with its organs to ensure that the courts in the dispensation of their judicial functions were not intimidated.
Following these events, the State appealed to the Supreme Court. In Attorney General V Ssemogerere &Ors, the Supreme Court over turned the decision of the Constitutional Court (which had proceeded along the lines of the doctrine of prospective ruling by finding that anything done by the illegal government was itself illegal) and declared that whereas the Act which set up the referendum had been unconstitutional, the results of the 2000 referendum were nevertheless valid

THE PRESIDENTIAL ELECTIONS OF 2001: NEW CHALLENGES

The presidential election of 2001 also helped to bring to the fore front the question of political representation and to test the judiciary even more. In those elections Y.K. Museveni the incumbent president had been declared by the Electoral Commission as winner with a 69.3% majority over his closest and bitter rival Dr. Besigye who only polled 27.8%. The elections however were allegedly characterized by country wide electoral violence, malpractice and disenfranchisement. Dr. Besigye challenged the election of Museveni in Besigye V Museveni & The Electoral Commission[1568] wherein he alleged rigging of elections. The Supreme Court after a 2 weeks hearing dismissed the petition by majority of 3 to 2. The majority were convinced that although there had no doubt been irregularities in the elections to which they could not shut their eyes, they had not substantially affected the final outcome.
It was during this petition that it was also discovered that Article 104 (2) of the Constitution was seen to be fraught with practical difficulties. Where as Article 104 (1) allows any aggrieved candidate to petition the Supreme Court for an order declaring that the person elected was not validly elected, Article 104 (2) then unreastically proceeds to require such petition to be lodged in the Supreme Court Registry within 10 days after the declaration of the results. The Besigye petition showed that this can be an insurmountable task. In his case, the lawyers had to move from district

[1568] Election Petition No.1 of 2001

to district taking evidence from various people. Many believe that had there been the chance to seek more evidence, the result may perhaps have convinced the Supreme Court. The Supreme Court is also required under Article 104 (3) to dispose of the petition in no more than 30 days from the date of its filing. It is also always opined that for a matter so grave and a matter going to the root of the question of representation of the people, that is perhaps so short a time within which to come to a well considered decision.

The political scene was yet to be dormant in Uganda after all these events. The 1995 Constitution under Article 271 (4), Parliament was mandated to make a law to give effect to that Article. The Article provided that the first presidential, parliamentary, local government and other public elections were after the promulgation of the constitution were to be held under the Movement political system. It was also provided that during the last month of the 4th year of the term of parliament referred to in paragraph (2) of that Article, a referendum was to be held t determine the political system the people f Uganda wish to adopt.

The first attempt at giving effect to this Article came with the tabling of the Political Organizations Bill in 1998 but it was never carried through. In June 2002, a new Political Parties Organization Act (PPOA) was then passed. It among others provided that no party or organization could open branches below national level and further that no party or political organization was allowed to hold more than one national conference in a year. The parties were further prohibited from holding public meetings except for the national conference, executive committees, seminars and conferences at national level.

This Act was later challenged by Paul Kawanga Ssemogerere & 5 Ors V AG[1569] , in which among other issues the Petitioners asked the Court to determine 'whether or not Sections 18 and 19 of the Act established a one party state, the party being the movement contrary to Article 75 of the Constitution'. The Petitioners sought to distinguish between the Movement refereed to and provided for in Article 70 and the Movement provided for in the Movement Act. Their contention was that the former was a political system while the latter was a political organization. The Constitutional Court accepted these arguments and found Sections 18 and 19 of the PPOA to be unconstitutional. The government appealed to the Supreme Court but on June 21st 2004 withdrew the appeal.

This development allowed political parties to participate more freely in the political affairs although they still had to register with the Registrar General.

The political scene was again full of activity. In February 2001, the State set up a Constitutional Review Commission (CRC). Its report was extensively debated by the relevant stakeholders. The

[1569] Constitutional Petition No. 5 of 2002

Government subsequently issued a White Paper based on the Report which was debated y Parliament's Legal and Parliamentary Affairs Committee. On 15th February 2005, the Attorney General tabled an Omnibus constitutional amendment Bill before Parliament the object of which was to amend a wide range of constitutional provisions at ago. While the Bill was still before the Legal and Parliamentary Affairs Committee for consideration, a petition emerged challenging the constitutionality of the Omnibus Bill. This was in Miria Matembe, Ben Wacha & Abdu Katuntu V AG[1570]. At the time of hearing the petition, the Committee had not yet submitted its report on the Bill and the Attorney General contended that the petition was thus premature. The majority of the Constitutional Court accepted this view and held that before a bill is enacted into law and becomes an Act of Parliament, it is evidently premature to resort to court to challenge its constitutionality. Court also stressed the importance of the doctrine of separation of powers holding that the Constitution does not require the court to supervise the functioning of the legislature in every aspect and at all the stages of its work. Care must be taken to ensure that the principle of separation of powers is duly observed by the 3 arms of government to avoid erosion of each other's constitutional functions. The function of the court is not to interfere in the operations of the executive and the legislature but to ensure that they comply with their mandate. It was noted that 'the executive and legislature must be left to perform their constitutional duties without undue interference from the courts. This would guard against overzealous litigants from dragging these government organs to court prematurely each time a bill is tabled in Parliament. There is need to avoid unnecessary obstruction of the conduct of the affairs of state. We are mindful of the mandate of the Court to ensure that the Legislature complies with the legislative procedure of Parliament to keep it on the constitutional track. However, this must be done within the constitutionally recognized parameters'. Mpagi Bahigeine JA in her dissenting judgment thought that whereas separation of powers must be respected, in a Constitutional state, courts are the fountain of constitutionalism and have to remain vigilant about legislative procedures. They could not simply close their eyes because it was too early in the process to interfere. Despite these strong words, the petition was dismissed on a 3 to 2 majority.

The government eventually decided to withdraw the Omnibus Bill alleging that it had done so after wide consultations with government leaders, political parties and all stake holders.

[1570] Constitutional Petition No. 5 of 2005

THE 2005 REFERENDUM ON POLITICAL PARTIES

This referendum was meant to relax the restrictions that had been placed on political parties. Article 74 (1) of the 1995 Constitution provides for the holding of a referendum if requested by a resolution of more than half the members of Parliament. On May 3rd 2005, parliament passed a resolution directing the Electoral Commission to organize a referendum to enable Ugandans to decide if they wanted to retain or to change the Movement system. On May 5th 2005, the EC received the resolution and began making preparations.

During these preparations, the petition of Okello Okello & 6 Ors V AG & Anor.[1571] The Petitioners based their petition on the decision in Paul Kawanga Ssemogerere & 5 ors V AG[1572] in which the Court declared the Movement and its organs a Political Party. The Petitioners argument was that since the no-party Movement System was a legal fiction and did not really exist as such, there was then no basis for the referendum. They claimed that Article 69 (1) and (2) (a) of the Constitution which provides for the holding of a referendum to choose and adopt the Movement Political system offends the constitution. They wanted the court to stop the AG and the EC to organize the referendum. The court dismissed the applicant on a 3 to 2 majority. In its opinion, the holding of such referendum was a constitutional means enabling Ugandans to determine their political destiny. Despite the repugnancy of holding a referendum on human rights and freedoms, the one party system is so entrenched that it must be changed through a referendum. While there are cheaper ways of changing the prevailing political system, that was a decision for the Parliament to take and not the courts. The Electoral Commission was accordingly simply implementing a constitutional requirement and the impugned provisions of the Referendum and Other Provisions Act, 2005 did not in any way infringe any provision of the Constitution. The Petitioners appealed to the Supreme Court but the appeal was incapable of being heard as there was no sufficient quorum on the bench following the retirement of Kato JSC.

The greatest challenge to the new political opening up has been that the government has manifested its unwillingness to let political parties assemble even after the referendum decided that political space be opened up. This has been evidenced by the massive way in which the State has continued to disperse political rallies of the opposition political parties.

[1571] Constitutional Petition No. 4 of 2005
[1572] Constitutional Petition No. 5 of 2002

FORMAT AND PATTERNS OF ELECTIONS AS REGARDS REPRESENTATION

The basic function of representation is to ensure that peoples of a particular constituency and interest group are effectively and adequately represented. This therefore requires that the persons enjoined to represent the constituencies have the mandate of the people and that mandate is reflected in the popular will of those people. The issues and questions have arisen with regard to the format for the representation of interest groups by the use of electoral colleges. These particularly was regards to representation in parliament of representatives for women, the army, youth, workers and person with disabilities under Article 78(1) paragraphs (b) and (c). Consider the fact that the Electoral College for army representatives is the Army Council which is directly influenced by the Commander-in-Chief of the Armed Forces. As such the representation of the army cannot be said to fully be effective. Similarly, the electoral colleges for women representatives usually constitutes of a bunch of elite women in urban centers. The grass root peasant woman is not only denied a chance to vote and exercise her will but even the right to stand.

THE COMING OF POLITICAL PARTIES

Regards the multiparty politics in Uganda, they provided for in Article 71 of the 1995 Constitution of the Republic of Uganda, Regards the literature review available, we look at privacy in the political system; perspectives from political science and Economics.

The IFES report of 2005 shows that in 2005 a referendum on resorting multiparty politics was held in Uganda on 4th May, 2005, while at the polls the voters voted on the question, ‘’Do you agree to open up the political space to allow those who wish to join different organisations/ parties to do so to compete for political power. The results were as in the table below,

CHOICE	VOTES	%
For	3,643,223	92.44
Against	297,865	7.56
Invalid/ blank votes	93,144	-
TOTAL	4,034,232	100
Registered voters/ turnout	8,524,234	47.33

Source. IFES

Following this referendum, a number of political parties begun to mushroom in the country following the enactment of the Political Parties and Organisation Act, 2005, an act to make provision for the regulating the financing and functioning of political parties and organisations,

their formation, registration, membership and organisation under Article 71,72 and 73 of the Constitution; the prescription of a code of conduct for political parties and the organisations and the establishment of national consultative forum for Political Parties and Organisation Act 2002 and for related matters. This also builds the basis for the study since the parties in the study are legally registered in Uganda and are entitled.

THEY MAKE DESOLATION AND CALL IT PEACE- (UBI SOLITUDINUM FACIUNT PACEMAPPELLANT)

They make desolation and they call it peace The above attribute is attributed to Tacitus or (Gaius Cornelius Tacitus; C. 56-After 117AD, who was a Roman Orator. Lawyer and Senator) / historian to describe the devastation of Britain by the Roman Empire in the first century AD. It came after the Romans had actually invaded England and caused a lot of damage by plundering, butchering, stealing and making a complete waste of the area. They did it in such a way that even their fellow Romans looked and wondered how one could actual conquer and destroy a nation.

The same can be said about the so called liberators of our nation, much plunder has taken place within and out Uganda, a good example is the plunder that took place in Congo where the Ugandan soldiers unitary invaded a sovereign country, plundered its natural resources such as gold and timber[1573].

Albeit to note that such devastations stimulated by avarice have only benefited a few to the detriment of the majority. They have ravaged, slaughtered and usurped several resources under false titles under the disguise that “We now have sleep” “Twebaka kutulo”.

Interestingly, all these are illusions had been foreseen by the Chief Executive who is remembered to have said, “The problem with most African leaders stay in power for a long time”. Whether or not that is true is self-explanatory well evidenced by the Chief Executive having stayed in power for over 35 years. On the problem we face as a nation is lack of a stainable legacy because in the end, we learn nothing and forget nothing.

If a nation fails to build a legacy beyond an individual, such a nation is bound to fail and therefore the much need to create systems and rules that can give us our latitude and longitude “the in that shelters for the night is not the journey’s end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth as stated by Benjamin Cardozo in 1924.

In instance what matters in every nation is the ideal of sustainability, every nation should strive to live beyond an individual because the legacy that you build today should not only affect our

[1573] Refer to the Uganda-Congo Case where Uganda was sued by Congo for the illegal entry into Congo and consequent plunder of their national resources.

individual's selfish gains but for greater prosperity.

This temporary custody of executive power is only a mantle to act on behalf of the greater good in securing a sustainable tomorrow. If a leader premises all ambitions on today, then there will be no tomorrow. And the dream of every nation is that everyone's child regardless of the background should be able to dream of becoming a Chief Executive one day.

Tacticus, Agricola, 30.4 stated that Robbers of the world, now that the earth is insufficient for their all-devastating hands they probe even the sea, if their enemy is rich, they are greedy, if he is poor, they thirst for dominion, neither East nor west has satisfied them; alone of mankind they are equally covetous of poverty and wealth. Robbery, slaughter and plunder they falsely Name Empire; they make a desert and they call it peace.

Different interpretations of the dynamics of Roman conquest have been deployed to legitimize modern empire-building as just, defensive or accidental, and just as often cited in condemnations of overseas aggression or gunboat diplomacy. However, with the exception of Fascist propaganda presenting Roman domination of the Mediterranean as the template and justification for a new Italian imperialism, and Hitler's avowed admiration for their aggression ('In every peace treaty, the next war is already built in. That is Rome! That is true statesmanship!'), Roman conquests were not proposed or taken as models for actual modern practice.

The manner in which the Roman Empire was ruled was a quite different matter; indeed, Roman conquests were frequently excused as the necessary means to the establishment of peace and civilization across Europe, and modern imperialism justified because it created the possibility of equaling Rome's achievement as a ruler of other nations in other regions of the world. Rome's exemplary status as an empire was based above all on its longevity and the absence of serious internal opposition or conflict, and this was attributed to its benevolent and beneficent impact on the areas it had conquered.

As the English historian J.R. Seeley put it, 'Imperialism, introducing system and unity, gave the Roman world in the first place internal tranquility.' This theme was especially popular in nineteenth- and early twentieth-century British commentaries on empire: 'it's imperial system, alike in its differences and similarities, lights up our own Empire, for example in India, at every turn'. The example was not taken as universally relevant; in contrast to the British Dominions, the Romans.

These references to Roman rule constantly return to three crucial points: the establishment of order and peace, the integration of the conquered natives into the system, and the bringing of civilizations to primitive regions. For a number of these writers, the first of these is demonstrably the most important, both as the basis for future development and as an alibi for the undeniable disruption and

destruction of conquest.

Wars, even if they once occurred, no longer seem real; on the contrary, stories about them are interpreted more as myths by the many who hear them. If anywhere an actual clash occurs along the border, as is only natural in the immensity of a great empire, because of the madness of the Getae or the misfortune of the Libyans or the wickedness of those around the Red Sea, who are unable to enjoy the blessings they have, then simply like myths, they themselves quickly pass and the stories about them. So great is your peace, though war was traditional among you. (*Oration 26 'To Rome'*, 70–1).

It is indeed difficult to administer a vast empire unless it is turned over to one man, as to a father. In any event, the Romans and their allies have never lived and prospered in such peace and plenitude as Augustus afforded them, from the time that he assumed absolute authority; and now his son and successor Tiberius continues his legacy. (*Geography*, 6.4.2)

The natives were adapting themselves to orderly Roman ways and were becoming accustomed to holding markets and were meeting in peaceful assemblies. They had not, however, forgotten their ancestral habits, their native customs, their old life of independence or the power derived from weapons. Hence, so long as they were learning these customs gradually and by the way, one might say, under careful surveillance, they were not disturbed by the change in their way of life and were becoming different without knowing it. But when Quintilius Varus became governor in Germany and thus administered the affairs of those peoples, he strove to change them more rapidly. (Dio, 65.18.2–3)

Controlling the fairest parts of land and sea, they have on the whole tried to preserve their empire by diplomatic means rather than to extend their power without limit over poor and profitless barbarian tribes, some of whom I have seen negotiating at Rome in order to offer themselves as subjects. But the emperor would not receive them because they are useless to him. (Appian, *Roman History*, preface vii)

The process that had begun in the later centuries of the republic, whereby military glory ceased to be an essential source of political power and legitimacy, continued; expansionism ceased to be taken for granted as a goal, and became a matter of policy debate. More importantly, the fierce competition for glory had largely ceased.

Emperors had no contemporary rivals for status; they matched themselves against their predecessors or against an image of the ideal emperor, and so could be content with a single conquest in the course of their reign rather than year-on-year competitive slaughter. In order that a population scattered and uncivilized, and proportionately ready for war, might be habituated by comfort to peace and quiet, he would exhort individuals and assist communities to erect temples,

market places and houses; he praised the energetic, rebuked the indolent, and the rivalry for his complements took the place of coercion. (*Agricola*, 21.1)

The province of Asia must be mindful of the fact that if it were not a part of our empire it would have suffered every sort of misfortune that foreign wars and domestic unrest can bring. And since it is quite impossible to maintain the empire without taxation, let Asia not grudge its part of the revenues in return for permanent peace and tranquility. (*Letters to his Brother Quintus*, 1.1.34)

Pliny to Trajan: We have celebrated with appropriate rejoicing, sir, the day of your accession, whereby you preserved the Empire; and have offered prayers to the gods to keep you in health and prosperity on behalf of the human race, whose security and happiness depends on your safety. We have also administered the oath of allegiance to the troops in the usual form, and found the provincials eager to take it too as a proof of their loyalty. If we oppose them, we shall alienate from ourselves and from the state an order that has deserved extremely well of us… and yet if we yield to them in everything, we shall be acquiescing in the utter ruin of those whose security, and indeed whose interests, we are bound to protect. (*Letters to his Brother Quintus*, 1.1.32)

In your province there are a great many who are deceitful and unstable, and trained by a long course of servitude to show an excess of sycophancy. What I say is that they should all of them be treated as gentlemen, but that only the best of them should be attached to you by ties of hospitality and friendship; unrestricted intimacies with them are not so much to be trusted, for they dare not oppose our wishes, and they are jealous not only of our countrymen but even of their own. (*Letters to Quintus*, 1.1.16)

I said I believed the day would come when our foreign subjects would be sending deputations to our people, asking for the repeal of the extortion court. Were there no such court, they imagine that any one governor would merely carry off what was enough for himself and his family; whereas with the courts as they now are, each governor carries off what will be enough to satisfy himself, his advocates and supporters, and his judges and their president; and this is a wholly unlimited amount. They feel that they may meet the demands of a greedy man's cupidity, but cannot meet those of a guilty man's acquittal. (I.41)

A proconsul need not entirely refrain from 'guest-gifts' (*xenia*), but only set some limit, not to refrain entirely in surly fashion nor to exceed the limit in grasping fashion… For it is too uncivil to accept from nobody, but contemptible to take from every quarter, and grasping to accept everything. (*Digest*, 1.16.6.3)

Timing is everything, according to the old adage. Yet in the field of classical studies there is a real hesitation to see a correspondence between the Judean rebellion against Rome in 66 C.E. and the literature and monuments produced at Rome subsequently, except when a Roman author *explicitly*

mentions the ruined city of Jerusalem or one of its refugees (such as the Judean priest and general turned historian, Josephus), or when discussing the Arch of Titus, which displays obvious artifacts from the temple in Jerusalem. More subtle echoes of the effects of this war are difficult to prove when doing analysis of the Roman texts, since classics scholars are less apt to apprehend veiled references to Judean affairs in any text, especially canonical works such as the writings of Tacitus. It is as if classicists today were channeling Tertullian, with a slight alteration: "What indeed has Rome [instead of 'Athens'] to do with Jerusalem?" A lot, it turns out, and timing is everything.

Tacitus's most famous phrase about Roman imperialism, "When they make a desert, they call it peace," offers an excellent opportunity to analyze how timing might, partially at least, explain its inspiration and meaning. This senatorial historian survived the murderous reign of Domitian towards the end of the first century to enjoy the relative calm and success of the empire under Nerva and Trajan at the very end of the first into the early part of the second century.

The war in Judea lingered as a memory throughout the careers of all three of these emperors, with Domitian commemorating the triumph of his dead brother Titus, the conqueror of Jerusalem, on the famous Arch, while also allowing strip-searches of men to see if they were Judean and thus liable to pay the postwar tax. Nerva, however, advertised on coins that he was rescinding the power of false accusations made against people in order to force them to pay the post-war tax into the Fiscus Iudaicus, while Trajan eventually had to deal with a rebellion involving Judeans in Cyrene in 116 C.E. that echoed the troubles of decades before. Tacitus surely experienced the events related to the Judeans first-hand at Rome, where he served as a senator from the time of Domitian's father, Vespasian, and wrote his five works. In one of these, his *Histories*, he displays his knowledge about the Judean people and their mores at the beginning of Book Five, but sadly the text is abruptly lost during his description of the siege of Jerusalem and the counterpart revolt of Civil is in Germany. Suffice it to say that Tacitus lived through these times and clearly recognized that the Judeans, whom we nowadays call the Jews, were part of the history of his own people, the Romans.

It is in his earliest text that we find Tacitus's denunciation of Roman imperialism, a biography of his father-in-law, Gnaeus Julius Agricola, published around 98 C.E.4 The scene comes when Agricola is leading a military expedition into modern day Scotland where he is about to encounter the local warriors at Mons Graupius. Tacitus allows the Caledonian chief Calgacus to rally the troops with a scathing indictment of Roman actions in Britain. The "cynical," as Martin Goodman calls him, Roman senator is putting these words into the enemy's mouth;5 there were no transcripts of any Caledonian speech, so we are left with a Roman senator creating a speech for an enemy character ranting in hyper-eloquent rhetoric against the Roman army. Calgacus states:

Whenever I consider the origin of this war and the necessities of our position, I have a sure

confidence that this day, and this union of yours, will be the beginning of freedom to the whole of Britain….But there are no tribes beyond us, nothing indeed but waves and rocks, and the yet more terrible Romans, from whose oppression escape is vainly sought by obedience and submission. Robbers of the world, having by their universal plunder exhausted the land, they rifle the deep. If the enemy be rich, they are rapacious; if he be poor, they lust for dominion; neither the east nor the west has been able to satisfy them. Alone among post-war tax into the Fiscus Iudaicus, while Trajan eventually had to deal with a rebellion involving Judeans in Cyrene in 116 C.E. that echoed the troubles of decades before. Tacitus surely experienced the events related to the Judeans first-hand at Rome, where he served as a senator from the time of Domitian's father, Vespasian, and wrote his five works.

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The Judean historian Josephus's account of the revolt in Judea is a primary witness to the Roman propensity to turn a place into a desert in the name of "peace." For several years before and after

the dedication of the Temple of Peace in 75 C.E., Josephus wrote his history of the war, articulating the effects of Roman military might in terms related to the landscape of Judea that we find in Calgacus's speech: the "desert" as an image of war's destructive nature, especially when waged by Romans. The desert, however, plays a different role in the Judean scriptural tradition and identity formation, one celebrating the desert as a place of prophecy and even salvation for the Judean people.

Josephus melds his interpretation of this scriptural tradition with the ambivalent Roman vision of its imperial mission, as described later in Tacitus. This blend of cultural identities formed in landscape culminates in Josephus's text out in the desert at Masada just as it does physically at the Temple of Peace in Rome. The timing of this temple's dedication and the publication of Josephus's *Judean War* in the late 70's to early 80's have never been taken into account when discussing influences on Tacitus creating his most famous aphorism on imperialism. The time has come for a deeper examination of the historical context.

MONUMENTALIZING WAR AND PEACE

When Titus Flavius Vespasianus gained control of Rome after defeating two internal enemies, his competitors in the Roman civil war of 69 and the Judeans in the east, the emperor faced a challenge quite similar to that of Octavian exactly one hundred years before: how to represent this double victory through monuments. In some respects, the ensuing *pax Flavia* was a response to, an emulation of, and perhaps even a competition with the historical precedent of the *pax Augusta* and its monuments.

In a recent popularizing book, *The Archaeology of War*, the editors imply the similarity between Octavian and Vespasian when they cleverly embed a feature box on monuments to the first-century Judean War, the Arch of Titus and the Colosseum, into a chapter on "The Spoils of Actium" set up by Octavian in Greece. In the main body of this chapter, the authors Murray and Petsas discuss a massive war memorial dedicated by Octavian in 29 B.C.E. at his new city Nikopolis, Victory City, on the site of his old command post near Cape Actium where his fleet defeated Antony and Cleopatra.

After the archaeologists cut back the weeds from the monument that were still radioactive from the fallout of the Chernobyl disaster, they discovered twenty three slots of the original thirty three to thirty five that would have held the bronze rams of the defeated enemy ships, much like those on the Rostra in the Roman Forum, except far bigger. A huge inscription above this impressive display of rams ran 165 feet and announced that "IMPERATOR CAESAR … CONSECRATED TO NEPTUNE AND MARS THE CAMP FROM WHICH HE SET FORTH TO ATTACK THE

ENEMY NOW ORNAMENTED WITH NAVAL SPOILS."

At home, Augustus continued this trend of honoring Mars by building a remarkable forum in downtown Rome, the focus of which was a temple to Mars Ultor. Containing cult statues of Mars, Venus, and the deified Julius Caesar, it was dedicated in 2 B.C.E. and fulfilled a vow Augustus had made forty years before to commemorate his vengeance against Caesar's assassins. Richard Beacham reports that "The completion of this complex…was celebrated with magnificent games (repeated annually thereafter on May 12), including the *lusus Troiae* and slaughter of 260 lions in the circus, gladiatorial combats in the Saepta, and a great naumachia, staged in a huge basin constructed beside the Tiber (Suet. Aug. 43.1; Dio 55.10.7-8; Ovid Ars Amat. 1.171-72)." Augustus himself explained in his *Res Gestae (Achievements)* that of all the many buildings he either restored or built from scratch (RG 19-21), "I built the temple of Mars the Avenger and the Forum Augustum on private ground from the proceeds of [war] booty."

War, however, found its balance in peace under the Augustan regime, since the Senate had also decreed in 13 B.C.E. that a magnificent Altar of Augustan Peace, Ara Pacis Augustae, which included a depiction of the god of war, Mars, be built on the Campus Martius to celebrate his return from pacifying Spain and Gaul, according to his *Res Gestae*.20 Augustus boasts:

It was the will of our ancestors that the gateway of Janus Quirinus should be shut when victories had secured peace (*pax*) by land and sea throughout the whole empire of the Roman people; from the foundation of the city down to my birth, tradition records that it was shut only twice, but while I was the leading citizen the senate resolved that it should be shut on three occasions. Thus, an ancient ritual was revived as a way of linking the presently peaceful Augustan Rome back to the good old days of King Numa and the middle Republic.

H.J. Rose has observed about this Augustan personification of political peace as Pax: Scarcely heard of before Augustus, she comes (as Pax Augusta) to represent one of the principal factors which make the imperial government both strong and popular, the maintenance of quiet at home and abroad (cf. Tac. *Ann*. 1.2.1: Augustus 'seduced everyone with the sweetness of peace'). The most famous, but not the only, monuments of the cult were the Ara Pacis Augustae and the Flavian Templum Pacis, dedicated in AD 75.23 In other words, as Brunt and Moore, the editors of the *Res Gestae*, explain:

"*Pax* means 'pacification' as much as 'no fighting'. But the citizens who enjoyed security at home could also take pride in the extension of Roman power to distant regions where Rome imposed peace." This sounds like the idyllic Vergilian vision of the Roman "arts" from the Aeneid Book 6. Vespasian will also close the gate of Janus in 70 C.E. as a sign of *pax*. In 75 C.E., on the fifth anniversary of the destruction of Jerusalem, he dedicated a Temple of Peace, which combined the

physical use of large outdoor space with a temple and porticoes found in the Forum of Augustus as well as the concept of Peace behind the Altar of Augustan Peace. Pliny the Elder, in fact, paired this Temple of Peace with the Forum of Augustus as two of the three most beautiful places in Rome ever seen. Approaching the entrances to this Flavian Temple of Peace, a visitor would have encountered flanking palm trees, perhaps as a reminder of the land of Judea recently conquered, which was symbolized on Flavian coinage in this way as well. Inside the grounds of Vespasian's Temple of Peace, one would have enjoyed refreshing water channels and beds of roses, with statuary collected from many conquered regions scattered throughout the grounds for viewing pleasure an oasis from the hubbub of the city, serving as an art museum, religious center, and academic resource. A temple of Pax with its altar out front was the forum's centerpiece, along with a library, and most remarkably, Josephus tells us that at this complex the emperor Vespasian deposited the precious golden objects surviving from the Jerusalem Temple to be on display for all visitors to admire.

Shortly after the death of the last Flavian emperor Domitian, however, the senator Tacitus is able to put a far harsher assessment of the first century's pax *Romana* into the mouth of the Briton Calgacus, "When they make a desert, they call it peace."30 Is this renaming of a desert as Roman peace simply a literary echo from other Latin authors such as Curtius and Pliny the Elder, or has Tacitus also been affected by the sight of the Temple of Peace with its treasure of conquered nations, including Egypt and Judea, now on display in downtown Rome? And is it possible that the Roman historian had also been reading the works of Josephus, the Judean historian who described the recent war in nicely Atticized Greek for sophisticated readers to enjoy? We cannot know for certain, but an analysis of Josephus's account of the Roman army's devastation of his land certainly can shed light on how Tacitus's aphorism might have played in the minds of contemporary literati at Rome.

The Roman army ends the siege on Caesar's orders after it has nothing else "to murder or plunder." Titus commands that his soldiers "raze both all the city and its temple" leaving only towers of the city wall as a testament to its former grandeur. The booty from the devastated wasteland of Jerusalem brought back to Rome will not only decorate the Temple of Peace, dedicated on the fifth anniversary of Jerusalem's fall, but also provide the capital for the construction of the Colosseum, which will be dedicated by the now emperor Titus on the tenth anniversary of the city's destruction in 80 C.E. The timing for these monumental events at Rome was not coincidental but served as anniversary celebrations of Roman imperial greatness at the expense of rebellious Judea.

C O N C L U S I O N

This is the Rome Tacitus and Josephus lived and wrote in. It is hard to imagine that Tacitus would not have been affected as a man in his twenties by these current events, with Judea made a desert and the emperor calling it peace. Tacitus would have seen Vespasian building a Temple to Peace, as if reliving the glory of Augustus and his Altar of Peace, and then outdoing the first emperor by building the greatest arena ever, the Colosseum. Did Tacitus read Josephus's *Judean War* in Greek, see the prominence of the desert theme play out, and find inspiration? I cannot prove this definitively, but perhaps we can now appreciate the famous words of Tacitus's Caledonian chieftain Calgacus about imperialism in a new light and accept that Roman and Judean identity formation, as exhibited in texts and monuments, were clearly intertwined in the late first century.

Josephus continued to live and write at Rome for decades after the war, and his outlook for the future, imbued with trust in God, appears hopeful. At the end of Book 10 of his *Judean Antiquities*, he writes of the prophet Daniel:

E P I L O G U E

Five hundred years ago exactly from this past 2011 Advent season, a brave Dominican friar stood up in the church in Santo Domingo and preached a fiery sermon of social justice to the Spaniards gathered for mass. Bartolome de las Casas gives an account of the sermon: They set aside the fourth week of Advent for the sermon, since the Gospel according to St. John that week is "The Pharisees asked St. John the Baptist who he was and he said: *Ego vox clamantis in deserto*." ["I am a voice crying in the wilderness."]…. At the appointed time Fray Anton Montesino went to the pulpit and announced the theme of the sermon: *Ego vox clamantis in deserto*.

After the introductory words on Advent, he compared the sterility of the desert to the conscience of the Spaniards who lived on Hispaniola in a state of blindness, a danger of damnation, sunk deep in the waters of insensitivity and drowning without being aware of it. Then he said: "I have come here in order to declare it unto you, I the voice of Christ in the desert of this island. Open your hearts and your senses, all of you, for this voice will speak new things harshly, and will be frightening." For a good while the voice spoke in such punitive terms that the congregation trembled as if facing Judgment Day. "This voice," he continued, "says that you are living in deadly sin for the atrocities you tyrannically impose on these innocent people. Tell me, what right have you to enslave them? What authority did you use to make war against them who lived at peace on their territories, killing them cruelly with methods never before heard of? How can you oppress them and not care to feed or cure them, and work them to death to satisfy your greed?" Another island, another empire, same basic message as Tacitus. Times may change, but human nature corrupted by power remains relatively the same.

CHAPTER EIGHTEEN

ELECTORAL DEMOCRACY

While quoting Samuel Issachar, Prof Graeme Orr stated that ‘’the law of electoral democracy encompasses the law and institutions governing representative elections (at whatever level), political parties, political finance and referendums. As a commonplace shorthand, ‘electoral law’ will be used in what follows. Occasionally, jostling for attention, people have tried on the term ‘the law of democracy’.[1574] The professor goes on to indicate that electoral democracy consists of democratic ideals namely participatory freedoms, political equality and deliberation, the right to vote and being attached to a political party which is to provide channels for creating groupings which promote a particular interest with a view off to electoral process.

Electoral democracy entails elections and an election is the process by which citizens elect the people to run government and political offices at all levels in a democratic government, elected officials are chosen by the people and serve for specific time called a term of office[1575]

In conclusion therefore, the available literature on the topic of study remains limited but the above is sufficient to establish a relationship between the right of privacy and electoral democracy in Uganda especially the opposition parties since they are legally operating.

AN EVALUATION ON HOW THE CONSTITUTIONAL RIGHT TO ELECTORAL DEMOCRACY HAS INFRINGED ON THE RIGHT TO PRIVACY IN UGANDA.

This chapter was triggered by an observation that I have been making on the right to privacy in our country, particularly by observing the political plateau in Uganda and the parties involved but most importantly how the parties in the opposition have enjoyed the afore said right. The general objective of the study is to analyse the effectiveness of the laws protecting the right to privacy on the political parties and the citizens therein.

In seeking to achieve the said objective, the study will look at how the enjoyment of the right to electoral democracy has led to the infringement of the right to privacy. The legal and institutional framework will be analysed from the premise of the fundamental human rights, the organisational

[1574]Eg Samuel Issachar off et al, The Law of Democracy: the Legal Structure of the Political Process, 5th ed (New York, Foundation Press, 2016).

[1575]Gutman, 2000

effectiveness theory and determination on the extent to which the right is ingrained in its systems and process. Prior to the conclusion, the study makes a comparative analysis with the USA and Kenya.

Privacy was initially seen as the 'right to be left alone[1576]' a simple yet powerful concept. This negative view of privacy, has been surpassed by several developments in comparative constitutional law. Privacy is nowadays understood not only as a right to be free from outside interference or observation in one's own private sphere, but also as a right to define and construct one's identity, not only in isolation but in social relations[1577].

Privacy means the quality, state or condition of being free from public attention to intrusion into or interference with one's acts or decisions[1578]. This definition satisfies a lay man's understanding and passes the reasonable man test although there are several legal definitions to include among others the following

Article 12 of the Universal Declaration of Human Rights[1579] is to the effect that ''No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interference or attacks.

In an almost identical wording, Article 17 of the ICCPR provides that;

1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour ad reputation.
2. Everyone has a right to the protection of the law against such interference or attacks.

Moving on to Ugandan jurisprudence, Article 27 of the 1995 Constitution of the Republic of Uganda (2006 as amended) provides that everyone has a right to privacy.

Democracy refers to a government by the people, either directly or through representatives elected by the people and involves a system in which everyone is equal and has the right to vote, make decisions among others[1580]. In Uganda for example, it is said that all power belongs to the people and is to be exercised in accordance with their laws[1581]

Following the above, a right of privacy accrues to political parties as well as we shall note with the political parties act. Uganda in 2005 adopted a multiparty system following a vote by the Ugandan Parliament to Conduct a Referendum on 4th May, 2005.

[1576]Byran A. Garner. (2019) Black's Law Dictionary, 11th Ed, Thomas Reuters Dallas Texas.
[1577]Manuel Jose Cepeda Espinosa, (2012) Privacy,'' in The Oxford Handbook of Comparative Constitutional Law 966, 969 (Micheal Rosenfeld &AndrasSajo
[1578]Byran A. Garner. (2019) Black's Law Dictionary, 11th Ed, Thomas Reuters Dallas Texas. .
[1579] 1948
[1580]Byran A. Garner, Black's Law Dictionary, 11th Ed, Thomas Reuters Dallas Texas, 2019 page 544
[1581] Article 1 of the 1995 Constitution of The Republic of Uganda (2006 as amended)

In the very early times, the law gave a remedy only for physical interference with life and property in its various forms; liberty meant freedom from actual restraint while the right to property secured to the individual his lands and his cattle. Later there came a recognition to man's spiritual nature, of his feelings and intellect. Gradually the scope of these legal rights to enjoy life broadened; and now the right to life has come to mean the right to enjoy life- the right to be left alone[1582] among others. The law continued to develop to encompass the intellectual and emotional life until recent inventions and business methods called for attention on the protection of the person, and for securing to the individual what Judge Cooley calls ''the right to be left alone''.

In a famous case of *Prince Albert v Strange*[1583]the court noted that the common law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also ''the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise. This in my opinion was to harness the development in the right to privacy amongst individuals and persons which I believe helped to up score the right.

Electoral democracy is said to involve, democracy that is controlled by representatives who are elected by the people of a country (the democratic process) and is organized on the principle that everyone has a right to be involved in making a decision (a democratic system of management) and lastly it organized according to the principle that all people in a society are equally important, whatever their material worth or social class (a democratic society)and involves political parties[1584]. Which is the case in Uganda every citizen of Uganda of eighteen years of age or above has a right to vote and it is the duty of the State to take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote[1585].

Following a series of elections in Uganda especially the (2016 and 2021 general elections) the events leading to the elections and those preceding the elections have always affected the parties involved. The opposition political parties (FDC & NUP) and the members plus leaders therein have been the most affected to the extent that their right to privacy has be violated or rather heavily undermined which is occasioning this study, from the surveillance and house arrests, the raiding of these political party headquarters by security officials. This background leaves me wondering and questioning whether the right to privacy is indeed a right and forms the wider basis of this research because the right to electoral democracy seems to override the right to privacy although the rights are provided for in different chapters of the Constitution, they both remain rights accruing to human

[1582] Harvard Law Review, Volume iv, December 15, 1890 at page 193
[1583] [1849] High Court of Chancery
[1584]Bryan A. Garner, Black's Law Dictionary, 11th Ed, Thomas Reuters Dallas Texas, 2019 page 544
[1585] Article 59, of the 1995 Constitution of the Republic of Uganda (2006 as amended)

beings and legal entities.

Following the 2021 general elections the army and Uganda Police Force raided the National Unity Platform (NUP) offices on 14th October, 2020. NUP officials say that the security took away shs23 million and 7,000,000 signatures the party had gathered to support the nomination of their presidential flag bearer Mr. Kyagulanyi Robert. The search warranties signed by Assistant Superintendent of Police Jane Imalingat and other police officers didn't capture money and the missing signatures[1586]. Immediately after the 14th January General Election Robert Kyagulanyi and his wife, Barbra were held under house arrest without being presented before a judge and for a non-cognizable offence[1587], suffice to note is the surveillance which was amounted around his house and the wife was reported in the media saying that the camera points straight to their bedroom and bathroom. This in my opinion jeopardises the right to privacy on the National Unity Platform and the citizens herein which calls for research on the institutional and legal framework that is to protect the said right. The said house arrests have also befallen the former FDC party leader Dr. Kizza Besigye at his home in Kasaganti which have intruded on his right to privacy plus that of his family. Similarly, on 20th November 2019, security operatives stormed and ransacked the office of the opposition political party the Forum for Democratic Change and confiscated items belonging to both journalist and two phones belonging to the chairperson of Kasese District, Saul Matte. The police however continued to deny the said allegations and this a lingering question as to whether the right to privacy is a myth or a constitutional right.

In relation to both rights, Raymond Mujuni a journalist with NTV Uganda tweeted on 9th January, 2021 on his official handle @qataharraymond asking MTN Uganda how Hon. Fr. Simon Lokodo MP of Dodoth West Constituency had acquired his phone data that had only given to MTN Uganda. This creates a lacuna in the law regarding both rights considering the extremes on how people have gone to enjoy both of the right of electoral democracy at the expense of the right to privacy.

It is hypothesized that the right privacy does not extend to electoral democracy because of the doctrine of state importance which calls for a balance on what is private and public but with the available literature review, the study will be able to result into a different finding and make recommendations that will stand to harness the simultaneous co-existence of both constitutional rights and causing their beneficial enjoyments.

The chapter will help to show the loopholes in the enjoyment of the right of electoral democracy on the citizens' right to privacy and will help the parties develop better frameworks that are in strict

[1586] Article by MichealKakumirizi/ Daily Monitor of 15th October, 2020. (also published on AllAfrica at https://allafricia.com/stories/202010160016.html)
[1587] https://www.amensty.org

adherence to the laws during their operations.

The chapter will help widen the citizenry understanding of both the legal and institutional framework regards the right to privacy and electoral democracy in Uganda. The citizens will understand these rights better especially when one is supressing the other.

The chapter will lay future grounds for research because it is not wholly conclusive and it has several limitations that are cutting the in depth analysis.

Considering the recent events and attacks on the political parties where their properties are confiscated and meetings intruded and the citizenry therein, the right of privacy to an individual (through surveillance on their homes) and other correspondence has been left abused and without lawful justification but rather curtailing the parties and individuals right. The need to research on the afore said topic is to underscore on how the laws in place aid to harness the right to privacy but specifically when enjoying the right to electoral democracy.

THE INTERNATIONAL DEFINITION OF THE RIGHT OF PRIVACY.

Article 17 of the ICCPR provides that;

1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
2. Everyone has a right to the protection of the law against such interference or attacks.

The International Convention on Civil and Political Rights was ratified in Uganda in June 1995 without making any reservations and the very purpose and origins of human rights law were to place certain fundamental rights beyond the whims of the majority opinion, and to protect those who may find themselves in the minority.

THE DOMESTIC DEFINITION OF THE RIGHT TO PRIVACY

In our domestic Laws, the supreme Law of the land under Article 27 of the 1995 Constitution of The Republic of Uganda (2006 as it is written in black and white that no person shall be subjected to (a) unlawful search of the person, home or other property of that person or (b) unlawful entry by others of the premises of that person. The Article further stipulates that no person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property. From the provisions of this Article it is clear that even political parties are accorded this right and so is the citizenry of Uganda.

THE IMPORTANCE OF THE RIGHT TO PRIVACY IN THE

ENJOYMENT OF ELECTORAL DEMOCRACY.

Here in your mind you have complete privacy. Here there's no difference between what is and what could be _ Chuck Palahnuik, an Asian writer quoted.

The importance of privacy in electoral democracy is majorly maintaining boundaries amongst the different political players because having the right to establish boundaries is important and good for building healthy relationships and political careers in such a growing democracy like Uganda. In the long run as professionalism is achieved other rights such as the right of freedom of speech will be protected, this arises out of the fact that nothing will have to be monitored in as far as the enjoyment of the right to privacy by the citizenry in the political parties does not the affect the rights of others, or interfere with the states agenda. In Uganda the right to freedom of expression is provided for in the laws of Uganda.

In furtherance of the same, the right to privacy will then harness the liberty for the legally existing political parties to engage freely in politics. Politics can be best understood as the activity through which people make, preserve and amend the general rules under which they live and it is also partisan and involves arguing against each other.[1588]Towards the 2021 general elections in Uganda, the National Unity Platform (NUP) which was soundly the leading opposition at the time, faced a raid as indicated in the statement of the problem, where the army and Uganda Police Force raided (NUP) offices on 14th October, 2020 and they reportedly took away shs23 million and 7,000,000 signatures the party had gathered to support the nomination of their presidential flag bearer Mr. Kyagulanyi Robert[1589]. As indicated, the breach of this right consequentially affected the right of NUP to engage freely in electoral democracy considering that the signatures that were confiscated formed part of the elements and conditions to fulfil the nomination requirements. NTV Uganda reported 18th July, 2020 that by 8;00 Am police in Jinja City had deployed heavily blocking all the roads leading to Baba, a local radio Station where Kyagulanyi was expected to appear[1590]that blockage was instigated by a continued surveillance on Mr. Kyagulanyi and his correspondence.

We have to also appreciate in this non-legal framework that privacy is important in preserving and protecting the reputation of the citizenry involved in the electoral democracy involved in this study. Reputation is best understood as the esteem in which someone is held or the goodwill extended to or confidence reposed in that person by others, whether with respect to personal character, private or domestic life, professional and business qualifications among others[1591].

[1588] Heywood, what is Politics? GVPT September 10, 2007.
[1589]Article by MichealKakumirizi/ Daily Monitor of 15th October, 2020. (also published on AllAfrica at https://allafricia.com/stories/202010160016.html
[1590]http://www.ntv.co.ug
[1591]Ibid, footnote 10

The breach of the right of privacy in the short term ruins the reputation of the parties involved because it conjures up images of malice, disruption and even violence plus deceit on top of manipulation and lies on the affected parties. One might consider taking an action in defamation resulting from the breach of the right to privacy that leads to making of statements against that person and publish them on top of the breach which obviously causes serious harm to that person reputation. In the case of a political party, the action may not suffice in defamation because defamation as a tort remains one in persona, hence the party can take out a different cause of action. The Liberal democratic theory assumes that a good life for the individual must have substantial areas of interest a part from political participation so as to preserve the individual's reputation.

Lastly but not least, the right to privacy aids in protecting the finances of the political parties involved. As such, political parties have a treasury that is only viable to the concerned stakeholders in the parties and as opposed to the public or state having access to such accounts.

With regard to the infringement on the right to privacy during the enjoyment of the electoral process that forms part of the electoral democracy, the scenarios are many as laid out which has caused breach of other rights embedded in our laws but through the day to day actions, even without the slighted idea, the right to privacy is infringed on and the citizens remain in lieu of the same yet continue to suffer at the helm of seeing electoral democracy manifest.

DIFFERENT WRITERS ON POLITICAL PRIVACY

Following the above firm background on the existence and operation of political parties in the enjoyment of electoral democracy, **Colin J. Bennet** questions whether political privacy actually exists. In His book, Privacy and Political System; Perspectives from Political Science and Economics[1592] notes that a right to privacy indicates personal autonomy which furthers an understanding of private as meaning non-public and Political scientists have struggled for years to place some conceptual boundaries and their discipline. The issue of privacy, as it has framed within advanced industrial states, raises a number of fascinating political questions that overlap the disciplines of the political science and economies. The starting point, therefore, is not an abstract and inevitably contestable conception of the privacy, or an artificial definition of disciplinary boundaries.

The author notes that the following questions must be answered namely what is the relationship between attitudes towards privacy and political culture and ideology plus, what can political science tell us about the nature and extent of surveillance? When privacy is viewed as a regulatory issue, then privacy protection raises a range of fairly traditional questions about agenda settings,

[1592] Colin J. Bennett, Department of Political Science University of Victoria, Victoria, BC Canada

pressure and group politics, the adjudication and evaluation[1593].

Edward Shils, a twentieth century proponent of this view of privacy, wrote in the 1950s that privacy is essential for the strength of American Pluralistic democracy because it bolsters the boundaries between competing and countervailing centres of power as well as reinforcing the barriers between the state and the individual and the state and civil society organisations.

Another writer, **Westin,** 1967 wrote on political privacy and emphasised that, 'it is a balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies''. Westin went on to spell that privacy is important in political parties and democracy because it promotes freedom of association, and shields scholarship and science from unnecessary interference from the government and lastly, it restrains improper police conduct such as physical brutality and unreasonable searches and seizures.

THE CHALLENGE OF ILLEGAL SURVEILLANCE AND HOW IT HAS LED TO THE INFRINGEMENT OF THE RIGHT TO PRIVACY.

Surveillance started from a notion known as the Panoptic-on (which was developed to ensure a state of permanent and continued visibility that would maintain discipline) and is summarily known as having information about one's movements and activities recorded by technologies on behalf of the organisations and governments that structured our society.

Surveillance is also defined as a purposeful routine, systematic and focused attention paid to personal details for the sake of control, entitlement, management, influence or protection. Some authors have also in their opinions regarded surveillance as a total denial of one's right to freedom and control of life and this is so because to be under surveillance means that almost every aspect of an individual life is being watched, monitored and controlled by those who consider themselves superior. In relation to the study, we must note that surveillance takes three to four forms but the most important being the physical, data and video surveillance. In January, 2021 when the NUP party leader was under house arrest, he was placed under video surveillance where a CCTV camera was placed directly opposite his house and the wife Mrs.Kagulanyi was quoted in the media saying the camera pointed directly towards their bedroom and bathroom which was intrusion into their private lives. Back at the NUP headquarters' both physical and data surveillance where present as indicated in their findings in chapter 4 of this research paper.

Through his verified twitter handle (@HEBobwine), Robert Kyagulanyi tweeted on the 26th January, 2021 that '' this has been the situation at my house these past days. Aside from the military and police surrounding us, military and police helicopters have been consistently hovering

[1593] Ibid, page 6

over our residence in breach of our privacy rights. Cowards'' end of tweet. This a clear example of illegal surveillance that followed shortly after the announcement of the results of January, 2021 polls by the electoral commission.

Like stated in the problem statement, several Ugandan citizens received messages from various contestants in the 2021 general elections requesting for their support and that was a complete abuse of their correspondence to a right to privacy and that is a complete breach of data protection. Considering raid that happened at the NUP offices on 14thOctober, 2020 several personal data especially the signatures, phone numbers of the party supporters were collected from the Kamwokya based head office of the National Unity Platform and this was against the laws protecting personal data and this was followed by a surveillance on the party's offices.

Under surveillance, in the report by CIPESA under paragraph 13 of which I will quote entirely as '' In the last few years, there has been an increased concern of political dissidents, human rights defenders and journalists in Uganda[1594], which surveillance has been heightened with the adoption of the Regulation of Interception of the Communications Act (RICA) and this has continued to cause a breach of the right to privacy on the political dissidents in the given opposition political parties. In regards to the same, the Independent Newspaper on 8th August reported that 'the police had been physically trailing Mr. Kyagulanyi Robert and eventually stopped him from appearing on a political talk show on BCU FM[1595]'' which contravenes two rights namely the right to privacy following the continued trailing and eventually infringed on his right to freedom of association which contributes greatly to electoral democracy.

In conclusion there is no way one can talk about surveillance without the issue of privacy. He maintains that privacy and surveillance cannot co-exist together without one being a hindrance to the other because surveillance cannot function properly without crossing the path of privacy and the concept of privacy cannot be enjoyed under surveillance.

THE CHALLENGE OF DATA INFRINGEMENT.

Raymond Mujuni a journalist with NTV Uganda tweeted on 9th January, 2021 on his official handle @qataharraymond asking MTN Uganda how Hon. Fr. Simon Lokodo MP of Doodoth West Constituency had acquired his phone data that had only given to MTN Uganda which is against the principles of data protection. Data protection aims at protecting any information relating to an identified or identifiable natural person, including names, dates of birth, photographs, video footage, email addresses and telephone numbers.

[1594] In a survey conducted in 2015 by CIPESA of human rights defenders, bloggers, journalist and others available at http://www.cipesa.org/?wpfb-d1=209

[1595]https://www.independent.co.ug/nup-condems-blockage-of-kyagulanyis-radio-talk-show

THE DOMESTIC REGIME ON THE RIGHT TO PRIVACY AND ELECTORAL DEMOCRACY

THE 1995 CONSTITUTION OF THE REPUBLIC OF UGANDA, 2006 AS AMENDED)

It is not in dispute that countries now attain their leads through elections and this has been dubbed as a democratic process and it is rooted in the Constitution of the Republic of Uganda under chapter 5 which is on the representation of the people

Every citizen of Uganda of eighteen years of age or above has a right to vote and it is the duty of the that citizen to register as a voter and the State shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote[1596].

Having agreed that electoral democracy, involves political and systems they are provided for in Article 69 of the Constitution which is to the effect that the people of Uganda shall have the right to choose and adopt a political system of their choice through free and fair elections or referenda[1597] and in 2005 Ugandans adopted a multiparty political system and have a right to form political organisations[1598].

The electoral democracy in Uganda is managed by the Electoral Commission of Uganda as substantively provided for the Constitution under Article 60 with a major function of ensuring that regular, free and fair elections are held. The procedural Law governing the conducting of the Elections is the Electoral Commission Act[1599] which lies out the functions of the EC further on procedural law, The Parliamentary Elections Act, 2005 together with the Presidential Elections Act of 2005.

Having observed that the right to privacy has been infringed on by different state operations on the said political parties namely, the NUP and the FDC together with the leaders therein up to their homes and other correspondence, I sought it prudent to check on the available laws that provide for the right to privacy in Uganda.

Under chapter four of the 1995 Constitution of the Republic of Uganda it provides that that no person shall be subjected to (a) unlawful search of the person, home or other property of that person or (b) unlawful entry by others of the premises of that person. The Article further stipulates that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property. From the provisions of this Article it is clear that even political

[1596] Article 59, the 1995 Constitution of the Republic of Uganda. (2006, as amended)
[1597] The 1995 Constitution of the Republic of Uganda. (2006, as amended)
[1598] Article 72, The 1995 Constitution of the Republic of Uganda, 2006 as amended)
[1599] Chapter 140, of the Laws of Uganda.

parties are accorded this right and so is the citizenry of Uganda[1600]. Having observed the happenings and the events that unfold such as the political party's headquarters or instruct offices being raided without justifiable reasons by the state, because there after properties are returned and the said investigations aren't maturing since there hasn't been any official report or formal ruling on the same.

Privacy in political parties and on the citizenry involved is also abused and infringed on by continued physical and video surveillance, yet the right to privacy in politics is provided for under international laws.

Section 10 of the Data Protection and Privacy Act[1601] is to the effect that a data collector, data processor or data controller shall not collect, hold or process personal data in a manner which infringers on the privacy of a data subject.

INSTITUTIONAL FRAMEWORK

There are a number of institutions created in Uganda to help in the respect and promotion of human rights such as the police force, the Human Rights' Commission, Courts of Law and others.

Article 221 of the Constitution of Uganda[1602] obliges UPDF and any other armed force established in Uganda namely the Uganda Police Force and any other police force, the Uganda Prisons Service, all intelligence services and the National Security Council to Observe and respect human rights and freedoms in the performance of their functions. The UPDF and other police agencies are the first institutional frameworks in place to preserve the right privacy and the electoral democracy

The Police Act[1603] under section 4 which provides for the functions of the force which are to protect the life, property and other rights of the individual reaffirms that the police is another institution available to protect the rights of the individuals.

It must be appreciated everyone is entitled to protection against the attacks to their privacy but to the contrary this does not seem to be the case since the police which is under a legal duty to enforce the rights of the citizens is at the helm of infringing and abusing the constitutional right to privacy while trying to harness the right to electoral democracy. It is at this point that one could argue on that the security officials carry out these attacks and raids on their private life of the citizens on National Interest grounds but fail since laws are clear and there has not been any justification by the state for instance the High Court in Uganda on 25th January, 2021 ordered security forces to end the de facto house arrest of opposition leader Robert Kyagulanyi, calling it unlawful and the Deputy

[1600] Article 27 of the 1995 Constitution of the Republic Of Uganda (2006, as amended)
[1601] 2019
[1602] Ibid, note 34
[1603] Chapter 303

Court Register Jameson Karemani read the ruling, which said the detention of Kyagulanyi and his family was a violation of their rights'' '' it has been established that right to personal liberty has been infringed. Having found, as I do that the restrictions imposed on the applicant are unlawful, it is hereby ordered that they are lifted[1604],,

Following the above judgement, the courts of law form part of the institutions set out to promote the respect and protection of Human rights and have decided on a number of cases which have since then caused modification in the enjoyment of these human rights. The courts of Judicature are established under Article 129 of The Constitution of Uganda

The other institution available is the Human Rights Commission (UHRC) which is provided for in Article 51 to 58 of the Constitution[1605].The Commission has several functions as provided for in Article 53 and among others includes to investigate at its own initiative or on a complaint made by any person or group of persons against the violation of any human right. The right to privacy forms part of the rights envisaged in chapter four of our Constitution and deserves such protection.

Summarily, the legal framework on electoral democracy and the right to privacy is substantive and elaborate both internationally and domestically so is the institutional framework.

It is remarkably prudent that I compare the legally existing situations on how electoral democracy has affected the right to privacy of other jurisdictions with the Ugandan situation. This comparison will guide on the findings and their recommendations.

THE INTERNATIONAL REGIME ON THE RIGHT TO PRIVACY

The ICCPR was ratified in Uganda on 21st June 1995 and the advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically two fold, internal and external. In the latter case, the delay between signature and ratification may often be advantageous in allowing extra time for consideration but it is in the internal aspect that is the most important, for it reflects the change in the political atmosphere[1606] and observation of the right being protected. The preamble of the ICCPR is to the effect that the rights under this convention, are derived from the Universal Declaration of human rights, the ideal of free human rights beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic rights. Bearing this in mind, will help shape the analysis on the legal and institutional frame regards preserving the right of privacy in political parties.

[1604] Halima Athumani; Uganda Court Orders opposition Leader Released from House Arrest, January 25, 2021 09:10a AM on https://www.trtworld.com
[1605] The 1995 Constitution of the Republic of Uganda (2006, as amended)
[1606]Malcom N. Shaw, (2008), International Law 6th Ed, Cambridge University Press, New York page 912

Article 17 of the ICCPR provides that

1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
2. Everyone has a right to the protection of the law against such interference or attacks.

The same wording of the ICCPR was domesticated into Ugandan laws to maintain an international writing on the right to privacy.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948

Article 12 of the Universal Declaration of Human Rights is to the effect that ‘’No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour ad reputation. Everyone has a right to the protection of the law against such interference or attacks.

According to **Prof. K.C Joshi** the declaration of the UDHR must be noted as an important event in the history of human rights in international law. This ‘path finding’ instrument provides a generally acceptable catalogue of man’s inalienable rights[1607]. In the case of **R Rajgopal v State of Tamil Nadu[1608]** court observed that a right to privacy was not enumerated as a fundamental right in their constitution but was inferred from Article 21 of the Constitution of India and noted that every person has a right to privacy. In the judgment, court held that the right to privacy in 2018 is a well discussed concept however in the year in 1995, it was not very well-acknowledged in case laws or legislations. Privacy was not a fundamental right then and hence this case acknowledged it. This was very important for this principle to develop.

According to **Bryan A. Garner**, the Editor in Chief of the Black’s Law Dictionary, a right to privacy means the quality, state or condition of being free from public attention to intrusion into or interference with one’s acts or decisions[1609]. The same writer continues on page 1447 to allude to autonomy privacy and writes that autonomy privacy includes that an individual’s right to control his or her personal activities or intimate personal decisions without interference or intrusion. If the individual’s interest in an activity or decision is fundamental, the state must show a compelling public interest before the private interest can overcome and if need be, the individual and the state must approach court to use the balancing test[1610] prior to evading the right to privacy.

INTERNATIONAL REGIME ON ELECTORAL DEMOCRACY

[1607] Prof K.C. Joshi, International Law and Human Rights, Eastern Book Company, 2006 at page 310
[1608] (1994) 6 SCC 632: AIR 1995 SC 264
[1609] Bryan A. Garner, Black’s Law Dictionary, 11th Ed, Thomas Reuters, 2019.
[1610] Hill v NCAA, 865 P.2d 633, 653-54 (Cal. 1994)

Article 21 of the UDHR is to the effect that '' Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country.

It is my opinion that this Article remains important because it prohibits the deprivation of rights according the procedures established by law because at the time of drafting this declaration, the framers focused on the right to personal liberty which springs to all other rights in a way in that by one's liberty they can freely engage in electoral democracy so long as they have the necessary qualifications.

In the background of this study I noted that the right to privacy sprung out of the right to life and personal liberty and with this, the right to privacy especially in electoral democracy entangles and co-exists with several rights for instance the right to freedom of expression and now the right to vote where one uses his personal information to enjoy his right.

THE NON-LEGAL ASPECTS ON THE RIGHT TO PRIVACY AND RIGHT TO ELECTORAL DEMOCRACY.

John Locke, and he wrote that '' *I with my liberty; autonomy; rationality; and privacy, am assumed to know my interests; and should be allowed a sphere which I own untouched by others*''. The interpretation we may allude to this maybe different and I thus choose to use the literal interpretation of the same to mean that the right of privacy is envisaged a human right.

As noted in the background of the study, the right to privacy has been noted a right to be left alone which has received several criticism which for this study are not in doubt but important to note is that privacy is definitely an issue whose time has since then come and I am in agreement that privacy protection now has all the characteristics of an important policy sector of comparable importance to the environmental protection[1611]. Be that is it may, if there be a politics of privacy, then it should follow that the discipline of political science should be able to add some important insights into questions about how privacy is treated with the political arena as public policy.

[1611]Colin J. Bennett, Department of Political Science University of Victoria, Victoria, BC Canada page 12

LEGAL REGIME GOVERNINGING THE RIGHT TO PRIVACY AND ELECTORAL DEMOCRACY IN COMPARISONS WITH OTHER JURISDICTIONS.

The legal regime is both substantive and procedural where by the former spells the law and the latter sets out how the general purposes and objectives identified in the former are to be accomplished ad this legislation contains regulations and directives[1612]. Laws are made by the legislative body of the government and the international conventions ought to be ratified by Uganda before they are operationalised.

Looking onto the institutional framework that is mandated with the enforcement of the existing legal regime, the available most thought of are the courts of judicature and the security agencies which are established substantively by the Constitution of the Republic of Uganda.

THE USA SITUATION ON THE RIGHT TO PRIVACY DURING THE ENJOYMENT OF ELECTORAL DEMOCRACY.

The Privacy Act of 1974 which was enacted on December 31st 1974 set a Code of Fair information practice that governs the collection, maintenance, use and dissemination of personally identifiable information about individuals that is maintained in the systems of records by federal states. The Privacy Act states in part that ‘’ No agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[1613]’’.

The remarkable success of the Obama successes of the Obama campaign in 2008 and 2012 and its advanced uses of new technologies to persuade and target voters have not gone unnoticed in other democratic countries. While ‘’voter and citizen surveillance ‘’ is nowhere as extensive or sophisticated in other countries candidates and political parties elsewhere have reportedly looked with great envy on their activities of their U.S counterparts and longed for similar abilities to find and potential voters and to ensure that they vote[1614]. The right to privacy is on voter and citizen surveillance which I believe is a failure as opposed to what the Privacy Act of 1974.

[1612] Glanville Williams; Learning The Law, 6th Ed, Thomson Reuters (Sweet and Maxwell), London on page 58
[1613] https://en.m.wikipedia.org/wik/Privacy_Act_of_1974 visited on 31st May, 2021.
[1614] https://firstmonday.org

THE KENYA SITUATION ON THE ELECTORAL DEMOCRACY AND THE RIGHT TO PRIVACY ESPECIALLY ON DATA PROTECTION.

As fate may have it, Uganda enacted the Data Protection Act in 2019 and from the statement of the problem of this study, there are continued reports on privacy infringement during the enjoyment of electoral democracy, the same lies for Kenya which enacted a similar Law on 8th November, 2019 and the law came to cure the mischief that happened in 2013 and 2017 Kenya general elections.

Briefly, the 2013 and 2017 Kenyan presidential elections saw the re-election of President Kenyatta and were embroiled in a scam in which Cambridge Analytical illegally collected Facebook profile data from millions of Kenyans. In 2017 to be specific, the insights were used in a data-driven micro-targeted digital campaign to help Kenyatta get re-elected. The UK-based consulting company had been in the limelight since USA President Donald Trump's election victory in 2016 for harvesting data about millions of Facebook users and targeting them with information intended to sway them in Trumps' favour[1615]. This in pursuit with this study indicates a failure of the protection of the right to privacy during the enjoyment of electoral democracy in Kenya and the USA[1616].

In Uganda, the right to privacy is breached by communications companies mainly MTN Uganda and Airtel Uganda. This shows how the both Uganda and Kenya are languishing in preserving the rights at the expense of electoral democracy.

The new law, in Kenya is aimed to enforce the right to privacy by providing remedies against any breach so is the Ugandan situation.

In a nut shell, the legal framework establishing the right to privacy and electoral democracy both internationally and domestically is rich and profound as seen in the afore cited Articles. The institutional frameworks remain the EC that ensures that electoral democracy is occasioned and in Ministry of Information, Technology and National Guidance is the one in charge of ensuring data protection regards the right to privacy and crowning it all, are the courts of Judicature where aggrieved persons seek redress against those that breach their right to privacy during the enjoyment of electoral democracy.

[1616] https://advx-globalvoices-org.cdn.ampproject.org./v/s/advox.globalvoices.org/2019/12/24/kenya

APPRAISAL ON THE INTERNATIONAL AND DOMESTIC FRAME WORK ON THE RIGHT TO PRIVACY AND ELECTORAL DEMOCRACY

It appears that the laws on both rights laws exist internationally and domestically namely, the ICCPR under Article 17 which was ratified in Uganda in 1995 and the UDHR under Article 12 on the right to privacy and under Article 21 on the right to electoral democracy and that is not in dispute. The 1995 Constitution of the Republic of Uganda also provides for the right to privacy and right to electoral democracy in Article 27 and under chapter 5 starting from Article 59[1617] respectively. In the Supreme Court in *Charles Onyango Obbo v Attorney General*[1618] held that '' protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. It that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstances is permissible''. I therefore find that the security officials don't qualify in the exceptional circumstances to breach right to privacy during the enjoyment of electoral democracy.

ON THE RATIONALE OF THE RIGHT TO PRIVACY IN ELECTORAL DEMOCRACY

It was found that the right to privacy plays key roles in electoral democracy. Bearing in mind that electoral democracy involves different players the right to privacy aids in occasioning boundaries amongst the various players and in the long run helps to maintain their reputations as electoral democracy is being enjoyed by each one of them. In an interview, one of the respondents while responding to the question whether the right of privacy plays a big role in the enjoyment of electoral democracy? he said '' yes privacy is a very important factor when it comes to electoral democracy, we vote by secret ballot but as you may know there are some people who were voted for in the previous election under the observation of the police. He further stated that the surveillance by the police forces around our homes and offices is the biggest form of privacy infringement I know of , the police always alleges having intelligence and it is heavy during all elections, when Dr Kizza Besigye was placed under house arrest, he was living in the presence of police that was everywhere around even in his garden and I think the same happened to Mr. Kyagulanyi in January, so I believe that during elections us exercising our rights, the state through the security officials violates this right''.

[1617] 2006 as amended.
[1618] Constitutional Appeal No.2 of 2002

ON THE EXTENT TO WHICH ELECTORAL DEMOCRACY HAS INFRINGED ON THE RIGHT TO PRIVACY IN UGANDA

It was found that enjoyment electoral democracy has infringed on right to privacy majorly through physical and video surveillance on the citizens of Uganda by the security officials, namely the Police Force of Uganda and the Uganda Peoples Defence Forces. There was a clear image portraying a continued surveillance by the UDPF and the UPF over Kyagulanyi Sentamu Robert's home in Magere and the newspaper Article of the Daily Monitor written by Micheal Kakumirizi shows how personal data and other information belonging to citizens attached to NUP where confiscated by security officials which is in complete disregard of the provisions of Article 27 of the Constitution of Uganda.

In an interview with another respondent on the extent to which the enjoyment of electoral democracy has infringed the right to privacy? he said that '' first and foremost, the right to privacy one of the rights that are heavily undermined in Uganda and world over because in our day to day life, our accounts are hacked, banks systems are pirated and it worsens during election time because the NRM is afraid of the opposition, it has to do all it takes to sabotage the other political parties. So much surveillance is mounted on our members right from their homes, they are trailed on their journeys and on 14th October, as you may remember our offices were raid by the security officials who took our property even personal files. I must admit that the right to privacy especially in the election period is a myth, the state has gone further to place spies amongst our homes, offices so as to collect information. You must have seen in the media families reporting how they are being threatened and trailed. The right to privacy is fundamental just as any other right and ought to be protected whether during the exercise of promoting electoral democracy or not''.

Another finding from the respondents, was that most of them don't actually believe that a right to privacy exists because the actions security officials during the enjoyment of electoral democracy.

It was further found that Telecommunication companies for instance MTN Uganda issued personal data belonging to their clientele to politicians during the campaigns' of the 2021 general election which was a breach of the correspondence of the right to privacy having faulted on data protection.

It can be argued that electoral democracy plays a key role in providing for a direct relationship between the members of the legislature and the executive with the local constituency and continues to promote the right to vote since it is a constitutional right however the enjoyment of this part should not be at the expense of the rights for example the enjoyment of the right to privacy among others. Indeed the right to privacy has been infringed on in the enjoyment of electoral democracy, the citizenry should utilize the institutional frameworks available to ensure that the perpetuators are published by the realms of the available legal framework, this is because the citizenry may not be

significantly aware of the extent the right to privacy as a human right and a fundamental human right which has since then extended to the political world.

Its therefore necessary for all political players to know that they are entitled to privacy as envisaged in Article 17 of the 1CCPR[1619]. Quoting Colin J. Bennett[1620] who writes and supports the notion of observing privacy in the political parties which forms part of electoral democracy gives firm ground for the affected citizens and the legally operating political parties to utilise the courts of law to protect their right to privacy.

THE NEED FOR THE HUMAN RIGHTS COMMISSION (UHRC) TO PERFORM BETTER AS NOTED IN THE CONSTITUTION OF UGANDA.

The UHRC is mandated to investigate on its own motion any complaint against the violation of any human right[1621] and has several powers that are granted by the Constitution so as to ensure a strict observance of human rights. Yes, the Commission has made reports but has not made any report regards the right to privacy on its own motion, if it did, maybe there would be a significant change and continuous upholding of this right.

THE NEED FOR CIVIC EDUCATION.

Civic education is broadly defined as the provision of information and learning experiences to equip and empower citizens to participate in democratic process[1622]. The citizenry, security agencies and all players involved in electoral democracy, need to be educated more how to enjoy the both rights, and how to protect them as well. The education can take very different forms including classroom-based training and mass media campaigns. The overall objective of civic education is to promote civic engagement and support democratic and participatory governance through civic knowledge, skills and disposition. This will help to create awareness on the existence of the rights and upholding them.

In the enjoyment of electoral democracy, having found that it involves parliamentary and presidential systems, surveillance of the citizens disregards the right to privacy both in their families and personal spaces and reduces the enjoyment of both constitutional rights effectively.

[1619] The international Convention on Civil and Political Rights
[1620] Colin J. Bennett, Department of Political Science University of Victoria, Victoria, BC Canada.
[1621] The 1995, Constitution of the Republic of Uganda (2006, as amended)
[1622] Jennifer Rietbergen-McCracken, Civic Education.

THE RIGHT TO INTERNET A FUNDAMENTAL HUMAN RIGHT

On Wednesday 13th January 2021, the eve of Uganda's General elections, Uganda's communications regulator UCC ordered telecoms operators and internet service providers in the country to suspend all internet gateways until further notice. According to Reuters Ugandans reported difficulties accessing the internet via mobile devices and wireless connections on Wednesday evening and internet monitor Netblocks said on twitter that the country was experiencing a nationwide blackout from 7:00pm (1600GMT).

The presidents Justification for the Internet shutdown was in retaliation for face book taking down some pro government accounts which is really frivolous and vexatious. Any internet shutdown should be grounded in the international human Rights principles of proportionality, necessity and legality internet shutdowns should not be used as an emotional retaliation tool.42% of Ugandans are internet users and 2.5 million Ugandans are active on social media via mobile tool devices.

Necessity means that only restriction of internet access must be limited to members that are strictly and demonstrably necessary to achieve a legitimate aim. It should be demonstrated that no other measure would achieve similar effects with more efficiency and less collateral damages.

Necessity also implies an assessment of the proportionality of the measures. Any restriction of internet access must also be proportional. A proportionality assessment should ensure that the restriction is the least intrusive instrument amongst those which might achieve the desired results. The limitation must target a specific objective and not unduly intrude upon other rights of targeted persons.

The internet has been ingrained into the tasks that Ugandans perform each day and the internet shutdown has caused detrimental effects to Uganda's economy and livelihoods at large. According to Net blocks an internet freedom monitor such a blackout could have already cost the Ugandan economy around USD 10million.

On 12th January, UMEME Uganda's 3 main electricity distribution company posted notice on its Twitter page asking its clients to purchase adequate amounts of electricity units as its service was being interrupted by the internet speed. During the five-day lockdown while the internet was fully shutdown, MEME customers were not able to access the prepaid service because the network was not available. The other services that were not available because of the shutdown were the Uganda Revenue Authority, National Social Security fund, banking services, medical emergency services like Rocket Health and E-commerce services in the form online transport services like Safeboda, Uber and Jumia.

If internet shutdowns are used as a blunt force means of blocking access locally to a specific

service or application, access to other unrelated services may also be impacted as collateral damages. For example, shutting down the internet also directly disrupted access to internet based ride sharing and taxi hailing applications, likely creating a major disruption for transportation services.

Uganda has got a cumulative figure of over 39,000 cases of covid 19 and from the start of the pandemic, the internet has been a safe space offering the best platform that doubled as a social distance tool without the internet Ugandans who have been transacting online and communicating online had to switch and get things done physically. An example is the seven App that simplifies health care by bridging a gap between a patient and a doctor virtually in the comfort of one's home or office. With the internet shutdown one had to walk to the hospital physically. During the prevailing COVID 19 pandemic, Ugandan need the internet space more than ever before.

Mobile money services come to a standstill on 14th January2021, Election Day as a result of lack of internet availability and poor network conditions. Media companies that facilitate journalists while in the field rely on mobile money. Journalists that were already in the field to cover the 14-16th January elections couldn't be facilitated so they resorted to borrowing money from friends within the areas designated to them. Mobile money is a service used by almost every mobile phone user in Uganda. Uganda has about 26million active mobile subscriptions that resonate with mobile money usage.

People routinely depend on the internet to stay in touch with family and friends, create local communities of interest, report public information, hold institutions accountable and access and share knowledge. To that end, it can be argued that internet access cannot be distinguished from the exercise of freedom of expression and opinion.

When a complete internet shutdown occurs in a given country, the technical impact can extend beyond the country's borders to the rest of the global internet. Being part of an interconnected network means having a responsibility towards the network as a whole and shutdowns hold the potential to generate systemic risks. An internet shutdown has a ripple effect on the country's economy and persists beyond the days on which the shutdown occurs.

LAWS AND POLICIES

Uganda has passed several laws and policies, some of which contain progressive provisions that advance the rights to freedom of expression. Principally, the right to freedom of expression and access to information is constitutionally guaranteed under Articles 29 (1) (a) and 41, respectively. Other legal framework include; the Access to Information Act, 2005 that seeks to promote an efficient, effective, transparent and accountable government as well as to give effect to Article 41 of the Constitution by providing the right of access to information held by organs of the State; the Computer Misuse Act, 2011 that seeks to make provision for the safety and security of electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems[1623]; the Uganda Communications Commission (UCC) Act, 2013 that mandates the Commission, under Section 5(l) to promote research into the development and use of new communications techniques and technologies, including those which promote accessibility to communications services for persons with disabilities, as well as the Uganda National Vision 2040 which clearly identifies ICT access and utilization not just as a cross development enabler but also as a major business opportunity, providing the highest policy level underpinning to the imperative for universality of ICT in Uganda.[1624]

Unfortunately, even with these progressive legal frameworks, there are a number of other laws, policies, and practices that have been adopted and have had a negative effect on the citizens' enjoyment of their rights to freedom of expression and online expression; for example, the An-Terrorism Act of 2002, under which interception of communications may be conducted on grounds such as safeguarding of the public interest; prevention of the violation of the fundamental and other human rights and freedoms of any person from terrorism; prevention or detecting the commission of any offence; and safeguarding the national economy from terrorism,[8] the 2011 Computer Misuse Act, which criminalised cyber harassment (section 24) and "offensive communication under section 25.

INTERNATIONAL LEGAL FRAMEWORK ON INTERNET RIGHTS AND FREEDOM

The right to freedom of expression (including on the internet) has been provided for under Article 19 of the Universal Declaration of Human Rights, that states that; "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without

[1623] hps://ulii.org/ug/legislaon/act/2015/2-6
[1624]MoICT (2018) RCDF Operational Guidelines 2017/18–2021/22 (RCDF III) at hps://www.ucc.co.ug/wp-content/uploads/2017/09/RCDF-Operaonal-Guidelines.pdf

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.**"**

This right is further articulated within Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR), stating that; Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in wring or in print, in the form of art, or through any other media of his choice.

On the African continent, Article 9 of the African Charter on Human and Peoples' Rights (ACHPR) states that; "Every individual shall have the right to receive information" (9(1); and "Every individual shall have the right to express and disseminate his opinion **within the law." (9(2).**

The ACHPR has also adopted several resolutions aimed at promoting the right to information and freedom of expression in Africa amongst which include; ACHPR/Res. 362 (LIX) 2016, adopted in Banjul on 4 November 2016. The resolution reaffirms the fundamental right to freedom of information and expression enshrined under Article 9 of the African Charter on Human and People's Rights and in other international human rights instruments and recognizes the role of the internet in advancing human and people's rights in Africa. This resolution came at a critical time when the region was witnessing regular internet shutdowns which impacted directly on freedom of expression and access to information.

AFRICAN DECLARATION ON INTERNET RIGHTS AND FREEDOMS

The African Declaration on Internet Rights and Freedoms (AfDEC) is a Pan-African initiative to promote human rights standards and principles of openness in internet policy formulation and implementation on the continent. The Declaration is intended to elaborate on the principles which are necessary to uphold human and people's rights on the Internet, and to cultivate an Internet environment that can best meet Africa's social and economic development needs and goals.

human rights documents including the African Charter on Human and Peoples' Rights of 1981, the Windhoek Declaration on Promoting an Independent and Pluralistic African Press of 1991, the African Charter on Broadcasting of 2001, the Declaration of Principles on Freedom of Expression in Africa of 2002, and the African Platform on Access to Information Declaration of 2011.

The Declaration has identified 13 key principles that include; Openness; Internet Access and Affordability; Freedom of Expression; Right to Information; Freedom of Assembly and Association on the Internet; Cultural and Linguistic Diversity; Right to Development and Access to

Knowledge; Privacy and Personal Data Protection; Security, Stability, and Resilience of the Internet; Marginalized Groups at Risk; Due Process; Democratic Multi stakeholder Internet Governance; and Gender Equity.

LAWS AND POLICIES AFFECTING INTERNET FREEDOM

Uganda has over the years enacted a number of laws aimed at regulating the use of the internet. Whereas the general purpose of the laws is to facilitate use of Internet and protect users from possible negative outcomes such as cybercrime, a number of laws have restrictions that limit the enjoyment of Internet freedom.

The **Uganda Communications Act, 2013** seeks to consolidate and harmonise the regulation of communications and electronic media in Uganda.[1625]The Act sets up the Uganda Communications Commission (UCC) as a regulatory body for all electronic communication systems in Uganda. The law gives UCC several powers, which range from regulating the sector, setting up policy, monitoring of the sector, licensing and enforcing laws relating to the communications sector, fining and punishing those who violate the law. Although the Act provides for establishment of a Communications Tribunal whose role is to be an arbitration issues relating to the communications sector, to-date this has not been done.[1626]The lack of a tribunal has also resulted in a situation where the UCC can be a complainant and a judge in cases and this presents a potential for miscarriage of justice. In the last year, UCC used its powers under this Act to issue directives for the blocking of social media and mobile money access during national elections and at the swearing in ceremony of the president. The regulator claimed the blockage was necessary for the security of the country. The blockage was condemned by various human rights organisations as a violation of the right to freedom to expression and other Internet freedoms.

The General Comment 34 on State parties' obligations under Article 19 of the **International Covenant on Civil and Political Rights** adopted on July 21, 2011 holds that the same rights an individual enjoys on line must be the same rights enjoyed online**[1627]**

In 2016, the United Nations passed a non-binding resolution on "the promotion, protection, and enjoyment of human rights on the Internet."[1628] The resolution specifically condemns measures to prevent or disrupt access and calls on all States to refrain from and cease such measures. It further recognizes the importance of access to information and privacy online for the realization of the

[1625] Act 1 of Uganda Communications Act, 2013
[1626] See Part X of Uganda Communications Act, 2013
[1627]Also see: General Comment no. 34 on Article 19 of the ICCPR
https://bangkok.ohchr.org/programme/documents/general-comment-34.aspx
1628 hps://www.arcle19.org/data/files/Internet_Statement_Adopted.pdf accessed on 20th December 2019

right to freedom of expression and to hold opinions without interference.[1629]

Although there is no express right of access to the internet under international law, the 2016 United Nations Resolution urges states to "consider formulating, through transparent and inclusive On February 26, 2016, the Minister of Information and Communications Technology gazetted the Communications (Amendment) Bill, 2016 that seeks to amend section 93(1) of the Communications Act, 2013 to enable the minister to make statutory instruments without seeking parliamentary approval. The current law requires the minister to lay regulations before parliament for approval, hence the amendment would be an attempt at ousting parliamentary oversight powers.[1630]The Amendment not only removes the requirement for parliamentary approval for regulations made by the minister under the Act, but also the requirement to inform parliament of the new legislation made through laying the regulation before parliament. This move violates Article 79 of the Constitution of Uganda, which gives parliament the overall powers to make laws and any other institution that makes laws such as subsidiary legislation can only do it with the consent of parliament. It is therefore important that the institution that delegates the powers to make laws remains with the powers to approve the laws, to be informed of the laws made and to withdraw or suspend the law made under delegation.

THE COMPUTER MISUSE ACT, 2011

This Act seeks to provide for safety and security of electronic transactions and information systems and to prevent unlawful access, abuse or misuse of information systems among other things.[1631]The Act has a broad definition of a computer, which covers all types of electronic or electromagnetic systems capable of storing or transmitting data. The broad definition of a computer means that any person using an electronic or electromagnetic system has a duty to act within the confines of the Act, failure of which is one of the several offences under the Act. The broad nature of this Act was tested in **Nyakahuma vs. Uganda**[1632]where, in a high court reference to determine whether posting materials on internet amounted to publication within the meaning of the Penal Code Act[1633],the judge ruled that the broad nature of the Computer Misuse Act captured all forms of posts made in cyber space irrespective of the tool used to post.

Section 25 of the Act calls for the punishment of "offensive communication" where "any person who willfully and repeatedly uses electronic communication to disturb or attempts to disturb the

[1629] hps://www.osce.org/fom/250656 accessed on 20th December 2019
[1630] HRNJ (2016) Analysis of the Uganda Communications (Amendment) Bill 2016
[1631] Act No. 2 of the Computer Misuse Act, 2011
[1632] High Court criminal reference No 1/2013 available at http://www.ulii.org/ug/judgment/high-court-criminal-division/2013/30-0
[1633] Cap 120, laws of Uganda

peace, quiet or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues commits a misdemeanor and is liable on conviction to a fine not exceeding Uganda Shillings 480,000 (about USD140) or imprisonment not exceeding one year or both". This provision is broad and has been abused by authorities to limit freedom of speech by prosecuting individuals deemed to have violated this section. As such, this section has been challenged in the constitutional court for being overly broad and unnecessary and likely to result in abuse of freedom of expression.[1634]

On a positive note, the Act prohibits unauthorised access to a computer or computer systems and tries to regulate any form of hacking that may occur whether online or a standalone system. It also gives court powers to make a preservation order where data that is subject to investigation or a court case is at risk of being damaged or lost.

Other laws relating to cybercrime offenses include the Electronic Transactions Act, 2011 and Electronic Signature Act, 2011, which regulate e-commerce but remain mostly unimplemented.

ANTI- PORNOGRAPHY ACT 2014

Meanwhile, the **Anti-Pornography Act, 2014**prohibits the publication and circulation of pornographic content. Section 2 of the Act defines pornography as "any representation through publication, exhibition, and cinematography, indecent show, information technology or by whatever means of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement." This definition of pornography has been criticised for being too broad and open to misinterpretation.[1635]Section 13 makes it an offence to publish, broadcast, traffic in, procure, import or export pornography. The law is mostly unfavourable to women as section 13 is likely to discourage victims of revenge pornography from reporting cases to authorities in fear of retribution as the victim and perpetrator are equally liable.

Moreover, section 17 requires Internet Service Providers (ISPs) not to allow their protocols and systems to be used for publishing pornography. It places an obligation on ISPs to monitor and carry out surveillance on their subscribers for them to be able to identify and remove content considered pornographic. Generally speaking, the broad nature of an offence under the Anti-Pornography Act 2014 Act is bound to affect various Internet users who may in one way or the other be in possession

[1634] See Andrew Karamagi and Shaka Robert Vs. AG. Constitutional Court Petition No. 5 of 2016. The background to this case is Shaka Robert was charged with offensive communication under Section 25 of the Computer Misuse Act after government officials believed him to be Tom Voltaire Okwalinga who pseudonymously posts information critical of government on Facebook. Shaka challenged the law under which he was charged and at the time of writing this report court decision was still pending.

[1635]See Lwawoko Jordan (2015) Gender and anti-pornography Act Uganda,

of content considered pornographic. For example, whereas in some countries courts have ruled that using the "like" button on social media such as Facebook does not give rise to action in defamation, it is not clear if "liking" a page with pornographic content can be adjudged as publishing pornographic content hence giving rise to criminal liability. It is also not clear how the law will treat cases where a person is found in possession of content considered pornographic which they accessed through social media such as Whatsapp, where he or she had no control on the process of distribution or download of the said content.

The Anti-Pornography Act, 2014 also calls for the establishment of an anti-pornography committee and in July 2016, a committee of eight members was setup. In June and August 2016, claims of government purchasing anti-pornography detection software surfaced.[1636]However, the ethics minister later denied the statements saying the government did not have enough funds to procure the software. Whereas restricting pornography, especially child pornography, is warranted, such restrictions should fall within internationally accepted standards. Blanket surveillance to snoop out pornography has bigger consequences such as limiting the right to privacy.

ANTI- TERRORISM ACT 2002

The right to privacy is further limited by the **Anti-Terrorism Act, 2002**, which provides for interception of communications.[1637]The law does not define what an electronic system is; however, going by the definition provided by the Computer Misuse Act, any system capable of transmitting electronic or electromagnetic data can be considered an electronic system. This means acts associated with online demonstration or expression of discontent such as hacking and bringing down government websites or interfering with their functionality can amount to terrorism in Uganda.

In 2015, amendments were made to the Terrorism Act to align the law to international requirements by providing for aspects of terror financing and money laundering. The coming into force of the amendment means police now has powers to conduct surveillance on online transactions with the aim of establishing if they are funding terror activities in Uganda. The Regulation of Interception of Communications Act, 2010provides for lawful interception and monitoring of communications in the course of their transmission through a telecommunication, postal or any other related service or system. Section 3 provides for the establishment of a monitoring centre under the oversight of a minister.

The Act makes it a crime to unlawfully intercept communication of a person and lawful

[1636]Pornography detection machine arrives September –Lokodo, http://www.newvision.co.ug/new_vision/news/1431545/pornography-detection-machine-arrives-august-lokodo

[1637]Section 7of the Anti-Terrorism Act 2002

interception is only permitted by authorised officials upon issue of a warrant by a judge. The act also calls for service providers to technically assist government to intercept communications by installing hardware and software to enable interception of communications at all time or when required. Service providers are also required to provide services that render real time and full time monitoring facilities for the interception of communication where failure to do so is punishable with a fine of UGX 2,040,000 (about USD583) or imprisonment for a period not exceeding five years, or both; and a possible cancelation of their license.

ABUSES OF THE RIGHT TO INTERNET IN UGANDA

Additionally, several provisions within these laws have been used to increasingly put pressure on private actors to censor content which the state deems illegal or simply "harmful to national security."[9]

In 2016, UCC ordered the shutdown of internet access on the eve of the presidential elections voting day in February, citing "national security", as well as during the inauguration in May 2016, affecting social media platforms including Facebook, WhatsApp, Twitter, and mobile money transfer services.[10]

In April 2018, the Ugandan communications regulator directed online data communication service providers, that include; online publishers, online news platforms and online radio and television operators, to apply and obtain authorisation from the commission within a period of one month or risk having their websites and/or streams being blocked by Internet Service Providers (ISPs).[11] The regulator later published a list of the licenced providers, who were each required to pay USD 20.

On 29, April 2019, UCC ordered internet service providers to shut down all unauthorized news sites following a directive requiring online data communication service providers, including publishers, news platforms, radio and television operators to obtain authorizaon.[12]

Later in 2019, another directive was issued by UCC requiring all "online publishers and influencers who have reached a capacity of sharing communication content and also using the online publication for commercial business" to register with regulator and pay a USD 20 levy.[13]

In May 2017, a famous movie translator, Marysmats Matovu alias VJ Junior and his colleague, Geoffrey Bbosa, were arrested and charged with cyber harassment and offensive communication based on allegedly provocative messages sent in a group message chain about the Uganda Film Producers Associaon.[14]

During the recently concluded 2021 General Elections, UCC shut down the internet for the entire week preceding and following voting of presidential candidates citing national security concerns. On January 13, 2021, the Uganda Communications Commission (UCC) ordered Internet Service

Providers (ISPs) to enforce a temporary "*Suspension of the Operation of Internet Gateways"* citing Sections 5(1) and 56 of the Uganda Communications Act of 2013, which requires UCC to monitor, inspect, license, supervise, control, and regulate communications services, among other requirements.

The disruptions to digital communications began on January 09, 2021 with applications such as Google Play and the Apple App Store being made inaccessible. By January 11, social media platforms such as Facebook, Twitter, Instagram, and WhatsApp had been blocked. Efforts to bypass the blockage were also frustrated, as the government ordered the blockage of over 100 Virtual Private Networks (VPNs). The social media blockage was justified by President Museveni as retaliation against Facebook and Twitter for their blockage of pro- ruling party accounts for what they described as coordinated inauthentic behavior aimed at manipulating public debate ahead of the 2021 general elections.

Although the Internet was restored five days later, the government ordered that social media, app stores, YouTube, GitHub, and many VPNs remain blocked indefinitely. On January 21, the State Minister for ICT and National Guidance, Peter Ogwang, issued a warning threatening to arrest all Ugandans currently using social media as they are in violation of the blockage.

INTRODUCTION OF THE OTT AND ITS RAMIFICATIONS (AS WELL AS THE RECENTLY INTRODUCED 12% EXCISE TAX ON DATA)

In 2018, the Parliament of Uganda passed the Uganda Excise Duty (Amendment) Bill 2018, which introduced taxation of "over-the-top" (OTT) services, and raised taxes on other telecommunications services violated this principle which requires service providers to treat all internet traffic equally, and not block access to online content and services. According to figures from the UCC, the number of subscribers reduced by two and a half million from 16 million to 13.5 million subscribers between July and September 2018. The same trend was noted in the amount of revenue falling from Uganda Shillings (UGX) 5.6 billion in July 2018, to UGX 3.96 billion in September 2018 (see table below).

Starting 1st July, 2021, the Ministry of Finance slapped a harmonized excise duty rate of 12% on airtime, value-added services and internet data as substitute for Uganda's controversially approved Over The Top (OTT) tax.

Access to the Internet plays a vital role in the full realization of human development and facilitates the exercise and enjoyment of a number of human rights and freedoms, including the right to freedom of expression and information, the right to education, the right to assembly and

association, the right to full participation in social, cultural and political life and the right to social and economic development. Accordingly, access and affordability policies and regulations that foster universal and equal access to the Internet, including fair and transparent market regulation, universal service requirements and licensing agreements, must be adopted, according to the AfDEC.

CONCLUSION

There indeed some positive steps, especially the legal framework that Uganda has adopted to ensure compliance to the key principles as laid out in the African Declaration on Internet Rights and Freedoms – including the ICT Policies, the Access to Information Laws, the Constitutional provisions, the Data Protection Act, the Income Tax Act of 2018 that introduced the social media tax among others. There are however other laws whose provisions are quite retrogressive and these need to be amended, especially those that infringe on privacy and personal data protection such as the Regulation of Interception of Communications Act, the Computer Misuse Act among others.

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APPENDIXES

APPENDIX A: PICTORIAL OF THE EXECUTIVE

Ugandan Flag

THE TRUTH BEHIND UGANDA'S NAME

12 SATURDAY VISION June 5, 2021

Commentary

MPORORO, NOT BUGANDA, GAVE UGANDA ITS NAME

OPINION
KAREBU KAHIRITA

There is a common misconception that the name Uganda came from Buganda, which was the main kingdom at Independence. That is not true!

The name Uganda was the colonial creation from the word Ruganda, which refers to a cultural relationship, called clan in the Mpororo language.

Among the people of the Great Lakes Region, the Bantu were unified under the clan identification called Abanya-Ruganda.

To mention the word Ruganda was an indication for true intimacy in society.

It went beyond blood relations because any reasonable people, a part from females, were expected to perform the blood friendship ritual to enhance the trust against the human betrayal.

The ancient and original gateway into the Great Lakes Region was south of Lake Victoria through Karagwe in Mpororo.

The first Arab traders, who penetrated Mpororo, were denied free trade because Bahororo did not fancy their cowrie shells.

They deemed their cowrie shells to be inferior in value compared to the tradition cattle – *ente*.

PROCEEDING TO BUGANDA

Around 1840, some of the Arabs, led by Ahmed Bin Ibrahim, crossed over to Buganda where their cowrie shells were accepted. Baganda called then *Nsimbi*.

The Arabs became friendly to Kabaka Suuna and taught of Islamic religion.

They also started and controlled slave trade caravans and guided the European explorers.

The first British explorers – John Speke and Grant – came in around 1861. They were followed by Henry Stanley in 1887 and Captain Lugard in 1902.

The two travelled through Mpororo and made contacts with prominent chiefs.

When the chiefs met the white men, in order to disarm the White men of any sinister moves, they encouraged the visitors to perform the traditional blood friendship, known as *kusharana aha nda*.

The pact couple would test the blood of another using a coffee berry, in a ritual indicating an artificial creation of blood brotherhood. Hence forth, the two would become clan mates. This clan membership was referred to as Ruganda.

The word Ruganda, the social unified name had an accent implications to the foreigners. They hardly pronounced the letter R and instead, combined the RU as U-ganda.

However, the blood friendship initiative never persuaded the chief's attitude towards accepting colonial rule.

The British also did not place as much value in it because it was not their culture. They instead preferred signed agreements, which Bahororo also did not find value in.

The monarchies in Mpororo rejected colonial rule. These tradition rulers who resisted, include Kahaya Ntare Rugingiza, Mutware Rwabugiri, Mutware Nyindo, Mukama Makobore, Mukama Rumanyika, Chief Mutsinga and Chief Ndibarema.

Some of them were eliminated/murdered or deported out of their territories. These include the guerilla fighter, Ntokibiri, who was killed in 1919.

In other incidents, the colonialists used allied agents, like Nuwa Mbaguta who signed British treaties on behalf of Kahaya Ntare Rugingiza.

BRITISH IN BUGANDA

The two Kabakas of Buganda, Sunna and Mutesa I, hosted the Arab traders and Christian missionaries respectively.

Buganda kingdom then became the base for the British colonial expansion over Uganda. The successor to the throne, Kabaka Mwanga, abused the religious code to stay in Mengo Palace.

Between 1884 and 1886, were years of persecution, against Christian believers. Some were burnt alive at Namugongo on June 3, 1886.

The functionaries for religious believers, joined arms and ousted Kabaka Mwanga around 1889.

While Kabaka Mwanga and the defected forces were in hiding in Buddu, they met the Germany Carl Peters and requested for military assistance.

Meanwhile, the Christians – Catholics and Protestants, were overwhelmed by the Muslims in leadership, led by Kabaka Kalema. The two reunited and re-instated Kabaka Mwanga.

HELIGOLAND TREATY OF 1890

While the ousted Kabaka Mwanga planned to fight back by engagement the foreign forces, the German agent, Carl Peters, promised the military assistance against the religious forces.

The secret military enforcement agreement was signed, including the protection measures over Buganda Kingdom.

Before the German forces entered the battle, Kabaka Mwanga had regained the throne although an agreement remained binding.

The revelation of secret agreement anguished the British who regretted the period of years they stayed in Buganda without written documents.

The British saw the Germans occupation over Buganda as a bold plan to control the source of the River Nile.

Instead, the two colonial powers negotiated about the fate caused by Kabaka Mwanga.

They both agreed on the exchange of the British Island found in the North Sea with Buganda.

The agreement, known as Heligoland Treaty, was signed in 1890 and it placed Buganda under the British Monopoly.

THE 1900 BUGANDA AGREEMENT

The British got concerned and appointed Captain Lugard to be in charge of Buganda affairs.

The same year, they established the security Fort on Old Kampala Hill.

Next, measures were taken, which involved the declaration of Buganda/Uganda under British control.

The British Union Jack was raised by Sir Gerald Portal at Old Kampala Fort on March 3, 1893.

On April 12, 1894, the Buganda/Uganda was declared a British Protectorate.

Five years later, Queen Victoria, appointed the first British commissioner, Sir Harry Johnston on July 1, 1899.

Johnston immediately got involved into Buganda Kingdom land Tenure, a clear indication that British acted justified by the Heligoland Treaty.

The original Mulwahwa monarchy, with the traditional three territories of Kyadondo, Busiro and Mawokota were added to the 18 counties of the present day Buganda Kingdom.

The British colonial master, helped by Buganda militia, enforced the extended boundaries in all comers.

In the North, Buganda reached the Victoria Nile, from the westwards to River Kafu and in the South, across River Katonga into the present Buddu/Bwera region of ancient Mpororo.

The negotiated Buganda Agreement was implemented in absence of Kabaka Mwanga.

The royal monarchy was supervised by the Kattikiro, Sir Apollo Kagwa, assisted by Stanislaus Mugwanya and Zakaria Kisingiri.

The three years vacuum after the deposed Kabaka Mwanga, ended with the infant Kabaka Chwa, who was enthroned in 1899.

In the same year, Kabaka Mwanga was captured by his previous subject, Andereya Kwandaga, on the colonial orders.

DISASTER AGREEMENT

The Buganda Agreement of 1900 was signed in bad faith between the British colonial representatives and the Buganda monarchy.

It reduced the Kabaka's powers over the kingdom land which was shared as follows: 10,500 sq. miles of forest and wetlands became protectorate government land.

The Kabaka was given 350 sq. miles, members of his royal family, 148 sq. miles, the 20 saza chiefs 8 sq miles each (total 160 sq. miles) and the regents; Sir Apollo Kagwa, Stanislaus Mugwanya and Zakaria Kisingiri got 16 sq. miles each, totalling to 48 sq. miles.

Nuhu Mbogo and Islam got 48 sq. miles, Kamushwaga of Koki 24 sq. miles, 1,000 chiefs got eight sq. miles each (total 8,000 sq. miles), missionary churches got 92 sq. miles and land that remained under the protectorate government was 50 sq. miles.

In simple analysis, the crown land, estimated at over 9,000 sq. miles, was scattered in different allocations.

The need for the 1900 Buganda Agreement resulted from the secret treaty Kabaka Mwanga made with the Germany agent, Carl Peters.

The territories which belonged to Bunyoro Kitara, Koki, Kabura/Lyantonde, Bwera/Kyanzanga/Ngoma/Ishembabure, Bigobyamugyenyi/Ntutsi cattle corridor, remained an unsolved historical factor.

The British introduced indirect rule which also favoured Buganda colonial agents.

They became warlords in the districts of western Uganda and beyond.

It is the period after the First World War (1914-1918), which suppressed the tradition leadership under Baganda colonial agents.

The public outcry forced the colonialists to withdraw their Baganda agents from the districts of greater Kigezi, Ankole, between 1920 and 1923.

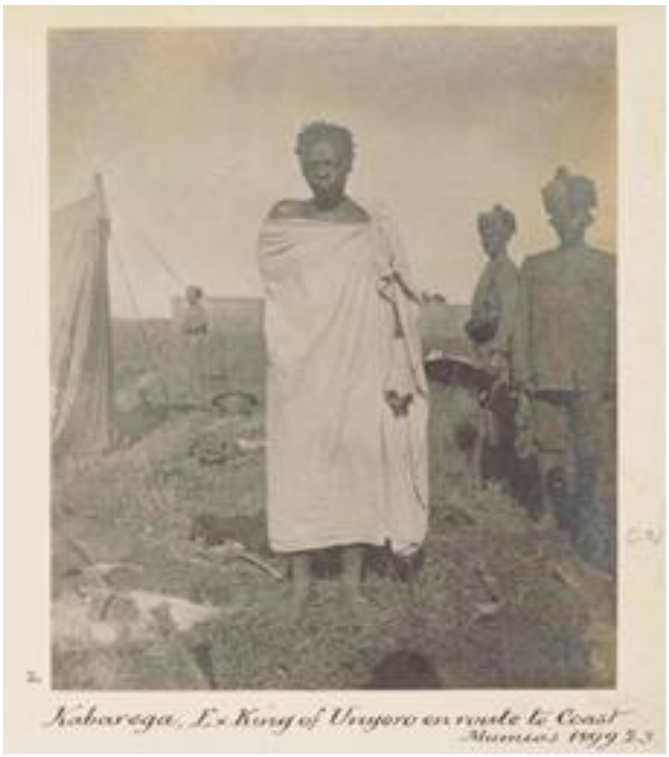
Accordingly, the land grabbing in Uganda, which was begun by selective hoax landlords, resulted into landless citizens in their own country.

The sidelined indigenous population included the ones whose counties were annexed into Buganda Kingdom. The Baganda colonial agents, who were warlords, used the chances of being appointed chiefs in the counties of greater Kigezi, Ankole and elsewhere in the country, to acquire a lot of land outside Buganda.

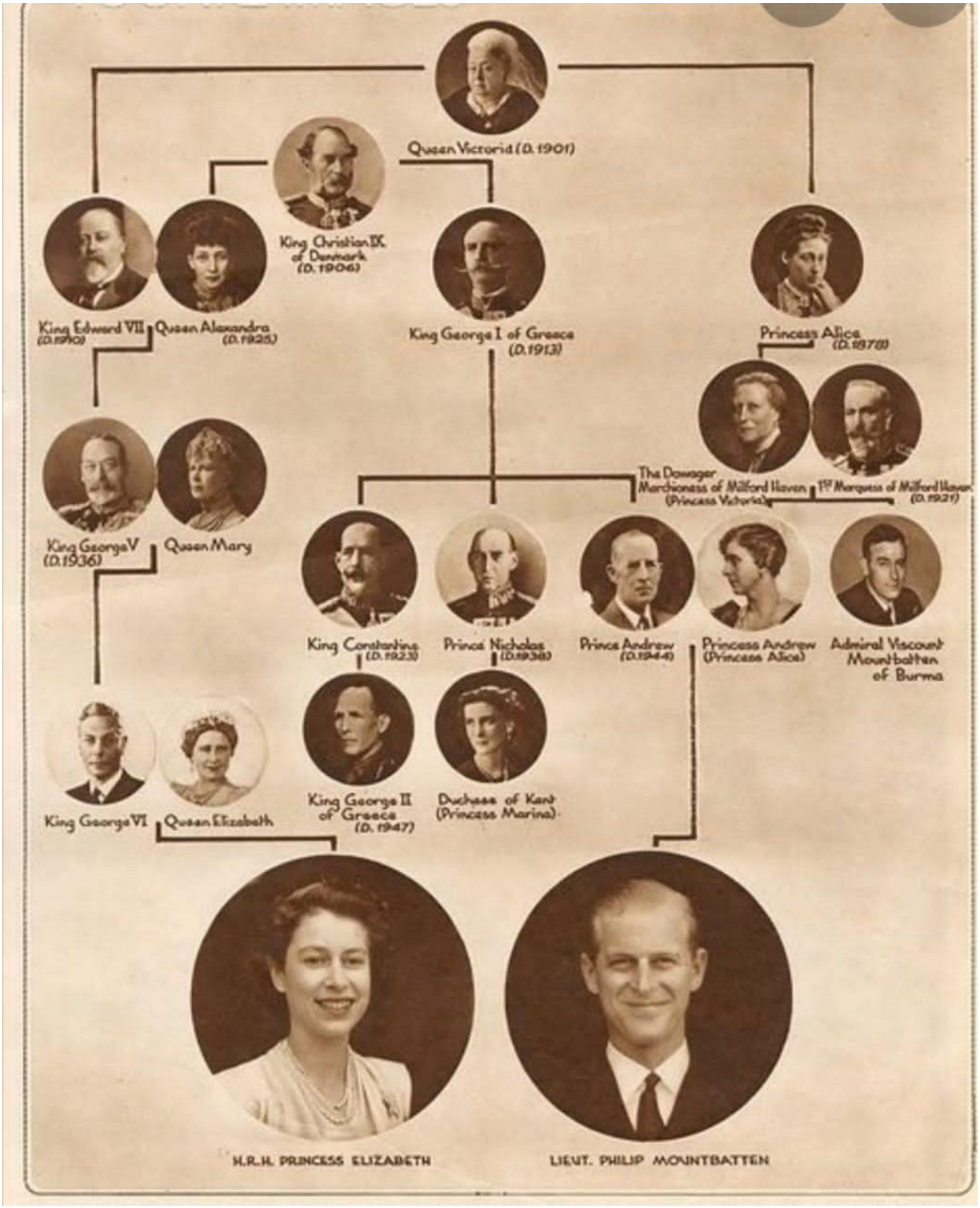
The 1900 Buganda Agreement, therefore, became inconsistent with the tradition land ownership. My personal proposal is that it should be revisited constitutionally to harmonise the land dispossession in the country including federation.

Kabaka Mwanga of Buganda

OMUKAMA KABAREGA

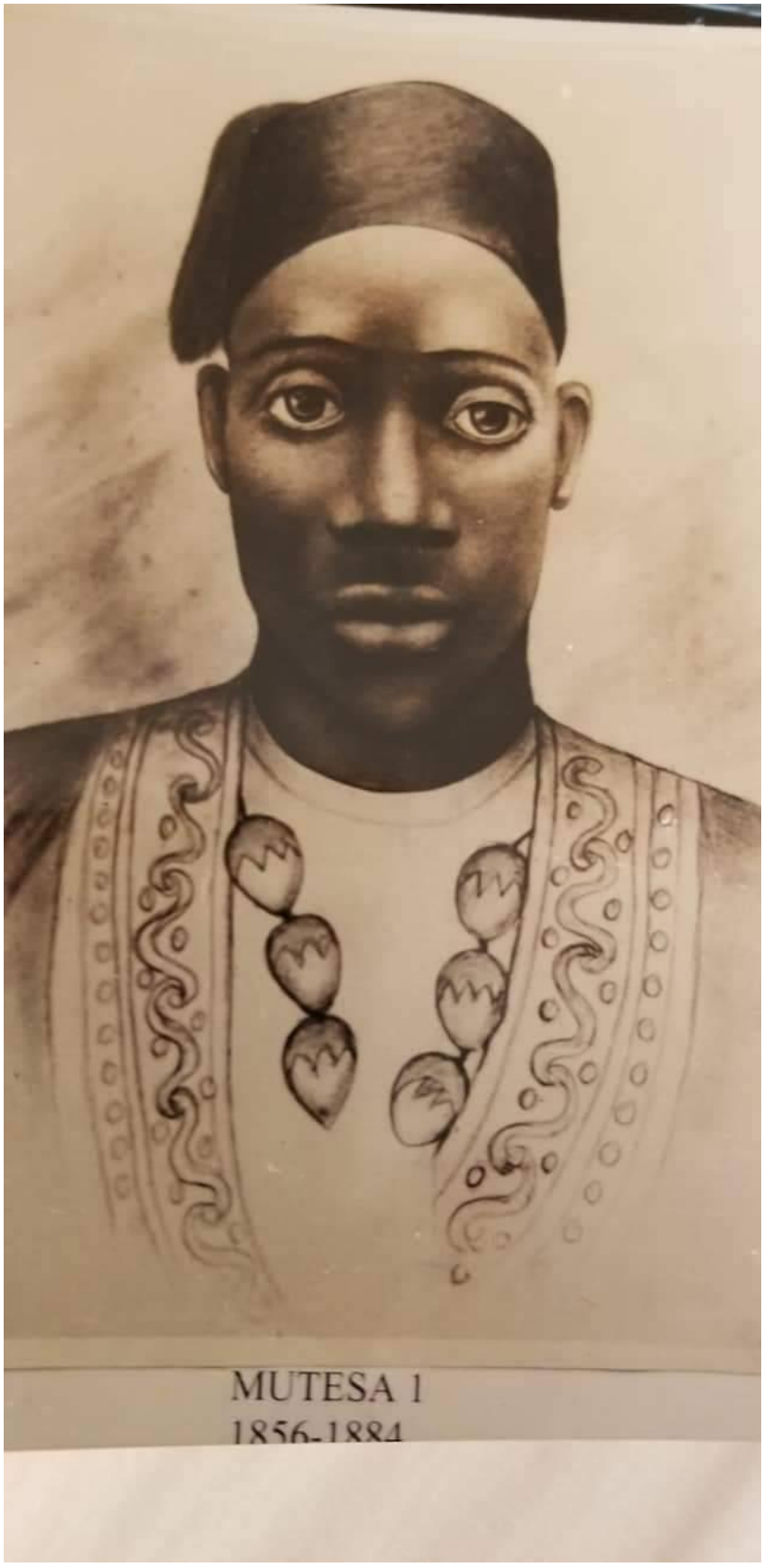


BRITISH LEADERSHIP

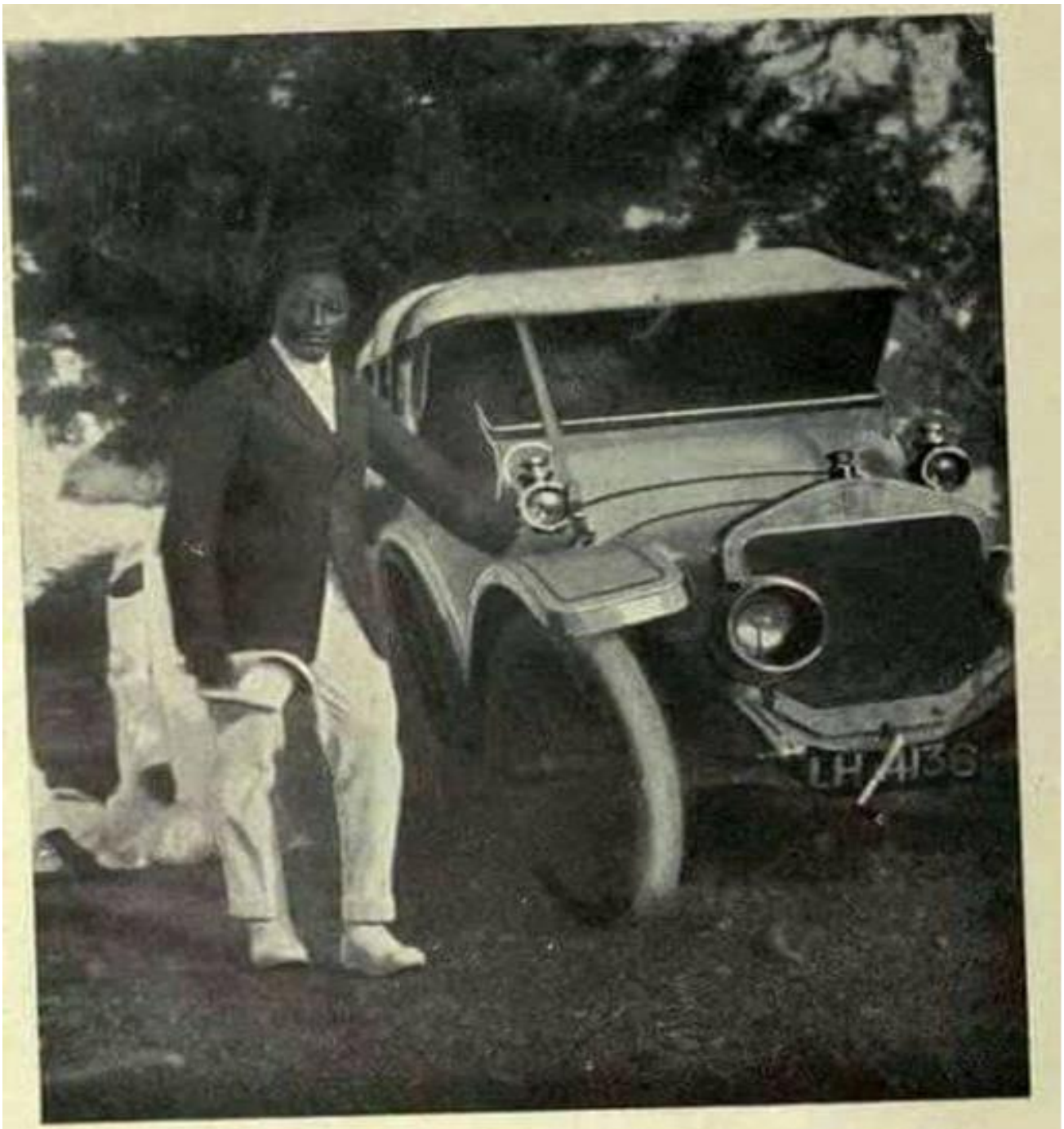


BUGANDA LEADERSHIP

K A B A K A M U T E S A I

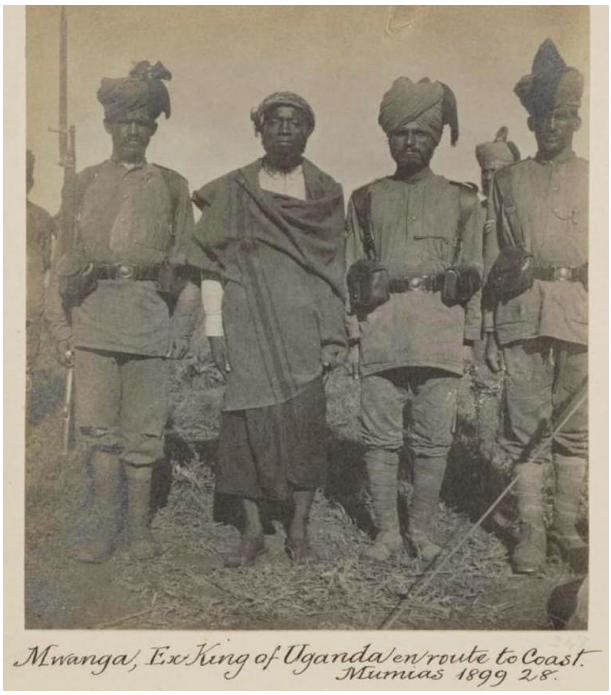


KABAKA DAUDI CHWA

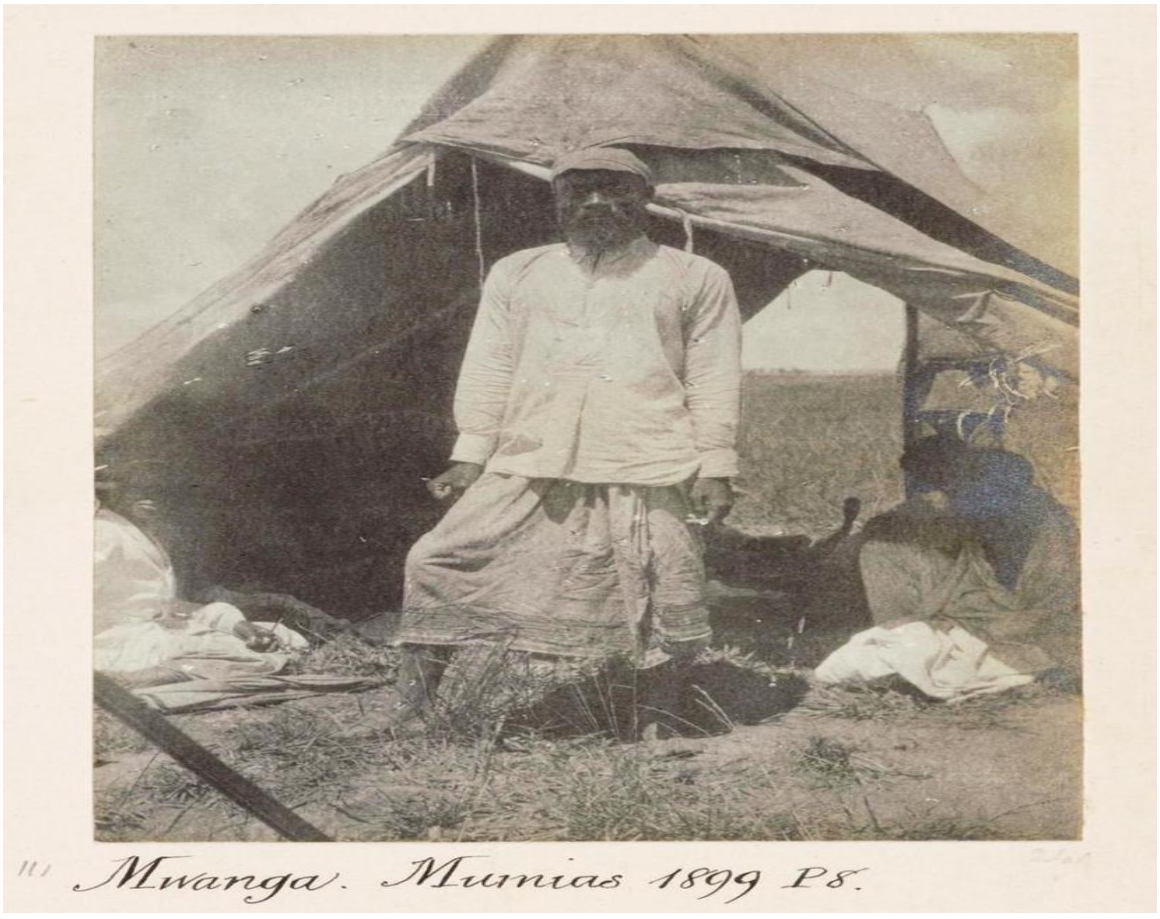


DAUDI CHWA, KABAKA (KING) OF UGANDA WITH HIS MOTOR CAR

K A B A K A M W A N G A



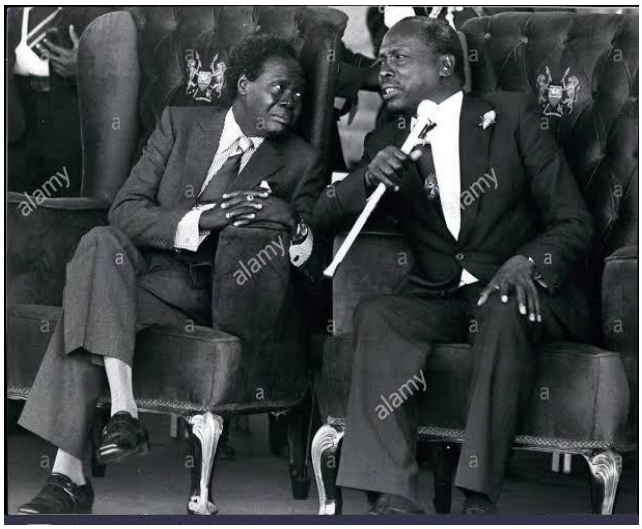
Mwanga's Favorite Wives. Mumias 1899 R11.



Mwanga. Mumias 1899 P8.

SIR EDWARD MUTESA II

DR. MILTON OBOTE

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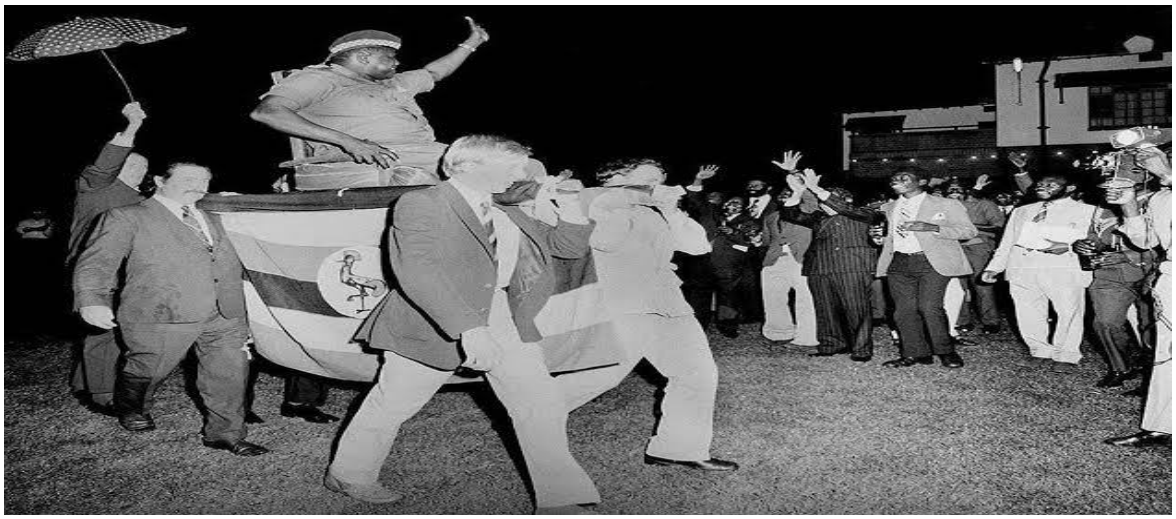
EXIT


His Excellency the Hon. Dr. A. Milton Obote, M.P.
President of Uganda
His Excellency the Hon. J. K. Bakiika, M.P.
Vice-President of Uganda-Minister of
Animal Industry, Game and Fisheries
DEPUTY
MINISTERS

IDI AMIN DADA


THE REPUBLIC OF UGANDA
(THE GOVERNMENT OF THE SECOND REPUBLIC OF UGANDA—AS AT SEPTEMBER 1, 1972)
CABINET MINISTERS

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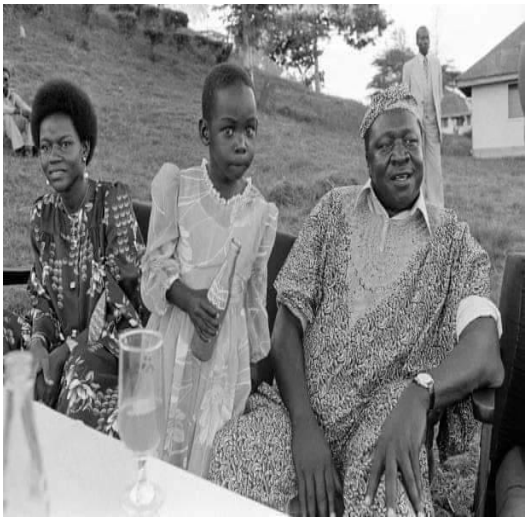

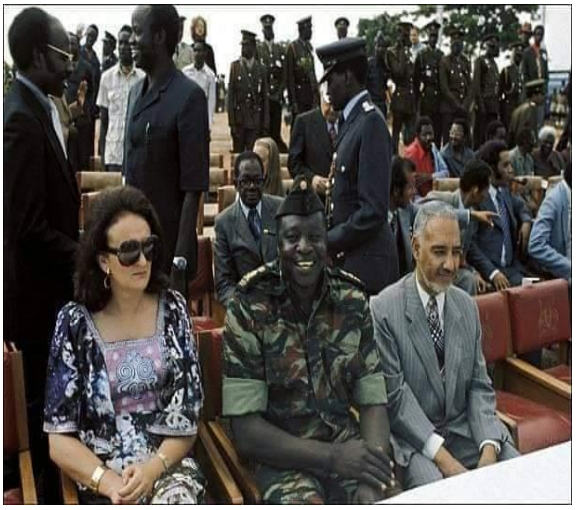


UGAND
1975


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Douglas Miller


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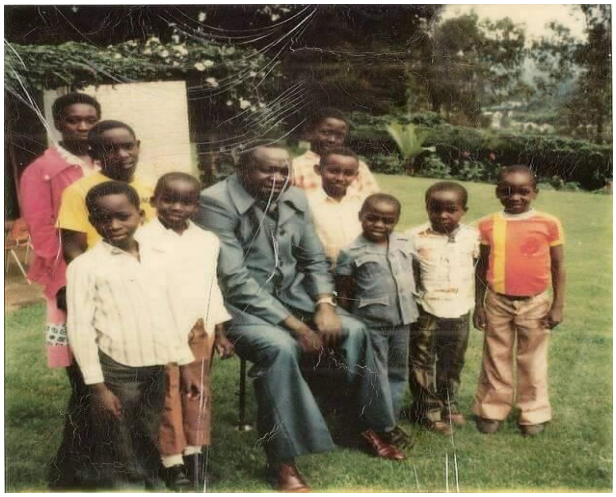
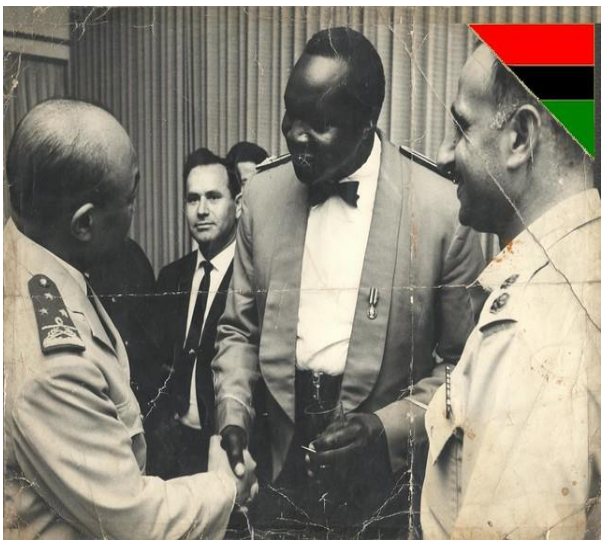
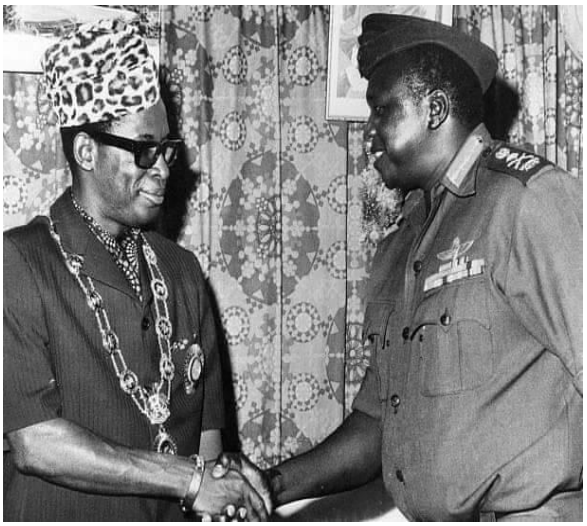
Keystone




UGANDA



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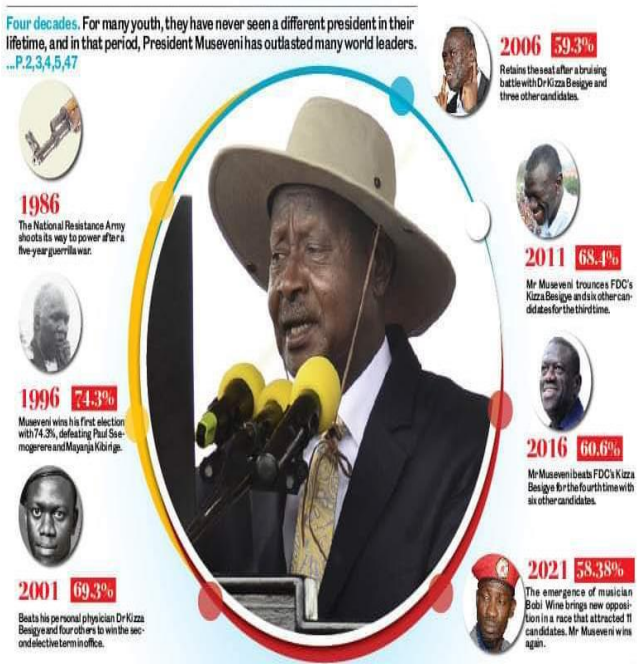
YUSUF LULE

GODFREY BINAISA

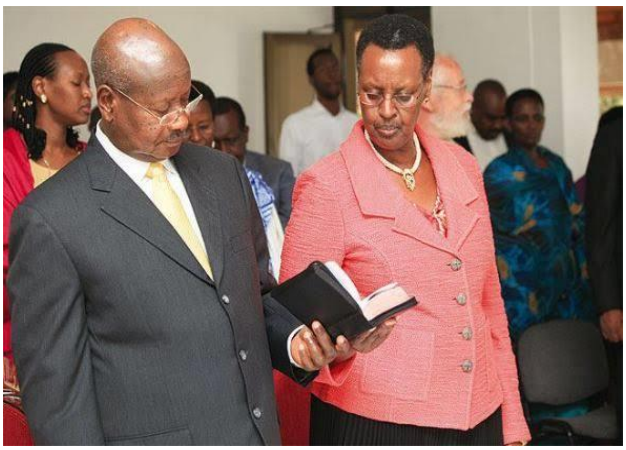
TITO OKELLO LUTWA

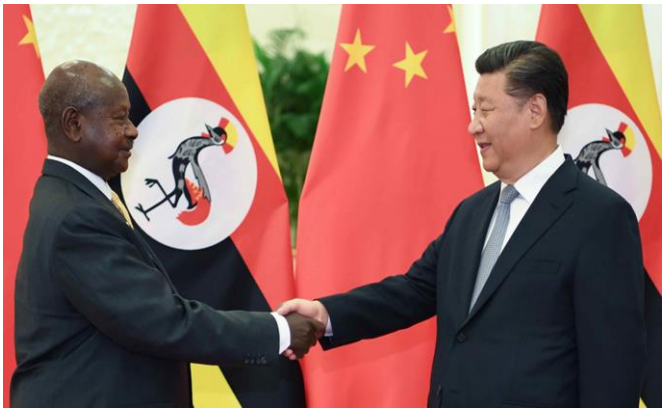
YOWERI KAGUTA MUSEVENI

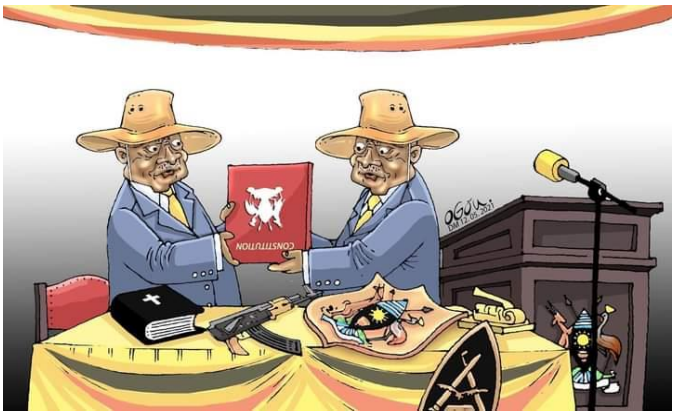

AP

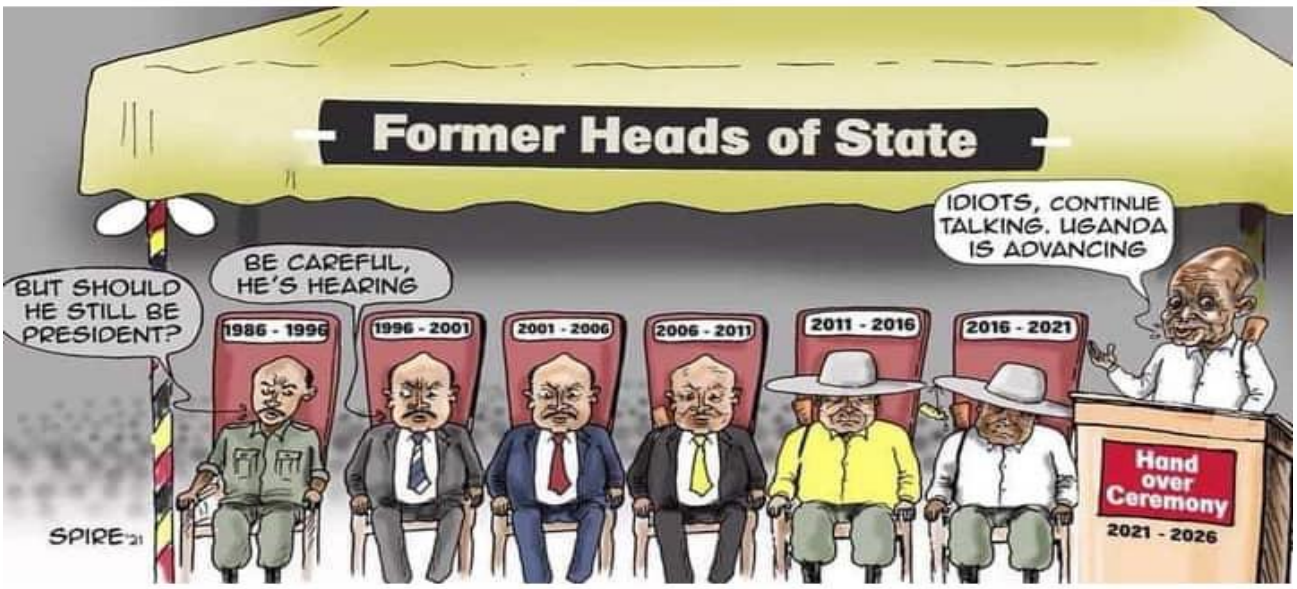

Four decades. For many youth, they have never seen a different president in their lifetime, and in that period, President Museveni has outlasted many world leaders.
...P.2,3,4,5,47
1986
The National Resistance Army shoots its way to power after a five-year guerrilla war.
1996 74.3%
Museveni wins his first election with 74.3%, defeating Paul Ssemogerere and Mayanja Kibirige.
2001 69.3%
Beats his personal physician Dr Kizza Besigye and four others to win the second elective term in office.
2006 59.3%
Retains the seat after a bruising battle with Dr Kizza Besigye and three other candidates.
2011 68.4%
Mr Museveni trounces FDC's Kizza Besigye and six other candidates for the third time.
2016 60.6%
Mr Museveni beats FDC's Kizza Besigye for the fourth time with six other candidates.
2021 58.38%
The emergence of musician Bobi Wine brings new opposition in a race that attracted 11 candidates. Mr Museveni wins again.


AP






CONSTITUTION


Former Heads of State
BUT SHOULD HE STILL BE PRESIDENT?
BE CAREFUL, HE'S HEARING
IDIOTS, CONTINUE TALKING. UGANDA IS ADVANCING
1986 - 1996
1996 - 2001
2001 - 2006
2006 - 2011
2011 - 2016
2016 - 2021
Hand over Ceremony
2021 - 2026
SPIRE

STATE HOUSE OF UGANDA

S O M E I N T R E S T I N G Q U O T E S O V E R Y E A R S

1981

"Obote has rigged my votes and so I'm going to the bush to fight his illegitimacy"

1986

"Africa's problem is not poverty but leaders who over stay in power"

1987

"I will not preside over a country where a person is killed or tortured and I don't know who the offender is"

1995

"This Constitution is the best in the whole world and if anyone tries to tamper with it, I'll go back to the bush"

1996

Am like a bicycle quarter pin. It enters by force and removed by force.

1998

"I will retire next year"

2000

"Gadaffi will attend my retirement ceremony."

2001

"I still need your support for only this term to accomplish NRM goals"

2006

"Uganda will be a middle income country by 2017".

"How can akapapura obupapura (just a ballot paper) remove someone from power?"

2011

"I dont need votes because I have the army and the money."

2014

"I dont work for Ugandans, I am working for myself and my grandchildren"

"I cannot hand over power to wolves (emishega)"

2015

"Those saying agende, they want to come and steal my oil"

2016

"I will smash anyone trying to joke around with my throne"

I am not a servant of any one. I am a freedom fighter fighting for my freedom, and what I believe in”

"Arrest those pigs who are killing Ugandans"

2017

"This Constitution is barring me from developing Uganda. Let's amend it"

"There's no money for menstrual pads for girls"

2019

"The enkonome is pheeewwwww" Finance minister

2020

"Every worker should contribute 10k to fight Corona virus.

A P P E N D I X B

UGANDA: KEY HISTORICAL AND CONSTITUTIONAL DEVELOPMENTS

1877: First Church Missionary Society (CMS) Christians came to Buganda.

1879: First White Father French Catholics visited Buganda.

1888: Kabaka Mwanga deposed by armed religious converts.

1890: Britain and Germany signed a treaty giving Britain rights to what was to become Uganda.

1894: Uganda became a British protectorate.

1892 January: Fighting broke out between Protestant and Catholic Baganda converts.

1900: The 1900 Buganda Agreement: between the British and Buganda. It gave Baganda chiefs a lot of personal land; imposed a tax on huts and guns; designated chiefs as tax collectors.

1900: Toro Agreement: An agreement similar to the 1900 Buganda Agreement but less generous without large-scale private land tenure. Other similar agreements signed were the 1901: Ankole Agreement and 1933: Bunyoro Agreement.

1902: An order in Council of 1902 was passed. It established a system of legislation through the promulgation of personal decrees by representatives of the British Crown. The Eastern province of Uganda transferred to the Kenya.

1920: Another Order in Council passed. It created a legislative body (the LEGCO) with a membership of 7 Europeans and headed by the Governor.

1921 March 23: First LEGCO (Legislative Council) meeting.

1926 May 26: First Asian Mr. Chrunabai Jekabhai Amin was sworn in as Member of LEGCO.

October 23, 1945: The Governor Sir John Hall announced an approval of a scheme for the nomination of three Africans as members of the Legislative Council, to represent Buganda, Eastern and Western Provinces.

December 4, 1945: The first African to join the LEGCO were sworn in and were: Micheal Ernest Kawalya- The Katikiro of Buganda; Petero Nyangabyaki- The Katikiro of Bunyoro and Yekonia Zirabamuzale- Secretary General of Busoga.

1947: Uganda African Farmers Union founded by I.K. Musaazi.

1949: An African representing the Northern region of Uganda joined the LEGCO making the total number of Africans.

1949: Riots in Buganda challenging the by passing of government price controls on the exports sales of cotton; urging the removal of the Asian monopoly over cotton ginning and the right to have own representatives in local government to replace chiefs appointed by the British.

1952: Musaazi's Uganda National Congress replaced the Uganda African Farmers Union.

1961: First direct elections of LEGCO. The election returned an African majority in the LEGCO. The Democratic Party (DP) led by Ben Kiwanuka formed the majority party and Uganda Peoples' Congress (UPC) led by Apollo Milton Obote formed the opposition.

1962: General elections held. UPC won 37 seats against 24 of DP excluding Buganda. Buganda region had opted for indirect election hence its Lukiko nominated 21 representatives to the National Assembly. The Buganda representative struck an alliance with UPC - the UPC /Kabaka Yekka (KY), to form a coalition government with Apollo Milton Obote as Prime Minister. DP led by Ben Kiwanuka led the opposition. It is the UPC/KY alliance government that received instruments of Independence.

1962 October 9: Uganda's Independence.

1962: The independence Constitution 1962 was promulgated based on compromise of various political interests namely the UPC/KY alliance to win state power from DP. A federal arrangement for Buganda was entrenched in the 1962 Constitution. Under this arrangement, Buganda retained powers over the local police, primary education, and local forests. The national assembly was partly elected and partly nominated. However, Buganda representatives to the national parliament continued to be directly elected by the Lukiko. Executive powers were vested in the Prime Minister.

1963: Posts of President and Vice President were created and Kabaka Edward Muteesa became the first president and William Nadiope , the Kyabazinga of Busoga became Vice President. Both posts were ceremonial.

1964: Referendum “over lost counties" between the kingdoms of Bunyoro and Buganda held.

1966 February 4: While on a trip in the north, a no confidence vote was passed against Obote by UPC MPs.

1966 May: The Independence Constitution was abrogated and an interim one introduced pending the promulgation of the Republic Constitution.

Otherwise known as the pigeon -hole constitution, introduced without discussion, and merely dropped in the pigeon holes of MPs.

Parliamentary and judicial powers were usurped by the Executive, by government trying to make laws instead of Parliament as was in the case of the debate on the Administrations (Kingdom) Bill.

Diminishing of the power of the judiciary, a case in point was that of the 5 ministers who had been arrested and deported to Karamoja. Much as the High court had declared the 1966 Interim Constitution unconstitutional, the East African Court of Appeal upheld the contrary in conformity with government's position. In the case of Matovu who had been arrested for calling on central government to remove its capital from Mengo, the High Court was frightened from declaring

the 1966 Interim Constitution unconstitutional.

1967: The Republic Constitution came into force. It abolished the Kingdoms. Buganda was divided into 4 districts. The Constitution maintained a multi- party system of government. It stipulated that after a general election, the party with the greatest numerical strength of elected members would form government. Members of the National Assembly were deemed to have been elected for another term of 5 years. Concentration of power in the hands of the executive was further revealed in the 1967 Constitution which exempted the president from any court proceedings whatsoever.

1969 December: Assassination attempt on Obote.

1971 January 25: Military coup by Idi Amin Dada toppled Obote.

1972 September: Idi Amin Dada expelled 50,000 Asians form Uganda and seized their property.

1998 November 1: Amin invaded Tanzania territory and annexed a section across River Kagera boundary.

1979: Uganda National Liberation Army (UNLA) overthrew of Idi Amin regime. An interim parliament, the National Consultative Council (NCC) was put in place as the supreme legislative body till the 1980 election. The NCC was composed of 30 members elected in Moshi Tanzania. The NCC was later expanded to 120 members. Yusufu Lule was made head of state, but was replaced a few months later by Godfrey Binaisa.

1980 May 10: Binaisa was overthrown as president. The Military Commission headed by Paul Muwanga governed Uganda for 6 months leading to the national elections of December 1980.

1980 December: General elections took place. UPC came into power and DP was in the opposition. Apollo Milton Obote was President and Paulo Muwanga was Vice- President and Minister of Defence.

1983: Death of General Oyite Ojok, Chief of staff and right hand man of Apollo Milton Obote.

1985 July 27: The UPC governement was overthrown in a military coup by General Tito Okello and Bazilio Okello.

1986 January 26: The National Resistance Movement came to power by Legal Notice 1 of 1986. Legislative power was vested in the National Resistance Council. NRC initially had 38 historical members of the National Resistance Movement and National Resistance Army. Through nationwide elections, the NRC's membership later expanded to 270 comprised of 38 Historicals, 149 county representatives, 19 city/municipal Council representatives; 20 nominated members and 34 District women representatives. Membership later included district and youth representatives.

1988: The NRC passed the Constitutional Commission Statute that created a 21 member Constitutional Commission, a body set up primarily to study and review the Constitution with a view to making proposals for the enactment of a national Constitution.

1993 December: The Constitutional Commission presented the draft Constitution to the President as the document from which the new Constitution was to emerge.

1993: NRC passed the Constituent Assembly (Statute) providing for elections to the Constituent Assembly in March 1994, to be organized by an Interim Electoral Commission. Museveni restored traditional institutions and kingdoms, but without giving them political power.

1993 March: Election of the Constituent Assembly.

1995 October: 1995 Constitution promulgated. The constitution legalised political parties, although it maintained the ban on political activity.

1995: An Interim Electoral Commission constituted under the Interim Electoral Commission Statute 1995.

1996 May 7: Interim Electoral Commission organized the first direct presidential elections.

1996 May 12: Elected President Yoweri Museveni Kaguta was sworn in.

1999 July: The Referendum and other Provisions Act was passed as the legal framework under which the Referendum would be held.

1999 July 30: The Referendum and other Provisions Act 1999 was challenged in court for being invalid first for lack of quorum at the time of its enactment and secondly, being enacted after the expiry of the date stipulated in the constitution.

1999 September 23: The Constitutional Court threw out the petition on the invalidity of the Referendum and other Provisions Act 1999 on the ground that parliamentary records (Hansards) could not be used as evidence without the permission of the Speaker. That according to the rules of procedure of parliament, courts of law had no jurisdiction to inquire into the internal workings of parliament.

2000 May 31: Supreme Court overturned the decision of the Constitutional Court. It was held that the need to get permission of the speaker to use parliamentary records was unsustainable. That the matter called for constitutional interpretation by the Constitutional court. The petition was sent back to the constitutional court to be heard on its merits.

2000 June 7: The Referendum (Political Systems) Bill was tabled before parliament. Rules of procedure were suspended to enable the Bill to proceed to the second reading and was passed at 5:30 pm the same day.

2000 June 22: A petition contesting the validity of the Referendum (Political Systems) Act 2000 was filed.

2000 June 29: Referendum to determine best system of governance for Uganda held The ruling Movement system was declared 90.7 % victor as against 9.3% for multiparty.

2000 August 10: The constitutional court declared the Referendum and other provisions Act

1999 unconstitutional on the grounds that the method of voice voting offered no precise vote and there was no quorum at the time of voting.

2000 August 29: The Constitution (Amendment) Bill 2000 was tabled. Rules that require a bill to go to the Sessional Committee were suspended to enable immediate passing of the bill without waiting for 14 days. The intention of the amendment was to validate previous laws, resolutions and actions of parliament that had been challenged by the Constitutional Court decision. The Constitution was amended without taking it back to the people. Quorum was required only during the time of voting and not during debate. Leave of the Speaker had to be got before using parliamentary records as evidence. This put these two matters out of the ambit of judicial inquiry.

2000 December: Presidential Elections Act passed.

2000 October: Aggrey Awori and Dr. Kizza Besigye announced their candidature for presidential elections.

2001 January: Uganda, along with the Tanzania and Kenya inaugurated the East African Community (EAC) in Arusha, Tanzania.

2001 February 6: Uganda's Sixth parliament presented the Political Parties and Organizations Bill to the president for assent. Parliament had allowed parties to open branches at district level.

2001 February 7: Constitutional Review Commission was elected in the heat of the presidential elections.

2001 March 12: Presidential elections held and President Museveni was re-elected as president.

2001 March: Uganda classified Rwanda, a former ally in the civil war in DR Congo, a hostile nation because of fighting in 2000 between the two countries' armies in DR Congo.

2001 April 10: The President returned the Political Parties and Organizations Bill to parliament for reconsideration arguing that political parties should restrict their activities to national headquarters.

2001 June 21: Parliamentary elections for District Women Members of Parliament held.

2001 June 27: Parliamentary elections held.

2002 March 9: Political Parties and Organisations Act was passed by parliament.

2002 March: Uganda and Sudan signed an agreement to contain the Lord's Resistance Army (LRA), active along the Sudan/Uganda border.

2002 April 24: New Leadership Code 2002 and IGG Act 2002 passed. The Leadership Code covers wider category of public servants and introduces sanctions for non - compliance including loss of jobs and confiscation of property acquired as a result of abuse of office. The IGG Act regulates the procedure for the making of complaints by members of public and ensuring access to services of IGG by the government.

2005 April: Uganda refuted DR Congo’s allegations at the International Court in The Hague that

Uganda invaded its territory in 1999, killing citizens and looting.

2005 July: Parliament approved a constitutional amendment removing presidential term limits.

2005 July: Referendum held with a majority of Ugandans voting for the return to multi- party politics.

2005 October: International Criminal Court issued arrest warrants for Joseph Kony and 4 other LRA commanders.

2005 November: Forum for Democratic Change (FDC) President and the main opposition leader Kizza Besigye was imprisoned and charged in a military court with terrorism and illegal possession of firearms.

2005 December: The International Court in The Hague ruled that Uganda should compensate DR Congo for rights abuses and the plundering of resources in the five years leading to 2003.

2006 January: Kizza Besigye released from prison on bail.

2006 February: Multi-party elections held and Museveni re-elected president.

2006 July: The government commenced peace talks with the LRA. In Southern Sudan mediated by Riek Machar.

2006 August: The government and the LRA signed an agreement to end conflict and agreed to a ceasefire.

2006 November: A United Nations report stated that the Ugandan army used indiscriminate and excessive force in its campaign to disarm tribal warriors in northeastern region of Karamoja. Government refuted these claims.

2006 November: The First addendum to the Cessation of Hostilities Agreement between LRA representatives and the Ugandan government signed.

2007 March: Ugandan peacekeepers deployed in Somalia as part of an African Union mission in the country.

2007 April: Ugandans protested against the planned give away of the Mabira forest. Several people died as a result.

2007: Kizza Besigye petitioned the constitutional court on the legality of his detention and trial by the Court Martial and High Court.

2008 February: Government and the Lord's Resistance Army signed a permanent ceasefire at talks in Juba, Sudan.

2008 November: Joseph Kony failed to appear to sign the anticipated Final Peace Agreement. The Final Peace Agreement included Agreements on disarmament, demobilization, reintegration, implementing and monitoring protocols, and the Comprehensive Solutions and Accountability and Reconciliation agreements.

2009 January: The Supreme Court ruled in a case involving more than 400 death row inmates that the death penalty is constitutional. It however stated that hanging was cruel and recommended parliament consider another means of execution.

2009 September: Rioting erupted in Kampala following government ban on Kabaka of Buganda over a planned visit to Kayunga an area where the Banyala ethnic group are opposed to the Kabaka's authority.

2009 October: The Al-Shabab threatened to attack Bujumbura and Kampala, following rocket attacks by Burundi and Uganda who are part of the peacekeeping forces in Somalia.

2009 October 14: Member of Parliament David Bahati submitted the Anti- Homosexuality bill as a private members bill in parliament. The Bill attempts to strengthen the criminalization of homosexuality and in cases of "aggravated homosexuality" proposes the death penalty.

2009 November: Human rights activists condemned the Anti-Homosexuality Bill.

2009 December: Parliament voted to ban female circumcision. The law prescribes a sentence of 10 years or life imprisonment for cases of an aggravated nature for instance if the person died, is disabled or contracts HIV as a result of the circumcision.

2010 January: President Museveni distanced himself from the anti-homosexuality Bill, noting it was a private members bill.

2010 March 16: Fire gutted the Kasubi tombs, the burial grounds for Buganda kings. This sparked riots in Kampala over allegations of arson. The tombs are a world heritage site under UNESCO.

2010 April, 9: The Prohibition of Female Genital Mutilation Act, 2010 passed into law.

2010 June: The Director of Public Prosecutions opened corruption investigations against top government officials and private businessmen including Vice-President Gilbert Bukenya, Foreign Minister Sam Kutesa and several other ministers and officials over alleged abuse of public fund during the 2007 Commonwealth Heads of State Summit.

2010 July: Approximately 74 people killed and many others injured following two bomb attacks on people watching World Cup final at the Ethiopian village restaurant and the Kampala rugby club in Kampala. The Al-Shabab were behind the attacks.

2010 August: National Resistance Movement primary elections for parliamentary and local candidates were suspended following irregularities and violence.

2010 October: The Constitutional Court dismissed treason charges against FDC president, Kizza Besigye and ten others.

2010 December: Security tightened after a grenade explosion on a Kampala-bound bus in Nairobi, Kenya.

2010 January: President Museveni signed the controversial Land (Amendment) Act 2010 in law

amidst protests by some factions especially Buganda rejecting the Act. The Press and Journalist (Amendment) Bill, 2010 tabled in Parliament. The Bill proposes mandatory registration and licensing of newspapers by the Media Council.

2010 March: The Domestic Violence Act, 2010 enact

2010 April: The Whistleblowers Protection Act, 2010 enacted.

2010 June: The Presidential Elections (Amendment) Act, 2010 enacted.

2010 August: Constitutional Court nullified Uganda's sedition law.

2010 September: Public criticised the purpose of the Public Order Management Bill 2009. The outcry was triggered by an announcement by the Metropolitan Police Chief that due to the threat of terrorism, public gatherings would require sanction of the Inspector General of Police (IGP). The Bill sought to regulate public gatherings and demonstrations. It also sought to reintroduce provisions of the Police Act, Cap 303 which were nullified by the 2008 Constitutional Court in the case of Muwanga Kivumbi v. Attorney General of Uganda.

2010 December: Institution of Traditional and Cultural Leaders Bill, 2010 was introduced in Parliament amidst controversy over its intentions. It sought to regulate the activities of traditional leaders and purports to operationalise Article 246 of the 1995 Constitution.

2010: The Electoral Commission (Amendment) Act, 2010 was passed. Its amendment provisions permit political parties or organizations and representatives of independent candidates to be accredited by the Electoral Commission as election observers.

2011 January: The Institution of Traditional and Cultural Leaders Bill was passed in parliament despite opposition members of parliament attempting to block it.

2011 February 1: The Constitutional Court ruled based on Article 83 (1) (g) and (h) of the Constitution, that all members of parliament who crossed from their respective parties to other parties or chose to contest as independents without resigning from their previous parties, could not contest in the 2011general elections. Approximately 77 members were affected by the Constitutional Court's ruling.

2011 February 11: Speaker of Parliament Edward Ssekandi directed the 77 MPs affected by the Constitutional Court ruling of February 1, 2011 to vacate their seats immediately. The MPs were also required to refund the salary (about 13m shillings per month) they had received since their nomination as candidates.

November 2010. The Supreme Court granted an interim stay of execution of the Constitutional Court's ruling.

2011 February: Presidential elections conducted and Museveni won his fourth presidential election amidst allegation by FDC president of vote rigging.

2011 April: Kizza Besigye arrested several times over "walk-to-work" protests against rising cost of living.

2011 May: Inspectorate General of Government forwarded charges against former vice president Gilbert Bukenya to the Anti-corruption court over abuse of office in relation to the procurement of the cars for the 2007 Commonwealth Summit.

2011 July: Rebecca Kadaga the Speaker of Parliament elected the vice chairperson of the Commonwealth Women Parliamentarians.

2011 September: Parliamentarians petition Speaker of Parliament to recall parliament from recess in order to discuss issues relating to the oil sharing agreements.

2011 October: Former Vice president Gilbert Bukenya committed to the High Court and remanded in prison following cancellation of bail.

2011 October: The Inspector General of Government forwarded charges against Foreign Affairs Minister Sam Kutesa, Government Chief Whip John Nasasira and Labour State Minister Mwesigwa Rukutana to the Anti-corruption Court in relation to the Shs14billion tender for fixing Speke Resort Munyonyo, ahead of the 2007 Commonwealth Heads of Government Meeting in Kampala.

2011 October 5: The High Court in Kampala nullified the election of former Vice - President Gilbert Bukenya as Busiro north MP over allegedly bribing voters.

2011 October 11: Former Vice president Gilbert Bukenya released on bail. In an unprecedented debate that commenced at 11:00am and ended at 10:15pm Parliament, the members of parliament resolved that a moratorium on executing oil contracts and transactions be placed on the government until necessary laws have been passed by Parliament to give effect to the National Oil and Gas policy. The laws must be tabled in Parliament within 30 days, government to forward all agreements signed with oil companies, reviews the Product Sharing Agreements, accounts for revenues received from oil sector and all Ministers implicated in corruption allegations relating to the oil dealings to step down from office until investigations completed.

2011 October 12: Foreign Affairs Minister Sam Kutesa, Government Chief Whip John Nasasira and Labour State Minister Mwesigwa Rukutana took leave of their offices pending investigation on charges of abuse of office and causing financial loss relating to CHOGM.

2011 October 17 & 18: Dr. Kizza Besigye arrested by police over attempts to continue the “walk-to-work” campaign, taken to a police station to record a statement and later returned to his home where he was placed under preventive house arrest. No charges were preferred on him.

2011 October 25: Public Order and Management Bill 2011 tabled in Parliament.

2011 October 25: In conformity with the Parliamentary resolutions for government to produce all

Agreements executed with oil companies, and proceeds, the Finance Minister tabled statements from Bank of Uganda showing revenues that government received from the oil industry.

2011 October 26: Production Sharing Agreements for Petroleum exploration, development and production between the government and nine oil companies tabled in Parliament.

2011 October 27: The Magistrates Court ruled that the incarceration of Dr. Kizza Besigye at his residence was unlawful since was not kept in lawful detention and beyond the constitutional 48 hours requirement.

2011 October 28: Dr. Kizza Besigye petitioned the constitutional court to declare Article 26 of the Criminal Procedure Code Act and Section 24 of the Police Act unconstitutional. Article 26 of the Criminal Procedure Code Act empowers the police to arrest any person whom the police highly suspects is about to commit an offence, and Section 24 of the Police Act grants powers to a police officer to conduct an arrest of any person where the police officer has reasonable cause to believe that the arrest and detention of such person is necessary to prevent them from causing physical injury to themselves or others and causing damage to property.

2011 October 31: Dr. Kizza Besigye arrested outside his home by police over attempts to continue the "walk-to-work" campaign. He was taken to a police station where he was detained for nine hours before being returned to his home. No charges were preferred against him.

2011 October: Civil society organisations petitioned the Constitutional court against government and Tullow Oil over lack of oil regulatory framework and eviction of people from exploration sites without compensation.

2011 October: Foreign Affairs Minister Sam Kutesa, Government Chief Whip John Nasasira and Labour State Minister Mwesigwa Rukutana filed a petition in the constitutional court challenging the powers and jurisdiction of the Inspector General of Government and the powers of the Magistrates Court to cancel bail of suspects.

2011 November 1: Amnesty International released a report titled Stifling Dissent: Restrictions on the Rights to Freedom of Expression and Peaceful Assembly in Uganda, in which it criticizes the government of repression.

2011 November: IGG discontinued the case against Former Vice President Gilbert Bukenya in which he was accused of abuse of office.

2011 November 9: Prof. Dani Wadada Nabudere died. Parliament passed a motion in his remembrance. He was Minister of Justice in 1979 and minister of Culture and Community Development and Rehabilitation in 1979 and 1980.

2011 December 20: The speaker of Parliament, Rt. Hon. Rebecca Kadaga announced that Uganda will host the Inter-Parliamentary Union (IPU) Assembly between 31st March and the 5th April.

The agenda for the conference are issues surrounding the current political, social and economic situations in the world under the theme: "Parliament and people: bridging the gap."

2011 December: The constitutional court halted the investigation by a parliamentary ad hoc committee investigating alleged ongoing oil scam which involved Prime Minister Amama Mbabazi, and Ministers Sam Kutesa and Hillary Anek. The court issued a temporary injunction in order to consider a request by the Parliamentary commission to be added as respondents to the petition. FDC officials Ingrid Turinawe and others charged with treason released on bail. Inspector General Police, Kale Kayihura called for a revision of the Public Order Management Bill.

2012 January 24: CHOGM Ministers' case adjourned to August pending the outcome of the Constitutional Court's ruling over the interpretation of their prosecution by the Inspectorate of Government which they allege is not properly constituted.

2012 February: Petroleum (refining, gas processing and conversion, transportation and storage) Bill and the Petroleum, Exploration and Production Bill, 2012 was tabled in Parliament repealing the 1985 Petroleum, Exploration and Production Act cap 150.

2012 March 6: Parliament cleared Bank of Uganda Governor Emmanuel Tumusiime Mutebile of a heavy compensation payment made to city business man Hassan Basajjabalaba.

2012 March 14: Seven opposition MP's spearhead a petition to impeach President Museveni over allegations of abuse of office.

2012 March: The High Court at Nakawa set March 28 to rule on an application by four civil society organizations seeking to be joined on an appeal case asking government to make public agreements it signed with oil prospecting companies in the Lake Albert basin.

2012 March: Government drafted a new media Bill titled "The Uganda Communications Regulatory Authority Bill, 2012," which would regulate radios and television stations including any broadcasting which would infringe on the privacy of any individual.

2012 March: The High Court granted a temporary order to bar any activities held by a splinter group of the Conservative party on its behalf.

2012 March 20: The High Court allowed the National Security Fund (NSSF) to amend pleadings that seek to overturn the award of $8.9 million to Alco International Ltd for construction of Workers House. Radio owners in the country publicly oppose the new Media Bill that is claimed will hand government the power to control the operations of broadcasts in the country. Parliament voted to amend rules of procedure to allow the media to use their electrical gadgets in Parliament sessions.

2012 March 21: 25 civil society organizations launched a country wide campaign supporting the opposition Mp's in attempts being made to impeach President Museveni and intend to collect

signatures from Uganda.

2012 March 28: FDC opposition leader Dr. Kizza Besigye was jointly charged with Kampala Mayor Erias Lukwago and three others for organizing an unlawful assembly that led to the death of Assistant Inspector of Police John Michael Ariong on March 21, 2012 in Kampala. Nakawa High Court dismissed the application by four civil society organizations that had sought to join an appeal case pushing for government to make public oil production agreements it signed with oil exploration companies.

2012 April 02: The 24 suspects accused of participating in the Buganda riots of September 2009 started, more than two years after their arrest.

2012 April 02: Opposition leaders from FDC succeeded in gaining entry and an audience with delegates attending the 126th Inter- Parliamentary Assembly in Kampala and used this opportunity to call for political and economic reform in the country.

2012 April 04: The Attorney General cited Section 56 (2) (c), Cap 120 of the Penal Code Act to declare the A4C an unlawful society, rendering its activities illegal. However, A4C national coordinator Mr. Mathias Mpuga (also Masaka Municipality independent MP) termed the declaration an abuse of their constitutional rights. He noted that the law applied is a colonial law and that banning the group and its activities is a violation of human rights that are clearly protected in Article 29 of the constitution.

2012 April 05: Constitutional court ruled that the Inspectorate General Government could not prosecute ministers, Sam Kutesa, John Nasasira and Mwesigwa Rukutana or any one because it was not fully constituted.

2012 April 19: A copy of the draft proposed Bill titled: “The Constitution Amendment Bill 2012”, was handed over to the speaker of Parliament by Western youth MP Mr. Gerald Karuhanga (the architect of the Bill) in an attempt to start a debate on restoration of term limits as provided for by Article 105 (2) of the 2005 constitution.

2012 April 20: The judiciary warned media houses not to discuss any of the Buganda riot case proceedings in their presentations or programs as this could amount to contempt of court which would in the long run see presenters charged with a maximum sentence of 6 months in jail.

2012 April 25: Parliament approved the selection of Justice Irene Mulyagonja as Inspector General of Government (IGG). She was the former High Court Judge in the Commercial division and is to replace acting IGG, Raphael Baku.

2012 April 26: Parliament passed the Prevention and Prohibition of Torture Bill, 2010.

2012 May 3: The NRM ruling party endorsed provisions in the proposed Public Order Management Bill, a proposed law which has been highly criticized by human rights activists in and outside the

country.

2012 May 11: The East African Court of Justice placed an injunction on Parliament a stopping them from conducting elections for Uganda's representatives to the East African Legislative Assembly and ordered Parliament to adopt Rules of Procedure that conform to Article 50 of the East African Community Treaty.

2012 May 13: Members of the opposition walked out of Parliament in protest of a debate on rules to formulate procedures of electing members of parliament to EALA, hence leaving the process to be decided by members of the ruling party and the independents.

2012 May 30: Parliament voted on EALA Parliament seats. The ruling NRM party was allocated 6 seats, the opposition parties 3 seats and the independents one seat.

2012 May 30: While meeting a delegation of Tanzanian MPs in Uganda, the speaker of Parliament, Ms. Rebecca Kadaga, took the chance to lobby support for Uganda's candidature for the position of speaker of EALA.

2012 May 30: Leader of the opposition in Parliament Hon. Nadala Mafabi sacked the Democratic Party (DP) shadow ministers in a disagreement over representatives for the EALA speakership. In total eight ministers from the Uganda People's Congress (UPC) and DP opposition parties were sacked.

2012 June: The Kampala High Court issued an order to freeze KCC revenue accounts citing claims of unpaid terminal benefits by former employees in accordance with a court ruling made in 1995. The benefits owed by the council total up to 1.5 billion Uganda Shillings.

2012 June 1: Government announced Ms. Dora Byamukama as its preferred candidate for the EALA speakership race.

2012 June 05: Hon. Margret Nantongo Zziwa from Uganda was elected and sworn into office as EALA speaker. She is the first female to hold the office.

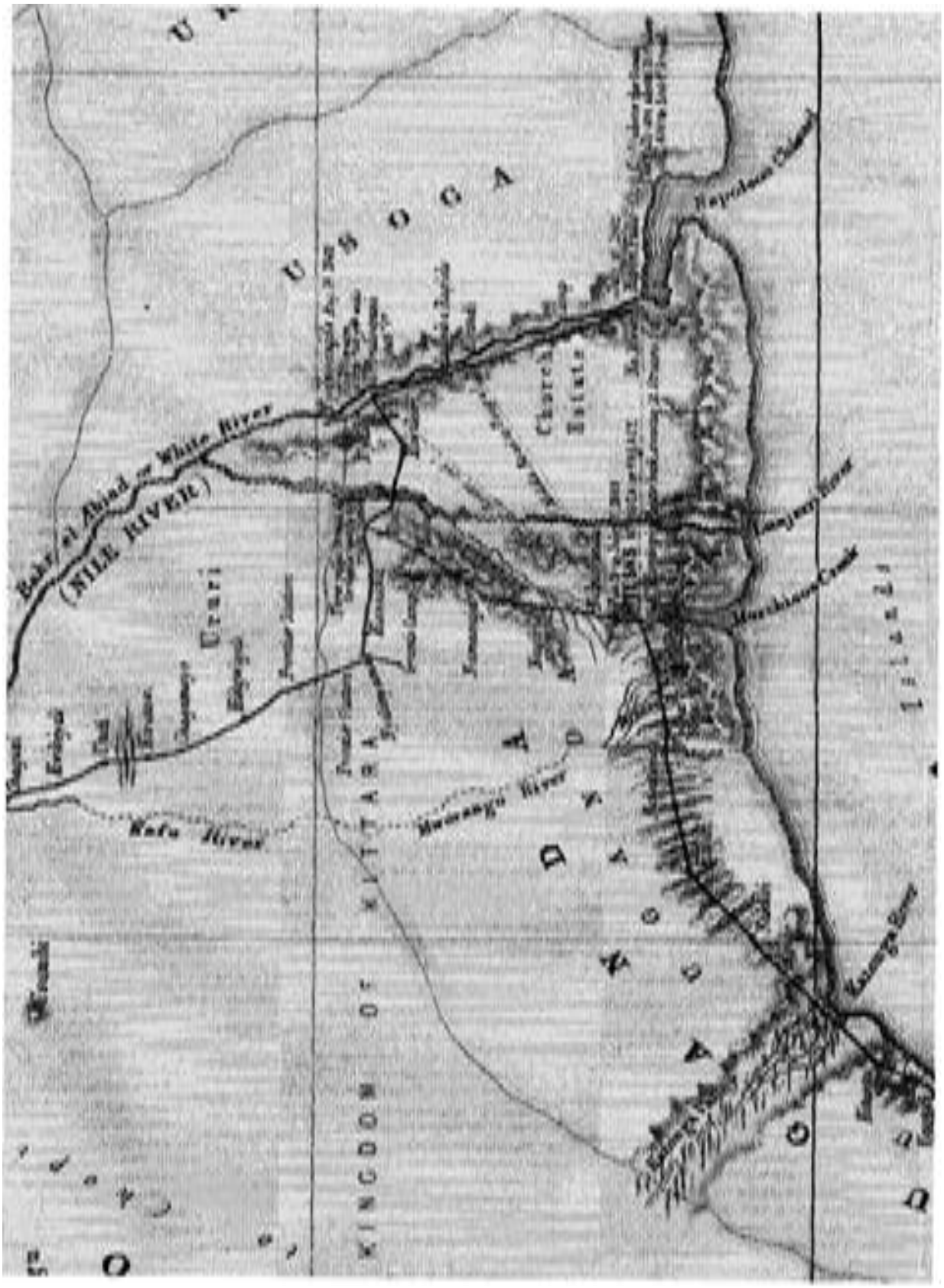
2012 June 20: Uganda's ranking among world's failed states moved from the 'in danger" status to a "critical condition" status on the 2012 failed states index. It was noted that the perceived loss on the legitimate use of force, inability to provide reasonable public services, etc informed the Uganda's categorisation.

2012 June 21: Uganda Revenue Authority (URA) petitioned Parliament seeking a review of the Retirement Benefits Sector Bill 2011. A petition signed by over 1,000 URA workers was presented to the speaker of Parliament Hon. Rebecca Kadaga

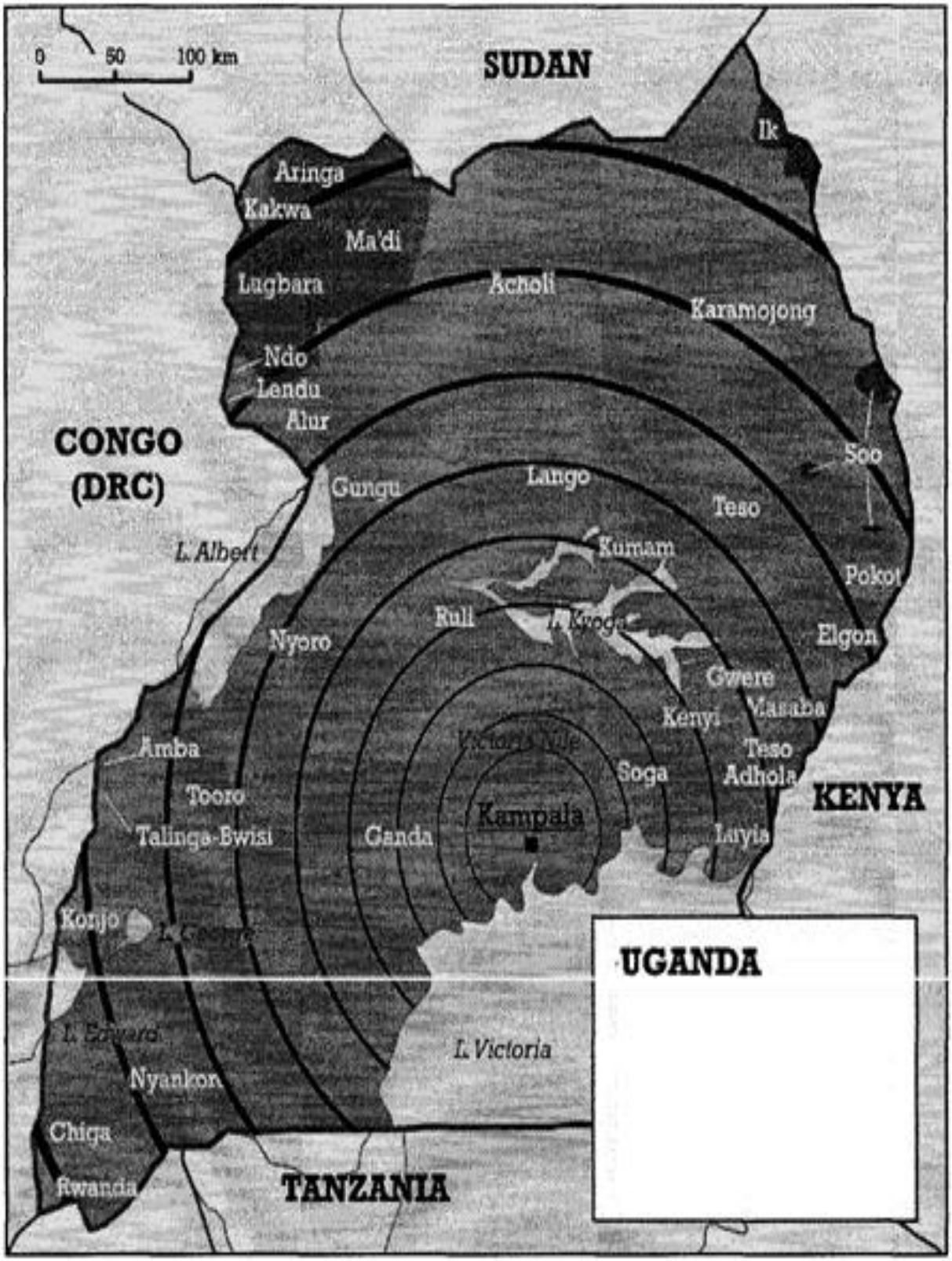
APPENDIX C

LIST OF MAPS

MAP 2A -DETAIL OF SPEKE'S MAP OF EASTERN AFRICA, 1864



ETHNO-LINGUISTIC MAP OF UGANDA



IMPORTANT CONSTITUTIONAL DOCUMENTS

APPENDIX D

The Magna Carta(The Great Charter)

Abuses by King John caused a revolt by nobles who compelled him to execute this recognition of rights for both noblemen and ordinary Englishmen. It established the principle that no one,including the king or a law maker,is above the law.

This is but one of three different translations I found of the Magna Carta; it was originally done in Latin, probably by the Archbishop, Stephen Langton.It was inforceforonly afew months, when it was violated by the king. Just over ayear later, with no resolution to the war, the king died, being succeeded by his 9-year oldson, HenryIII. The Charter (Carta) was reissued again, with some revisions, in 1216, 1217and 1225.As near as I can tell, the version presented here is the one that preceeded all of the others; nearly all of its provisions were soon superceded by other laws, and none of it is effective today. The two other versions I found each professed to be the original, as well. The basic intent ofeach is the same

Preamble:

John, by the grace of God, King of England, Lord of Ireland, duke ofNormandyand Aquitaine, and count of Anjou, to the archbishop, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings.

Know that,having regard to God and for the salvation of our soul,and those of all our ancestors and heirs,and unto the honor of God and the advancement of his holy Church and for the rectifying of our realm, we have granted as underwritten by adviceofour venerable fathers,Stephen,archbishop of Canterbury,primate of all England and cardinal of the holy Roman Church,Henry, archbishop of Dublin,William of London,Peter of Winchester, Jocelynof Bathand Glastonbury,Hugh of Lincoln, Walter of Worcester,WilliamofCoventry, Benedict of Rochester,bishops; of Master Pandulf, subdeacon and member of the household ofour lord the Pope,of brother Aymeric(master of the Knights of the Templein England),and of the illustrious men William Marshal, earl of Pembroke,William,earl of Salisbury,William, earl of Warenne,William, earl of Arundel,Alanof Galloway(constable of Scotland),Waren Fitz Gerold, Peter Fitz Herbert, Hubert De Burgh (seneschal of Poitou),Hugh de Neville,Matthew Fitz Herbert,Thomas Basset, Alan Basset,Philip

d'Aubigny,Robert of Roppesley,John Marshal,John Fitz Hugh,and others,our liegemen.

In the first place we have granted to God,and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire,and her liberties inviolate; and we will that itbe thus observed;which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church,we,of our pure and unconstrained will, did grant,and did by ourcharterconfirmanddid obtain the ratification of the same from our lord,Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed ingood faith by our heirs forever.We have also granted to all freemen of our kingdom,forus andour heirs forever,all the underwritten liberties,to be had and held by them and their heirs,of us and our heirs forever.

If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe"relief", the shall have his inheritance by the old relief, to wit, the heir or heirs of an earl, for the whole baronyofan earl by £100; the heir or heirs of a baron, £100 for a whole barony; the heir or heirs of a knight, 100s, at most, and whoever owes less let him give less, according to the ancient custom offees.

If, however, the heir of anyone of the aforesaid has been underage and inwardship, let him have his inheritance without relief and without fine when he comes of age. The guardian of the land of an heir who is thus underage,shall take from the land of the heir nothing but reasonable produce,reasonable customs,and reasonable services,and thatwithout destruction or waste of men or goods; and if we have committed the wardship of thelands of any such min or to the sheriff, or toanyotherwhoisresponsibletousforitsissues,and he has made destruction or waster of what he holds in wardship,we will take of him amends,and the land shall be committed to two lawful and discreet men of that fee,who shall be responsiblefor the issues to us or to him to whom we shall assign them;and ifwehave given or sold the wardship of any such land to anyone and he has therein made destruction or waste,he shall lose that wardship, and it shall betransferredtotwo lawful and discreet men of that fief,who shall be responsible to us in like manner as aforesaid.

The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, fish ponds, stanks, mills, and other things pertaining to the land, out of the issues of the sameland; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and wainage, according asthe season of husbandry shall require, and the issues of the land can

reasonable bear.

Heirs shall be married without disparagement, yet so that before the marriage takesplace the nearest in blood to that heir shall have notice. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the dayofthedeath of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

Neither we nor ourbailiffs will seize any land or rent for any debt,as longas thechattelsofthe debtor are sufficient to repay the debt;nor shall thesuretiesofthedebtorbedistrained solongas the principal debt or is able to satisfythedebt;and if the principal debt or shall fail to pay the debt, having nothing where withto pay it,then the sureties shall answer for the debt;and let them have the lands and rents of the debtor, if they desire them,until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof thatheisdischarged thereofasagainstthe said sureties.

If one who has borrowed from theJews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heiris under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.

And if anyone die indebted to the Jews, his wifeshall haveher dowerandpaynothingof that debt; and if any children of the deceased are left underage, necessaries shallbeprovided for the min keeping with the holding of the deceased; and out of there sidue the debt shall be paid, reserving, however, service duet of eudal lords; in like manner let it be done touching debts due to others than Jews.

No scutagenot aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall notbe levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

And the city of London shall have all it ancient liberties and free customs, as well bylandasby water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

And for obtaining the common counsel of the king domanent the assessing of anaid (except in the three cases aforesaid)or of ascutage,wewill causetobe summoned thearchbishops,bishops, abbots,earls,and greater barons, severally by our letters; and we will move over cause tobe summoned generally, through our sheriffs and bailiffs, and others who hold of us in chief,for a fixed date, namely, after the expiry of atleast forty days,anda ta fixed place;and in all letters of such summons we will specify the reason of the summons. And when the summons hasthusbeen made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

We will notfor the future grantto anyone license to take anaid from his own free tenants, except toransom his person, to make his eldestson a knight, and once to marryhis eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

No one shall be distrained for performanceof greater service for a knight's fee, or for any other free tenement, than is due there from. Common pleas shall not follow our court, but shall be held in some fixed place.

Inquests of novel disseisin, of mortd'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following; We, or, if we should be out of the realm, our chief justiciar, will send two justiciariesthrough every county four timesayear, who shall alone withfour knightsofthecounty chosenby the county, hold the said assizes in the county court, on the day and in theplaceof meeting of that court.

And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that day, as many as maybe requiredfor the efficient making of judgments, according asthebusinessbemoreorless. Afreeman shall not be amerced for as light offense, except in accordance with thedegree of the offense; and for agrave offenseheshall be amerced in accordance with the gravity of the offense, yet saving always his"contentment”; and a merchant in the same way, saving his "merchandise”; andaville in

shall beamerced in the same way, saving his "wainage"if they have fallen into our mercy:and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.

Earlsand barons shall not be amerced except through their peers, and only in accordance with the degree of the offense. A clerk shallnot be amerced inrespectofhislay holdingexceptafter the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.

No village or individual shall be compelled to make bridge satriver banks, except those who from of old were legally bound to do so.
No sheriff, constable, coroners, or other so four bailiffs, shall hold pleas of our Crown.

All counties, hundred, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.
If anyone holding of usalay fief shall die,and our sheriffor bailiff shall exhibit our letters patent of summons for a debt which the decease dowed us,it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the deceased,found upon the lay fief,to the value of that debt,at the sight of law worthy men, provided always that nothing whatever be hence removed until the debt which is evident shall befully paid to us;and the residue shall be left to the executors to fulfill the will of the deceased;and if there be nothingduefrom him to us,all the chattels shall go to the deceased,saving to his wife and children their reasonable shares.

If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the Church, saving to everyone the debts which the deceased owed tohim.

No constable or other bailiff or fours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man.

Further, if we have ledor sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.

No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

Neither wen or our bailiffs shall take, for our castles orfor any other work of ours, wood which is not ours, against the will of the owner of that wood.

We will not retain beyond one year and one day, the lands those who have been convicted of felony, and the lands shall thereafter have behanded over to the lords of the fiefs.

Allkydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.

The writ which is called praecipe shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.

Let there be one measure ofwine throughout our whole realm; and one measure of ale; and one measure of corn, to wit,"the London quarter”; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ellswithin the selvedges; of weights also let it be asofmeasures.

Nothing in future shall be given or takenfora writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

If anyone holds of us by fee-farm, either by socageor by burage, or of any other land by knight's service,we will not (by reason of that fee- farm,socage,or burgage),have the wardship of the heir,or of such land of his as if of the fief of that other;nor shall we have wardship of that fee-farm,socage,or burgage, unless such fee-farm owes knight's service.We will not by reason of any small serjeancy which anyone may hold of usby the service of rendering to us knives, arrows, or the like,have wardship of his heir or of the land which he holds of another lord by knight's service.

No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law", without credible witnesses brought for this purposes.

No freemen shall be taken or imprisoned or disseised or exiled or in anyway destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

To no one will we sell, to no one will were fuse or delay, rightorjustice.

All merchants shall have safeand secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buyingand selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found inour land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justicia, how the merchants of our land found in the land at war with us are treated; and four men are safe there, the others shall be safe in our land.

It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as if above provided) to leave our kingdom and to return, safe and secureby land and water, exceptforashort period in time of war, on grounds of public policy- reserving always the allegiance due to us.
If anyone holding of some escheat (such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall given or other relief, and perform or other service to us than he would have done to th ebaron if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.
Men who dwell without the forest need no thence forthcome before our justiciariesofthe forest upon a general summons, unless they are in plea, or sureties of one or more, who are attached for the forest.
We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of there alm and mean to observe it well.

All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long continued possession, shall have the wardship of them, when vacant, as they ought to have.

All forests that have been made suchinour time shall forthwith be disafforsted; and a similar course shall be followed with regard to riverbanks thathavebeenplaced"indefense"byusinour time. All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river banks and their wardens, shall immediately by inquired into ineachcounty by twelves worn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, beutterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

We will immediately restore all hostages and charters delivered to us by Englishmen, assureties of the peace of faithful service. We willentirelyremovefromtheirbailiwicks, the relations of Gerard of at hee (so that in future they shall have no bailiwick in England); namely, Engelard of Cigogne, Peter, Guy, and Andrew of Chanceaux, Guy of Cigogne, Geoffrey of Martigny with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.

As soon as peace is restored, we will banish from the kingdom all foreign born knights, crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the kingdom's hurt.

If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore the unto him; and if a dispute arise over this, then letitbe decided bythefiveand twentybaronsof whom mention is made below in the clause for securing the peace. Moreover, for all those possessions, from which anyone has, without the lawful judgment of hispeers,beendisseisedor removed, by our father, King Henry,or by our brother, King Richard, and which we retain in our hand(or which as possessed by others,to whom we are bound towarrantthem)weshall have respite until the usual term of crusaders;excepting those things about which a plea has been raised,or an inquest made by our order,before our takingof the cross;but as soon as we return from the expedition,we will immediately grant full justicetherein.

We shall have, more over, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests whichHenryour father and Richard our broter afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had byreason of a fief which anyone held of usby knight's service), and concerning abbeys founded on other fiefs than our own,in which the lord of the fee claims to have right;and when we have returned,or if we desist from our expedition,we will immediately

grant full justice to all who complain of such things.

Noone shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

All fines made with us unjustly and against the law of the land, and all amercements,imposed unjustly and against the law of the land,shall been tirely remitted, or else it shall be done concerning them according to the decision of the five and twenty barons whom mention is made below in the clause for securing the pease, or according to the judgment of the majority of the same,along with the aforesaid Stephen, archbishop of Canterbury,if he can be present,and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him,provided always that if anyone or more of the aforesaid five and twenty barons are in a similar suit,they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by theres of the same five and twenty for this purpose only,and after having been sworn.

If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise overthis,then let it be decided in the marches by the judgment of their peers; for the tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches.Welsh men shall do the same to us and ours.

Further, for all those possessions from which anyWelshman has, without the lawful judgment of his peers, been disseised or removed by King Henryourfather,orKing Richard our brother,and which we retain in our hand(or which are possessed by others,and which we ought to warrant),we will have respite until the usual term of crusaders;excepting those things about which aplea has been raised or an inquest made by our order before we took the cross;but as soon as we return (or if per chance we desist from our expedition),we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the foresaid regions.

We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

We will do towards Alexander, kingofScots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our where barons of England, unless it ought to be otherwise according to the charterswhich we hold from William his father, formerly king of Scots; and this shall be accordingtothejudgmentofhis peersinourcourt.

Moreover, all these aforesaid customsand liberties, the observances of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed ball of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

Since, moveover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all the seconcessions, desirous that they should enjoy them incomplete and firm endurance forever,we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will,who shall be boundwith all their might,to observe and hold,and cause to be observed,the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we,or our justiciar,or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shallhave broken any oneof the Articlesofthis peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repairto us (or our justiciar,if we are out of the realm)and, laying the transgression before us, petition to have that ransgression redressed without delay.And if we shallnot have corrected the transgression (or, intheeventofour being out of the realm,if our justiciar shall not have corrected it)within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distrain and distress us in all possible ways, namely, by seizing our castles,lands,possessions, and in any other way they can, until redress has been obtained as they deem fit, savingharmlessourownperson, and the persons of our queen and children; and when redress has been obtained,they shall resume their old relations towards us.And let whoever in the country desires it,swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, and along with them,to molest us to the utmost of his power; and we publicly and freely grant leave to everyone who wishes toswear,and we shall never forbid anyone to swear.All those, move over,in the land whoof themselves and of their own accord are unwilling to swear to the twenty fiveto help the min constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if anyone of the five and twenty barons shall have died or departed from the land,

orbe incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty-five barons whoare left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is entrusted, to these twentyfive barons,if per chance these twenty five are present and disagree about anything, or if some of them,after being summoned, are unwilling or unable to be present,that which the majority of those present or dain or command shall be held as fixed and established,exactly as if the whole twenty fivehad concurred in this; and the said twentyfive shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and ifanysuch thingshasbeen procured, let it be void and null, and we shall never use it personally or b yanother.

And all the will, hatreds, and bitterness that have arisen betweenus and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned toeveryone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we havefully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, arch bishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandul fastouching this security and the concessions aforesaid.

Wherefore we will and firmly order that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid. Anoath, moreover, has been taken, as wellon ourpartas on the art of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent.

Given under our hand- the above named and many others being witnesses-in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.

PETITION OF RIGHT (1628)

In 1628 the English Parliament sent this statement of civil liberties to King Charles I.

The next recorded milestone in the development of constitutionalism was the Petition of Right, produced in 1628 by the English Parliament and sent to Charles I as a statement of civil liberties.

Refusal by Parliament to finance the king's unpopular foreign policy had caused his government to exact forced loans and to quarter troops in subjects' houses as an economy measure. Arbitrary arrest and imprisonment for opposing these policies had produced in Parliament a violent hostility to Charles and to George Villiers, the Duke of Buckingham. The Petition of Right, initiated by Sir Edward Coke, was based upon earlier statutes and charters and asserted four principles:

1. No taxes may be levied without consent of Parliament,
2. No subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus),
3. No soldiers may be quartered upon the citizenry, and
4. Martial law may not be used in time of peace.

APPENDIX E

THE UGANDA AGREEMENT OF 1900

(See Native Agreement and Buganda Native Laws, Laws of the Uganda Protectorate, Revised Edition 1935 Vol. VI, pp. 1373-- 1384; Laws of Uganda 1951 Revised Edition, Vol. VI, pp. 12-26)

We, the undersigned, to wit, Sir Henry Hamilton Johnston, K.C.B., Her Majesty's Special Commissioner, Commander-in-Chief and Consul-General for the Uganda Protectorate and the adjoining Territories, on behalf of Her Majesty the Queen of Great Britain and Ireland, Empress of India, on the one part; and the under-mentioned Regents and chiefs of the Kingdom of Uganda on behalf of the Kabaka (King) of Uganda, and the chiefs and people of Uganda, on the other part: do hereby agree to the following Articles relative to the government and administration of the Kingdom of Uganda.

1. The boundaries of the Kingdom of Uganda shall be the following: starting from the left bank of the Victoria Nile at the Ripon Falls, the boundary shall follow the left bank of the Victoria Nile into Lake Kioga, and thence shall be continued along the centre of Lake Kioga, and again along the Victoria Nile as far as the confluence of the River Kafu, opposite the town of Mruli. From this point the boundary shall be carried along the right or eastern bank of the River Kafu, up stream, as far as the junction of the Kafu and Embaia. From this point the boundary shall be carried in a straight line to the River Nkusi, and shall follow the left bank of the River Nkusi down stream to its entrance into the Albert Nyanza. The boundary shall then be carried along the coast of the Albert Nyanza in a south-westerly direction as far as the mouth of the River Kuzizi, and thence shall be carried up stream along the right bank of the river Kuzizi to near its source. From a point near the source of the Kuzizi and near the village of Kirola (such point to be finally determined by Her Majesty's Commissioner at the time of the definite Survey of Uganda) the boundary shall be carried in a south-westerly direction until it reaches the River Nabutari, the left bank of which it will follow down stream to its confluence with the River Katonga. The boundary shall then be carried up stream along the left bank of the River Katonga, as far as the point opposite the confluence of the Chungaga, after which, crossing the Katonga, the boundary shall be carried along the right bank of the said Chungaga River up stream to its source; and from its source the boundary shall be drawn in a south-easterly direction to the point where the Byoloba River enters Lake Kachira; and shall then be continued along the centre of Lake Kachira to its south-eastern extremity, where the River Bukova leaves the lake, from which point the boundary shall be carried in a south-easterly direction to the Anglo-German frontier. The boundary shall then follow the Anglo-German frontier to the coast of the Victoria Nyanza and thence shall be drawn across the waters of the Victoria Nyanza in such a manner as to include within the limits of the Kingdom of Uganda the Sese Archipelago

(including Kosi and Mazinga), Ugaya, Lufu, Igwe, Buvuma, and Lingira Islands. The boundary, after including Lingira Islands, shall be carried through Napoleon Gulf until it reaches the starting point of its definition at Bugungu at the Ripon Falls on the Victoria Nile. To avoid any misconception it is intended by this definition to include within the boundaries of Uganda all the islands lying off the north-west coast of the Victoria Nyanza in addition to those specially mentioned.

2 The Kabaka and chiefs of Uganda hereby agree henceforth to renounce in favour of Her Majesty the Queen any claims to tribute they may have had on the adjoining provinces of the Uganda Protectorate.

3 The Kingdom of Uganda in the administration of Uganda Protectorate shall rank as a province of equal rank with any other provinces into which the Protectorate may be divided.

4 The revenue of the Kingdom of Uganda, collected by the Uganda Administration, will be merged in the general revenue of the Uganda Protectorate, as will that of the other provinces of this Protectorate.

5 The laws made for the general governance of the Uganda Protectorate by Her Majesty's Government will be equally applicable to the Kingdom of Uganda, except in so far as they may in any particular conflict with the terms of this Agreement, in which case the terms of this Agreement will constitute a special exception in regard to the Kingdom of Uganda.

6 So long as the Kabaka, Chiefs, and people of Uganda shall conform to the laws and regulations instituted for their governance by Her Majesty's Government and shall co-operate loyally with Her Majesty's Government in the organization and administration of the said Kingdom of Uganda, Her Majesty's Government agrees to recognize the Kabaka of Uganda as the native ruler of the province of Uganda under Her Majesty's protection and over-rule. The King of Uganda shall henceforth be styled His Highness the Kabaka of Uganda. On the death of a Kabaka, his successor shall be elected by a majority of votes in the Lukiko, or native council. The range of selection, however, must be limited to the Royal Family of Uganda, that is to say, to the descendants of King Mutesa. The name of the person chosen by the native council must be submitted to Her Majesty's Government for approval, and no person shall be recognized as Kabaka of Uganda whose election has not received the approval of Her Majesty's Government. The jurisdiction of the native Court of the Kabaka of Uganda, however, shall not extend to any person not a native of the Uganda province. The Kabaka's courts shall be entitled to try natives for capital crimes, but no death sentence may be carried out by the Kabaka, or his Courts, without the sanction of Her Majesty's representative in Uganda. Moreover, there will be a right of appeal from the native Courts to the principle Court of Justice established by Her Majesty in the Kingdom of Uganda as regards all

sentences which inflict a term of more than five years' imprisonment or a fine of over £100. In the case of any other sentences imposed by the Kabaka's Courts, which may seem to Her Majesty's Government disproportioned or inconsistent with humane principles, Her Majesty's representatives in Uganda shall have the right of remonstrance with the Kabaka, who shall, at the request of the said representative, subject such sentence to reconsideration.

The Kabaka of Uganda shall be guaranteed by Her Majesty's Government from out of the local revenue of the Uganda Protectorate a minimum yearly allowance of £500 a year.

During the present Kabaka's minority, however, in lieu of the above-mentioned subvention, there will be paid to the master of his household, to meet his household expenditure, WO a year, and during his minority the three persons appointed to act as Regents will receive an annual salary of £400 a year. Kabaka's of Uganda will be understood to have attained their majority when they have reached the age of 18 years. The Kabaka of Uganda shall be entitled to a salute of nine guns on ceremonial occasions when such salutes are customary.

7 The Namasole, or mother of the present Kabaka. (Chua), shall be paid during her lifetime an allowance at the rate of £50 a year. This allowance shall not necessarily be continued to the mothers of other Kabaka's.

8 All cases, civil or criminal, of a mixed nature, where natives of the Uganda province and non-natives of that province are concerned, shall be subject to British Courts of Justice only.

9 For purposes of native administration the Kingdom of Uganda shall be divided into the following districts or administrative counties:

(1) Kiagwe	(6) Buyaga	(11) Butambala (Bweya)	(16) Sese
(2) Bugerere	(7) Bwekula	(12) Kiadondo	(17) Buddu
(3) Bulemezi	(8) Singo	(13) Busiro	(18) Koki
(4) Buruli	(9) Busuju	(14) Mawokoto	(19) Mawogola
(5) Bugangadzi	(10) Gomba (Butunzi)	(15) Buvuma	(20) Kabula

At the head of each county shall be placed a chief who shall be selected by the Kabaka's Government, but whose name shall be submitted for approval to Her Majesty's representative. This chief, when approved by Her Majesty's representative, shall be guaranteed from out of the revenue of Uganda a salary at the rate of E200 a year. To the chief of a county will be entrusted by Her Majesty's Government, and by the Kabaka, the task of administering justice among the natives dwelling in his county, the assessment and collection of taxes, the upkeep of the main roads, and the general supervision of native affairs. On all questions but the assessment and collection of taxes

the chief of the county will report direct to the King's native ministers, from whom he will receive his instructions. When arrangements have been made by Her Majesty's Government for the organization of a police force in the province of Uganda, a certain number of police will be placed at the disposal of each chief of a county to assist him in maintaining order. For the assessment and payment of taxes, the chief of a county shall be immediately responsible to Her Majesty's representative, and should he fail in his duties in this respect, Her Majesty's representative shall have the right to call upon the Kabaka to dismiss him from his duties and appoint another chief in his stead. In each county an estate, not exceeding an area of 8 square miles, shall be attributed to the chieftainship of a county, and its usufruct shall be enjoyed by the person occupying, for the time being, the position of chief of the county.

10 To assist the Kabaka of Uganda in the government of his people he shall be allowed to appoint three native Officers of State, with the sanction and approval of Her Majesty's representative in Uganda (without whose sanction such appointments shall not be valid)-a Prime Minister, otherwise known as Katikiro; a Chief Justice; and a Treasurer or Controller of the Kabaka's revenues. These officials shall be paid at the rate of £300 a year. Their salaries shall be guaranteed them by Her Majesty's Government from out of the funds of the Uganda Protectorate. During the minority of the Kabaka these three officials shall be constituted the Regents, and when acting in that capacity shall receive salary at the rate of £400 a year. Her Majesty's chief representative in Uganda shall at any time have direct access to the Kabaka, and shall have the power of discussing matters affecting Uganda with the Kabaka alone or, during his minority, with the Regents, but ordinarily the three officials above designated will transact most of the Kabaka's business with the Uganda Administration. The Katikiro shall be *ex officio* the President of the Lukiko, or native council; the Vice-President of the Lukiko shall be the native Minister of Justice for the time being; in the absence of both Prime Minister and Minister of Justice, the Treasurer of the Kabaka's revenues, or third minister, shall preside over the meetings of the Lukiko.

11 The Lukiko, or native council, shall be constituted as follows: 'In addition to the three native ministers who shall be *ex officio* senior members of the council, each chief of a county (twelve in all) shall be ex *officio* a member of the Council. Also each chief of a county shall be permitted to appoint a person to act as his lieutenant in this respect to attend the meetings of the council during his absence, and to speak and vote in his name. The chief of a county, however, and his lieutenant may not both appear simultaneously at the council. In addition, the Kabaka shall select from each county three notables, whom he shall appoint during his pleasure, to be members of the Lukiko or native council. The Kabaka may at any time deprive any individual of the right to sit on the native council, but in such a case shall intimate his intention to Her Majesty's representative in Uganda,

and receive his assent thereto before dismissing the member. The functions of the council will be to discuss all matters concerning the native administration of Uganda, and to forward to the Kabaka resolutions which may be voted by a majority regarding measures to be adopted by the said administration. The Kabaka shall further consult with Her Majesty's representative in Uganda before giving effect to any such resolutions voted by the native council, and shall, in this matter, explicitly follow the advice of Her Majesty's representative. The Lukiko, or a committee thereof, shall be a Court of Appeal from the decisions of the Courts of the First Instances held by the chiefs of counties. In all cases affecting property exceeding the value of £5, or imprisonment exceeding one week, an appeal for revision may be addressed to the Lukiko. In all cases involving property or claims exceeding £100 in value, or a sentence of imprisonment exceeding five years, or sentences of death, the Lukiko shall refer the matter to the consideration of the Kabaka, whose decision when countersigned by Her Majesty's chief representative in Uganda shall be final. The Lukiko shall not decide any questions affecting the persons or property of Europeans or others who are not natives of Uganda. No person may be elected to the Lukiko who is not a native of the Kingdom of Uganda. No question of religious opinion shall be taken into consideration in regard to the appointment by the Kabaka of members of the council. In this matter he shall use his judgement and abide by the advice of Her Majesty's representative, assuring in this manner a fair proportionate representation of all recognised expressions of religious belief prevailing in Uganda.'

12 In order to contribute to a reasonable extent towards the general cost of the maintenance of the Uganda Protectorate, there shall be established the following taxation for Imperial purposes, that is to say, the proceeds of the collection of these taxes shall be handed over intact to Her Majesty's representative in Uganda as the contribution of the Uganda province towards the general revenue of the Protectorate.

The taxes agreed upon at present shall be the following:

'(a) A hut tax of three rupees, or 4s. per annum, on any house, hut or habitation used as a dwelling-place.

(b) A gun tax of three rupees, or 4s. per annum, to be paid by any person who possesses or uses a gun, rifle or pistol.'

The Kingdom of Uganda shall be subject to the same Customs Regulations, Porter Regulations, and so forth, which may, with the approval of Her Majesty, be instituted for the Uganda Protectorate generally, which may be described in a sense as exterior taxation, but no further interior taxation, other than the hut tax, shall be imposed on the natives of the province of Uganda without the agreement of the Kabaka, who in this matter shall be guided by the majority of votes in his native council. This arrangement, however, will not affect the question of township rates, lighting rates,

water rates, market dues, and so forth, which may be treated apart as matters affecting municipalities or townships; nor will it absolve natives from obligations as regards military service, or the up-keep of main roads passing through the landson which they dwell. A hut tax shall be levied on any building which is used as a dwelling-place. A collection of not more than four huts, however, which are in a separate and single enclosure and are inhabited only by a man and his wife, or wives, may be counted as one hut. The following buildings will be exempted from the hut tax: temporary shelters erected in the fields for the purposes of watching plantations; or rest houses erected by the roadside for passing travellers; buildings used solely as tombs, churches, mosques or schools, and not slept in or occupied as a dwelling; the residence of the Kabaka and his household (not to exceed fifty buildings in number); the residence of the Namasole, or Queen Mother (not to exceed twenty in number); the official residences of the three native ministers, and of all the chiefs of counties (not to exceed ten buildings in number); but in the case of dispute as to the liability of a building to pay hut tax, the matter must be referred to the collector for the province of Uganda, whose decision must be final. The collector of a province may also authorize the chief of a county to exempt from taxation any person whose condition of destitution may, in the opinion of the collector, make payment of such tax an impossibility. By collector is meant the principal British official representing the Uganda Administration in the province of Uganda.

The representative of Her Majesty's Government in the Uganda Protectorate may from time to time direct that in the absence of current coin, a hut or gun tax may be paid in produce or in labour according to a scale which shall be laid down by the said representative. As regards the gun tax, it will be held to apply to any person who possesses or makes use of a gun, rifle, pistol, or any weapon discharging a projectile by the aid of gunpowder, dynamite or compressed air. The possession of any cannon or machine gun is hereby forbidden to any native of Uganda. A native who pays a gun tax may possess or use as many as five guns. For every five or for every additional gun up to five, which he may be allowed to possess or use, he will have to pay another tax. Exemptions from the gun tax will, however, be allowed to the following extent: 'The Kabaka will be credited with fifty gun licences free, by which he may arm as many as fifty of his household. The Queen mother will, in like manner, be granted ten free licences annually, by which she may arm as many as ten persons of her household; each of the three native ministers (Katikiro, Native Chief Justice, and Treasurer of the Kabaka's revenue) shall be granted twenty free gun licences annually, by which they may severally arm twenty persons of their household. Chiefs of counties will be similarly granted ten annual free gun licences; all other members of the Lukiko or native council, not Chiefs of counties, three annual gun licences, and all landed proprietors in the county, with estates exceeding 500 acres in extent, one free annual gun licence.'

13 Nothing in this Agreement shall be held to invalidate the preexisting right of the Kabaka of Uganda to call upon every ablebodied male among his subjects for military service in defence of the country; but the Kabaka henceforth will only exercise this right of conscription, or of levying native troops, under the advice of Her Majesty's principal representative in the Protectorate. In times of peace, the armed forces, organized by the Uganda Administration, will probably be sufficient for all purposes of defence, but if Her Majesty's representative is of opinion that the force of Uganda should be strengthened at any time, he may call upon the Kabaka to exercise in a full or in a modified degree his claim on the Baganda people for military service. In such an event the arming and equipping of such force would be undertaken by the administration of the Uganda Protectorate.

14 All main public roads traversing the Kingdom of Uganda and all roads the making of which shall at any time be decreed by the native council with the assent of Her Majesty's representative, shall be maintained in good repair by the chief of the Saza (or county) through which the road runs. The chief of a county shall have the right to call upon each native town, village, or commune, to furnish labourers in the proportion of one to every three huts or houses, to assist in keeping the established roads in repair, provided that no labourers shall be called upon to work on the roads for more than one month in each year. Europeans and all foreigners whose lands abut on established main roads, will be assessed by the Uganda Administration and required to furnish either labour or to pay a labour rate in money as their contribution towards the maintenance of the highways. When circumstances permit, the Uganda Administration may further make grants from out of its Public Works Department, for the construction of new roads or any special repairs to existing highways, of an unusually expensive character.

15 The land of the Kingdom of Uganda shall be dealt with in the following manner: Assuming the area of the Kingdom of Uganda, as comprised within the limits cited in this agreement, to amount to 19,600 square miles, it shall be divided in the following proportions:

	Square miles
Forests to be brought under control of the Uganda Administration	1,500
Waste and uncultivated land to be vested in Her Majesty's Government, and to be controlled by the Uganda Administration	9,000
Plantations and other private property of His Highness the Kabaka of Uganda	350
Plantations and other private property of the Namasole (Note.-If the present Kabaka died and another Namasole were appointed, the	16

existing one would be permitted to retain as her personal property 6 square miles, passing on 10 square miles as the endowment of every succeeding Namasole.)	
Plantations and other private property of the Namasole, Mother of Mwanga	10
To the Princes: Joseph, Augustine, Rarnazan, and Yusufu-Suna, 8 square miles each	32
For the Princesses, sisters, and relations of the Kabaka	90
To the Abamasaza (chiefs of counties), twenty in all 8 square miles each (private property): 160 Official estates attached to the posts of the Abamasaza, 8 square miles each: 160	320
The three Regents will receive private property to the extent of 16 square miles each: 48 And official property attached to their office, 16 square miles each, the said official property to be afterwards attached to the posts of the three native ministers: 48	96
Mbogo (the Muhammedan chief) will receive for himself and his adherents	24
Kamswaga, chief of Koki, will receive	20
One thousand chiefs and private landowners will receive the estates of which they are already in possession, and which are computed at an acreage of 8 square miles per individual, making atotal of	8,000
There will be allotted to the three missionary societies in existence in Uganda as private property, and in trust for the native churches, as much as	92
Land taken up by the Government for Government stations prior to the present settlement (at Kampala, Entebbe, Masaka, etc., etc.)	50
Total	19,600

After a careful survey of the Kingdom of Uganda has been made, if the total area should be found to be less than 19,600, then that portion of the country which is to be vested in Her Majesty's Government shall be reduced in extent by the deficiency found to exist in the estimated area. Should, however, the area of Uganda be established at more than 19,600 square miles, then the surplus shall be dealt with as follows:

'It shall be divided into two parts, one-half shall be added to the amount of land which is vested in Her Majesty's Government, and the other half will be divided proportionately among the properties of the Kabaka, the three Regents or native ministers, and the Abamasaza, or chiefs of counties.

'The aforesaid 9,000 square miles of waste or cultivated, or uncultivated land, or land occupied without prior gift of the Kabaka or chiefs by bakopi or strangers, are hereby vested in Her Majesty the Queen of Great Britain and Ireland, Empress of India, and Protectress of Uganda, on the understanding that the revenue derived from such lands shall form part of the general revenue of the Uganda Protectorate.

'The forests, which will be reserved for Government control, will be, as a rule, those forests over which no private claim can be raised justifiably, and will be forests of some continuity, which should be maintained as woodland in the general interests of the country.

'As regards the allotment of the 8,000 square miles among the 1,000 private landowners, this will be a matter to be left to the decision of the Lukiko, with an appeal to the Kabaka. The Lukiko will be empowered to decide as to the validity of claims, the number of claimants and the extent of land granted, premising that the total amount of land thus allotted amongst the chiefs and accorded to native landowners of the country is not to exceed 8,000 square miles.

'Europeans and non-natives, who have acquired estates, and whose claims thereto have been admitted by the Uganda Administration, will receive title-deeds for such estates in such manner and with such limitations, as may be formulated by Her Majesty's representative. The official estates granted to the Regents, native ministers, or chiefs of counties, are to pass with the office, and their use is only to be enjoyed by the holders of the office.

'Her Majesty's Government, however, reserves to itself the right to carry through or construct roads, railways, canals, telegraphs or other useful public works, or to build military forts or works of defence on any property, public or private, with the condition that not more than 10 per centum of the property in question shall be taken up for these purposes without compensation, and that compensation shall be given for the disturbance of growing crops or of buildings.'

16 Until Her Majesty's Government has seen fit to devise and promulgate forestry regulations, it is not possible in this Agreement to define such forests rights as may be given to the natives of Uganda; but it is agreed on behalf of Her Majesty's Government, that in arranging these forestry regulations, the claims of the Baganda. people to obtain timber for building purposes, firewood, and other products of the forests or uncultivated lands, shall be taken into account, and arrangements made by which under due safeguards against abuse these rights may be exercised gratis.

17 As regards mineral rights. The rights to all minerals found on private estates shall be considered to belong only to the owners of these estates, subject to a 10 per centum *ad valorem* duty, which

shall be paid to the Uganda Administration when the minerals are worked. On the land outside private estates, the mineral rights shall belong to the Uganda Administration, which, however, in return for using or disposing of the same must compensate the occupier of the soil for the disturbance of growing crops or buildings, and will be held liable to allot to him from out of the spare lands in the Protectorate an equal area of soil to that from which he has been removed. On these waste and uncultivated lands of the Protectorate, the mineral rights shall be vested in Her Majesty's Government as represented by the Uganda Administration. In like manner the ownership of the forests, which are not included within the limits of private properties, shall be henceforth vested in Her Majesty's Government.

18 In return for the cession to Her Majesty's Government of the right of control over 10,550 square miles of waste, cultivated, uncultivated, or forest lands, there shall be paid by Her Majesty's Government in trust for the Kabaka (upon his attaining his majority) a sum of £500, and to the three Regents collectively, *£600,* namely, to the Katikiro *£300,* and the other two Regents £150 each.

19 Her Majesty's Government agrees to pay to the Muhammedan Uganda Chief, Mbogo, a pension for life of £250 a year, on the understanding that all rights which he may claim (except such as are guaranteed in the foregoing clauses) are ceded to Her Majesty's Government.

20 Should the Kingdom of Uganda fail to pay to the Uganda Administration during the first two years after the signing of this Agreement, an amount of native taxation, equal to half that which is due in proportion to the number of inhabitants; or should it at any time fail to pay without just cause or excuse, the aforesaid minimum of taxation due in proportion to the population, or should the Kabaka, Chiefs, or people of Uganda pursue, at any time, a policy which is distinctly disloyal to the British Protectorate; Her Majesty's Government will no longer consider themselves bound by the terms of this Agreement.

On the other hand, should the revenue derived from the hut and gun tax exceed two years running a total value of £45,000 a year, the Kabaka and chiefs of counties shall have the right to appeal to Her Majesty's Government for an increase in the subsidy given to the Kabaka, and the stipends given to the native ministers and chiefs, such increase to be in the same proportional relation as the increase in the revenue derived from the taxation of the natives.

21 Throughout this Agreement the phrase 'Uganda Administration'shall be taken to mean that general government of the Uganda Protectorate, which is instituted and maintained by Her Majesty's Government; 'Her Majesty's representative' shall mean the Commissioner, High Commissioner, Governor, or principal official of any designation who is appointed by Her Majesty's Government to direct the affairs of Uganda.

22 In the interpretation of this Agreement the English text shall be the version which is binding on both parties.

Done in English and Luganda at Mengo, in the Kingdom of Uganda, on the 10th March, 1900.

H. H. JOHNSTON, Her Majesty's Special Commissioner, Commander-in-Chief and Consul-General,

on behalf of Her Majesty the Queen of Great Britain and Ireland, Empress of India.

APOLLO, Katikiro, Regent.

MUGWANYA, Katikiro, Regent.

MBOGO NOHO, his X mark.

ZAKARIA KIZITO, Kangawo, Regent.

SEBAUA, Pokino.

YAKOBO, Kago.

PAULO, Mukwenda.

KAMSWAGA, of Koki, his X mark.

(On behalf of the Kabaka, Chiefs, and people of Uganda.) Witness to the above signatures:

F. J. Jackson, Her Majesty's Vice-Consul.

J. Evatt, Lieutenant-Colonel.

James Francis Cunningham.

Alfred R. Tucker, Bishop of Uganda.

Henry Hanlon, Vicar Apostolic of the Upper Nile.

E. Bresson (for Mgr. Streicher, White Fathers).

R. H. Walker.

Matayo, Mujasi.

Latusa, Sekibobo.

Matayo, Kaima.

Yokana, Kitunzi

Santi Semindi, Kasuju.

Anderea, Kibugwe.

Sereme, Mujasi, his X mark.

Coprien Luwekula.

Nova, Jumba Gabunga.

Ferindi, Kyabalango.

Saulo, Lumana.

Yokano Bunjo, Katikiro of Namasole.

Yosefu, Katambalwa.

Zakayo, Kivate.

Hezikaya, Namutwe.

Ali, Mwenda, his X mark.

Nselwano, Muwemba.

Sernioni Sebuta, Mutengesa.

Njovu Yusufu, Kitambala, his X mark.

Kata, Nsege.

Note: The term ***"Uganda"*** is from the Swahili and means *"Land of the Ganda"*. Originally, (and as used throughout the above agreement) this term applied only to the Buganda kingdom. As British colonial control expanded outwards from this central territory, the term was retained for the whole Protectorate. The central territory was distinguished from the wider colony by using its indiginous name of Buganda.

APPENDIX F

COLONIAL OFFICE REPORTUGANDA PROTECTORATE: BUGANDA PRESENTED BY THE SECRETARY OF STATE FOR THE COLONIES TO THE BRITISH PARLIAMENT BY COMMAND OF HER MAJESTY NOVEMBER 1954

1. In recent months two new factors have emerged in Uganda. One is the agreement reached on constitutional matters at the conference between the Governor of Uganda and the Buganda Constitutional Committee appointed by the Lukiko and presided over by Sir Keith Hancock. The other is the judgment in the case brought in the Uganda High Court to test the validity of the action taken last year by Her Majesty's Government with regard to the Kabaka Mutesa II (Cmd. 9028).

2. It was announced on the 1st March that Sir Keith Hancock, Director of the Institute of Commonwealth Studies at London University, had agreed, at the invitation of the Rt. Hon. Oliver Lyttelton, now Lord Chandos, and of the Governor of Uganda, to visit the Protectorate to consult with representatives of the Baganda and with the Protectorate Government on various constitutional questions relating to Buganda. For three months, from the 24th June to the 17th September, Sir Keith Hancock presided over discussions first alone with the Constitutional Committee appointed by the Buganda Lukiko, and later with the Committee and the Governor together. This Conference took place at Namirembe, near Kampala, and resulted in complete agreement. The Conference recommended, among other things, that the Kingdom of Buganda, under the Kabaka's government, should continue to be an integral part of the Protectorate; that the conduct of public affairs in Buganda should be in the hands of Ministers; and that, while all the traditional dignities of the Kabaka should be fully safeguarded, Kabaka’s in future should be constitutional rulers bound by a Solemn Engagement to observe the conditions of the Agreements regarding the Constitution and not to prejudice the security and welfare of the Buganda people and the Protectorate. These Agreed Recommendations are attached at Appendix A.

3. The Governor, in a Statement attached at Appendix B, has made a number of separate recommendations regarding the Executive and Legislative Councils of the central Protectorate Government, as an immediate step forward to implement Her Majesty's Government's policy of constitutional development for Uganda as a whole. The Governor has recommended the introduction of a Ministerial system. The Executive Council would consist of 14 members (including the Governor) : nine of these would be Officials, six or seven of them with Ministerial status, and there would be five Ministers, of whom three would be Africans, drawn from the public. There would also be two African Parliamentary Under-Secretaries. At the same time the Legislative Council would be slightly enlarged, to permit of increased African representation for Buganda,

Busoga and one other district, and the proportion of African members would be increased to half the total. African members would sit on both sides of the House and the present balance, which gives the Government side the majority through the Governor's vote, would be preserved.

4. In the light of the Governor's recommendations the Buganda Constitutional Committee have agreed to recommend to the Lukiko that Baganda members should be elected to the Protectorate Legislative Council by the Lukiko.

5. The effect of the constitutional proposals made in the Governor's Statement and the Agreed Recommendations taken together is explained in a memorandum issued by the Namirembe Conference and attached at Appendix C.

6. The Governor's recommendations for the Legislative and Executive Councils are accepted by Her Majesty's Government who propose that they should be put into effect as early as possible. The Agreed Recommendations dealing with Buganda are also acceptable to Her Majesty's Government and are now being placed before the Great Lukiko. The implementation of these two sets of recommendations should settle satisfactorily the points of difference which have arisen from time to time between the Buganda and the Central Protectorate Governments; in particular the willing acceptance of the continued integration of Buganda with the Protectorate as a whole, which should be ensured under these proposals, together with the transfer of executive power and responsibility from the person of the Kabaka to his Ministers will, it is hoped, create a new and healthier political situation.

7. Her Majesty's Government are greatly indebted to Sir Keith Hancock, whose wise and patient guidance contributed much to the success of the Namirembe Conference.

8. The second new factor is the recent judgement of the Uganda High Court. The plaintiffs sought five declarations. Those directly relating to the withdrawal of recognition from the Kabaka were the first and fifth: -

"1. A declaration-

(a) That H.H. Mutesa II is, and has at all material times since 30th November 1953, been native ruler of the Province of Buganda....;

or alternatively

(b) That H.H. Mutesa II is, and has at all material times since 17th December, 1953, been, native ruler of the Province of Buganda.....

5. A declaration (a) that the purported withdrawal by H.E. the Governor of Uganda of recognition of H.H. Mutesa II as native ruler of the Province of Buganda was unlawful, ultra vires and void or alternatively (b) that such withdrawal was of no effect as from the 17th December 1953."

9. The Chief justice refused all the declarations asked for by the Plaintiffs. He held that the 1900

Agreement did not give the Kabaka a legal right to recognition enforceable by the Court. In case he was held wrong as to this on appeal, he said it, was convenient that he should deal with the question whether or not any right on the part of Her Majesty's Government to withdraw recognition under Article 6 of the Agreement had arisen on the 30th November, 1953. He expressed the view that a right under that Article to withdraw recognition had not arisen on the 30th November.

10. He said: - "At that stage" (i.e. November) "a position had been reached wherein the Secretary of State had made known his decisions on policy, and the Kabaka was called upon to refrain from opposition to the decisions on policy, notably on the question of time-table for independence, whether that opposition be expressed by public pronouncement to the Lukiko or by consultation with the Lukiko, before signing the undertakings which the Kabaka had been called upon to give. The Kabaka's refusal to abide by the decisions on policy as communicated to him, clearly, at that stage, constituted disregard on his part of his duty under the terms of the Agreement to acknowledge and abide by the over-rule of the Crown through the Protectorate Government, which by the Agreement had been acknowledged. It is manifest that the Kabaka having evinced intention to pursue a disloyal policy it was clearly within the right of Her Majesty's Government to exercise the rights reserved by Article 20 of the Agreement and declare the Agreement to be at an end. Again there could have been a withdrawal of recognition as an Act of State. In fact withdrawal of recognition was declared, and declared to be made, under Article 6 of the Agreement."

11. As the Chief Justice indicated, Her Majesty's Government did not terminate the Agreement under Article 20: nor did they claim to withdraw recognition as an Act of State independent of the terms of the Agreement. They regarded themselves as bound by the terms of that Agreement and as entitled by reason of the Kabaka's conduct to withdraw recognition under Article 6.

12. The termination of the Agreement under Article 20 would have meant that neither the Crown nor the Kabaka, Chiefs and People of Buganda would any longer have been bound by any of the provisions of the Agreement or entitled to rely on their rights under that Agreement. This extreme step Her Majesty's Government were not disposed to take and did not take.

13. By Article 6 of the Agreement Her Majesty's Government agreed to recognise the Kabaka, of Buganda as the native ruler of the province of Buganda under Her Majesty's protection and over-rule "so long as the Kabaka, Chiefs and People of Buganda shall conform to the laws and regulations instituted for their governance by Her Majesty's Government, and shall cooperate loyally with Her Majesty's Government in the organisation and administration of the said Kingdom of Buganda." Action by Her Majesty's Government under this Article did not consequently involve any question of the termination of the whole Agreement.

14. The Chief Justice held that reliance upon Article 6 was mistaken and that a right to withdraw

recognition under that Article had not arisen on the 30th November, 1953 on two grounds; firstly, that to entitle Her Majesty's Government to withdraw recognition under Article 6, there had to be a failure not on the part of the Kabaka alone but on the part of the Kabaka. Chiefs and People to comply with that Article; and secondly, that the Kabaka's conduct did not involve failure to cooperate loyally in relation! to "organisation and administration" of the Kingdom of Buganda.

15. Thus it was the view of the Chief Justice that the conduct of Mutesa II entitled Her Majesty's Government to take action under the Agreement but that on his interpretation Article 6, Her Majesty's Government were mistaken in relying upon that Article.

16. This judgment and the constitutional proposals for Buganda (which if accepted by the Lukiko will settle satisfactorily the points of difference which arose last year) create a new situation in which there is both need and opportunity for a new approach to the question of the Kabaka. Her Majesty's Government, after full consultation with the Governor, have therefore decided that subject to certain conditions and after a suitable interval the Lukiko should be given the opportunity to choose whether a new Kabaka should be elected or whether Kabaka Mutesa II should return as Native Ruler of Buganda. These conditions are as follows:

(1) The Agreed Recommendations of the Namirembe Conference should be accepted as a whole by the Great Lukiko.

(2) Her Majesty's Government and the Lukiko should agree the terms of the Solemn Engagement recommended by the Namirembe Conference to be entered into by the Kabaka. The amendments and additions to the 1900 Agreement to give effect to the Agreed Recommendations should also be agreed by Her Majesty's Government and the Great Lukiko and the amending Agreement should be formally executed by the Governor on behalf of Her Majesty's Government and by the Regents and representatives of the Lukiko on behalf of Buganda and be brought into effect.

(3) In order that the new arrangements may be well established before it is called on to make the decision, the choice of the Great Lukiko whether Kabaka Mutesa II should return as Native Ruler or whether a new Kabaka should be elected should be made nine months after the new arrangements have been brought into effect. Her Majesty's Government will however be glad to shorten the period if they are convinced before the end of it that the constitutional arrangements have become well established and are working satisfactorily. Her Majesty's Government will make every effort to ensure that they are brought into effect by the 31st March next year.

17. When the choice of the Lukiko has been made, the Kabaka will be required to enter into the Solemn Engagement and to sign and thereby confirm the amending Agreement before he is recognised by Her Majesty's Government.

STATEMENT BY THE GOVERNOR

This is the statement referred to in Article 43 of the Agreed Recommendations of the Namirembe Conference

The Secretary of State for the Colonies on behalf of H.M. Government stated in the House of Commons on the 23rd February, 1954, that "the long-term aim of H.M. Government is to build the Protectorate into a self-governing state" and that "when self-government is achieved the government of the country will be mainly in the hands of Africans." He also stated that "when the time for self-government eventually comes H.M. Government will wish to be satisfied that the rights of the minority communities resident in Uganda are properly safeguarded in the constitution, but this will not detract from the primarily African character of the country."

2. In accordance with this statement of policy the ultimate aim of constitutional development in Uganda is a responsible Government answerable to an elected Legislature of the whole Protectorate, with proper safeguards in the constitution for the rights of the minority communities resident in Uganda. As an immediate stop towards this eventual aim I propose to make certain recommendations to the Secretary of State.

3. I am anxious that members of the public should be more closely associated than they are at present in the formation and execution of policy. Not only is this desired by many members of the public; I am convinced that by bringing the Government closer to the people such a step would promote the orderly and smooth progress of the country.

4. I accordingly propose to make the following recommendations to the Secretary of State:

(1) A Ministerial system should be introduced.

(2) Seven members of the public, of whom five would be Africans, should be invited to join the Government and to sit on the Government side of the Legislative Council.

(3) Of these seven persons joining the Government, five, of whom three would be Africans, would be members of the Executive Council with the status of Ministers. Of these five Ministers, two -one African and one other- would have full executive responsibility under the Governor for groups of departments; one, an African, while he would be a full member of the Executive Council, would be an Assistant Minister dealing under the Minister concerned with the large portfolio of Social Services covering Education, Health, African Housing and Labour; while the other two would not have executive responsibility, but would, I should hope, concern themselves with particular spheres of Government activity. In addition there would be two African Parliamentary Under-Secretaries.

(4) The selection of these Ministers and Parliamentary Under-Secretaries and the allocation of responsibilities to them would be in the Governor's discretion. He would choose them, on grounds of merit, either from the representative side of the Legislative Council, at which he should, I

suggest, look particularly, or from the cross-bench or from outside the Council.

(5) There would be nine official members of the Executive Council, as against ten at present, of whom six or seven would have Ministerial status. All these six or seven other than the Attorney General, who is the Government's principal Legal Adviser, would have executive responsibility for departments.

(6) The membership of the Council, including the Governor, would thus be fifteen, with nine official members other than the Governor and three Africans and two others drawn from the general public as against one African and four others at present.

(7) The Executive Council would be the principal instrument of policy and the members would be required publicly to support any policy decided upon by it. The Governor would consult the Executive Council on all important matters save in exceptional circumstances and, although he would continue to have the constitutional right to act against the advice of members of Executive Council, he would not, I should assume, do so save in exceptional circumstances.

(8) Ministers with executive responsibility, whether officials or members of the general public, would have the function under the Governor of forming and directing policy within their spheres of responsibility. But heads of departments would retain their full present status and responsibility for the administration of their departments.

(9) Parliamentary Under-Secretaries would have the functions of assisting their Ministers in the presentation of Government measures in Legislative Council, in answering questions and in debate; of assisting their Ministers generally in their work, including the formation of policy; and of travelling round the country and keeping in close touch with the public in connection with the work with which they were concerned.

5. The Legislative Council has recently been reorganised and enlarged and now has 56 instead of 32 members in addition to the Governor

APPENDIX G
AGREED RECOMMENDATIONS OF THE NAMIREMBE CONFERENCE

CONSTITUTIONAL ARRANGEMENTS IN BUGANDA

CHAPTER I: CONSTITUTIONAL ARRANGEMENTS IN BUGANDA.

Article 1

The Kingdom of Buganda under the Kabaka's Government shall continue as heretofore to be an integral part of the Protectorate of Uganda.

Article 2

Wheresoever in these Articles the term "Buganda Government" appears, it shall bear the same meaning as "Kabaka's Government".

Article 3

The Kabaka shall succeed as heretofore to the throne of Buganda by descent and election of the Great Lukiko. The name of the person chosen by the Great Lukiko must be submitted to Her Majesty's Government for approval, and no person shall be recognised as Kabaka of Buganda whose election has not received the approval of Her Majesty's Government.

Article 4

The Kabaka shall retain all his traditional titles and dignities and shall continue to be the symbol of unity of the people of Buganda and between their past, present and future; and all rules governing ceremonies and customs appertaining to such dignities of the Kabaka shall be observed.

Article 5

Such constitutional reforms as may be brought into effect shall be consistent with the maintenance of the proper interests and dignity of the Royal House.

Article 6

Permanent provision shall be made whereby the Namasole, the Sabalangira and the Speaker of the Great Lukiko shall be appointed as Regents in the event of the infancy, absence or total incapacity of the Kabaka.

Article 7

Clan and succession cases shall be determined as heretofore, subject to the modifications shown in Appendix A.

Article 8

The conduct of the affairs of the Kabaka's Government shall be the responsibility of Ministers. All public acts done by the Kabaka's Government shall, so far as law and custom so ordain be done in

the name of the Kabaka. Formal communications with the Protectorate Government shall be transmitted to and by the Buganda Ministers in accordance with this arrangement.

Article 9

The constitutional powers of the Kabaka shall, as far as is practicable, be exercised by the promulgation of written instruments signed by the Kabaka and counter-signed by a Minister. To signify final enactment, laws passed by the Great Lukiko shall be signed by the Kabaka.

Article 10

A Minister shall be legally and politically responsible for every act commanded or authorised to be done by him or by an instrument to which he has put his signature.

Article 11

Each Minister shall be politically responsible for the conduct of affairs in his own Department and the Ministers shall together be responsible as a Ministry within the functions assigned to the Kabaka's Government.

Article 12

There shall be six Ministers, namely the Katikiro, the Omulamuzi, the Omuwanika, the Minister of Health, the Minister of Education and the Minister of Natural Resources who shall together constitute the Ministry. The designations and departmental responsibilities of the six Ministers may be varied within the sphere of responsibility of the Ministry.

Article 13

The Ministers shall be appointed in the following manner: -

(1) Names of candidates for the office of Katikiro, shall be submitted to the Speaker of the Great Lukiko by a given date. Candidates must be nominated by not less than five members of the Great Lukiko.

(2) The list of candidates will then be presented by the Speaker to the Governor, who will be entitled to remove the name of any candidate whom he deems to be unacceptable.

(3) The list of candidates, excluding any names removed by the Governor, will then be placed before the GreatLukiko. Five week-days after the day upon which the names of candidates are placed before it by the Speaker, the Great Lukiko will proceed to elect by secret ballot from the list placed before it a person (hereinafter called the Katikiro Designate) who will be charged with the duty of forming a Ministry.

(4) Names of candidates for ministerial will then be submitted to the Speaker of the Great Lukiko, each candidate requiring to be nominated by not less than three members of the Great Lukiko. Any member of the Great Lukiko may nominate up to three candidates. The Katikiro Designate will be entitled to add further names to the list.

(5) Three week-days after the day on which names of candidates for ministerial office have been placed before it by the Speaker, the Great Lukiko will elect by secret ballot forty persons.
(6) The Katikiro Designate, after consultation with the Governor and such other persons as he thinks fit, will choose five ministerial colleagues from among the list of persons elected by the Great Lukiko. At least one of the persons chosen by him must be a serving Saza Chief.
(7) After the Governor has signified his approval of the persons thus chosen, the Kabaka will formally appoint the Katikiro Designate as Katikiro by handing him the Ddamula in accordance with custom, and will also formally appoint his five colleagues as Ministers. The Kabaka will then hand to each of the six Ministers the seal of his office.
(8) A Minister need not be a member of the Great Lukiko at the time of his appointment to office; if he is not already a member of the Great Lukiko he will become a member of the Great Lukiko *ex official* if he is appointed Katikiro, Omulamuzi or Omuwanika, and by nomination by the Kabaka if he is appointed one of the other three Ministers.

Article 14

The duration of a Lukiko, and the term of office of A Ministry appointed at the beginning of the life of a Lukiko, shall be five years. The term of office of a Ministry appointed other than at the beginning of the life of a Lukiko, shallbe such period as remains until the expiry of the life of the Lukiko. The life of the Lukiko that is in existence when these Articles come into effect shall be prolonged from four to five years.

Article 15

A Ministry shall tender its resignation to the Kabaka through the Katikiro if a vote of no confidence in the Ministry on an important matter is proposed by twenty members and is carried in the Great Lukiko with the support of not less than two-thirds of the whole membership of the Great Lukiko. Fourteen days' notice shall be given of any motion of no confidence in the Ministry. It shall lie within the discretion of the Speaker of the Great Lukiko, to determine whether a motion of no confidence raises an issue that is important enough to justify its being debated.

Article 16

A Ministry may be collectively dismissed by the Governor in Council if in the opinion of the Governor in Council the Ministry has failed to accept or to act upon formal advice given to it by the Governor in Council thereby prejudicing peace, order or good government. Upon the dismissal of a Ministry by the Governor in Council the offices of the Ministers will become vacant.. The Governor shall notify the Kabaka accordingly, whereupon the Katikiro shall return the Ddamula and the Ministers shall return their seals of office to the Kabaka.

Article 17

(1) A Minister shall be dismissed by the Kabaka, upon conviction of a criminal offence for which the punishment is imprisonment without the option of a fine or which involves moral turpitude; or upon the production of a medical certificate that the Minister is incapacitated by reason of physical or mental infirmity from discharging the duties of his office.

(2) If in the opinion of the Katikiro a Minister has failed to carry out the policy or decisions of the Ministry either persistently or in an important matter he may propose to the Ministry that the said Minister be dismissed. If a majority of votes is cast in favour of the proposal (the Katikiro having an original and a casting vote), the Katikiro may dismiss the said Minister.

Article 18

The Katikiro shall give the Kabaka all necessary information on matters of public importance.

Article 19

Ministers shall be assisted by Permanent Secretaries who, in the case of the Departments administering services to be transferred to the Buganda Government, may be officers seconded by the Protectorate Government.

Article 20

The Permanent Secretary to the Katikiro, who will be who will be selected either from among Saza Chiefs or from among other senior officers of the Kabaka's Government shall be the Head of the Buganda Civil Service.

Article 21

There shall be established a Buganda Appointments Board, consisting of the Permanent Secretary to the Katikiro as chairman and four other members who will be persons experienced in public affairs but not at the time of their appointment actively engaged in politics. When the Board is constituted for the first time, the appointment of all of the members shall be made by the Kabaka on the advice of the Katikiro, subject to the approval of the Governor. Subsequent appointments of its members other than the chairman shall be made in the manner aforesaid; but the chairman, who will hold his office by virtue of his appointment as Permanent Secretary to the Katikiro, shall be appointed to his departmental post in the same manner as other Permanent Secretaries. Members other than the chairman shall hold office for five years and may be re-appointed; but arrangements for the rotation of membership shall be made. Members shall be dismissible by the Kabaka on the grounds specified in Article 17 (1) above.

Article 22

In order that officers of the Kabaka's Government shall stand outside the sphere of politics and shall have proper security of tenure, the Appointments Board and not the.Ministers shall be the authority

that will make decisions regarding the appointment, promotion, transfer, dismissal and disciplinary control of all public officers serving under the Kabaka's Government, including Saza Chiefs but not including officers seconded by the Protectorate Government. Appointments of Chiefs and Permanent Secretaries shall be made by the Kabaka in conformity with the decisions of the Appointments Board. The approval of the Governor shall be required for the appointment and dismissal of Permanent Secretaries; but his approval of the decisions of the Appointments Board shall not be withheld save in exceptional circumstances. The Permanent Secretary to the Katikiro shall be dismissible by the Kabaka upon the recommendation of the Katikiro, subject to the approval of the Governor, should he fail to carry out the policy of the Kabaka's Government in matters other than those falling wholly within the purview of the Appointments Board.

Article 23

The regulations to be followed by the Appointments Board in the matters falling within it's jurisdiction shall be agreed between the two Governments. If either Government considers that the regulations have been infringed in any way, the two Governments shall consult together. If the matter cannot be settled by such consultation, a committee to examine the matter shall be set up in consultation between the two Governments, should either Government so desire.

Article 24

The Saza, Gombolola and Miruka Chiefs shall remain the backbone of public administration in Buganda and shall be responsible to the Katikiro, subject to the Governor's ultimate authority, for the maintenance of law and order. As soon as is practicable, the Protectorate Government shall put at the disposal of each Saza Chief, either in or in proximity to his saza, a unit of the Protectorate Police to assist in the maintenance of law and order. The Protectorate Government shall arrange training courses for the Buganda Government Police with a view to raising standards of efficiency.

Article 25

The composition and method of election of the Great Lukiko shall for the present time remain unaltered. Before the next general election of the Great Lukiko, however, consideration shall be given to the questions whether the present system whereby three representatives are elected from each saza should be varied in cases where there are large differences in population between sazas; and whether the requirement that representatives of a saza must be resident in the saza should be abolished.

ArticIe 26

There shall be a Speaker of the Great Lukiko, who shall receive a salary to be determined by law. The first business of the Great Lukiko after a general election shall be the election of a Speaker. The Speaker shall be chosen from among former Buganda Ministers, former Saza Chiefs or other

persons who have had long experience of membership of the Great Lukiko. The Great Lukiko shall elect a Deputy Speaker with similar qualifications from among its own members. Either the Speaker or the Deputy Speaker shall preside at every meeting of the Great Lukiko. If the Speaker is acting as a Regent the Deputy Speaker shall preside.

Article 27

There shall be the following Committees of the Great Lukiko: Finance Committee, Public Works Committee, Education Committee, Health Committee, Natural Resources Committee, Community Development and Local Government Committee and such other committees, permanent or, for a particular purpose, as the Great Lukiko deems expedient. Each permanent Committee shall be under the chairmanship of the appropriate Minister and shall have attached to it the Permanent Secretary or Secretaries of the Department or Departments concerned and such other administrative and technical officers and other persons as it requires for its efficient working. Officers or other persons attached to a Committee shall have the right to speak but not to vote. It shall be the function of each Committee to study policy in the field of government with which it is concerned, and to give advice to the Minister responsible. The existence of these committees shall in no wise detract from the individual responsibility of Ministers for the conduct of their Departments or from the responsibility of the Ministry as a whole for the general course of policy in matters committed to it. The recommendations in this Article do not affect the position of the Standing Committee.

Article 28

Every Kabaka shall henceforward on becoming Kabaka enter a Solemn Engagement with the Great Lukiko and people of Buganda and, with Her Majesty's Government, formally accepting and agreeing to be bound by these Articles and by the Uganda Agreement, 1900, and any amendments thereto, and undertaking not to prejudice the security and welfare of his people and the Protectorate.

Article 29

So long as the Kabaka shall observe his Solemn Engagement, Her Majesty's Government agrees to recognise the Kabaka as the ruler of the Kingdom of Buganda.

CHAPTER II: RELATIONSHIP OF BUGANDA WITH THE PROTECTORATE

Article 30

The functions entrusted to the Kabaka's Government shall be formally defined in a document that shall be brought into operation simultaneously with the Agreement, amending or supplementing' the Uganda Agreement, 1900, which will be negotiated after the recommendations of this Conference have been accepted by Her Majesty's Government and the Great Lukiko. At the outset these functions shall be those at present carried on by the Kabaka's Government, together with

those listed in paragraph 2 of the Memorandum on Constitutional Development and Reform in Buganda, issued in March, 1953. Local government in the sazas shall be the responsibility of the Buganda Government, with the advice and assistance of the Protectorate Government; the position in townships and trading centres will be examined in accordance with Article 47. In community development the Buganda Government and its officers shall work in co-operation with the Protectorate Community Development Department. The list of functions may subsequently be varied by agreement between the Protectorate and Buganda Governments.

Article 31

The Buganda Government shall administer the services for which it is responsible in accordance with the general policy of the Protectorate Government and (subject to Article 5 of the Uganda Agreement, 1900) in conformity with the lawsgoverning those services. It shall initiate policy in the spheres of responsibility thus committed to it, provided that its policies shall not be opposed to the general policies of the Protectorate Government. In the formulation of Protectorate policies in relation to those services from time to time, expression will be given to the views of the people of Buganda by the representatives of Buganda on the Legislative and Executive Councils and by the representatives of the Buganda Government on the Consultative Committees referred to in Article 32 below.

Article 32

There shall be established Consultative Committees on education, medical and health questions, natural resources, local government and community development. Buganda shall be represented by the Minister and Permanent Secretary concerned and by two or three unofficial members of the Great Lukiko Committee dealing with the subject. The Protectorate shall be represented by the Member of Executive Council, the Parliamentary Under-Secretary (if any) and the head or heads of the Departments concerned, and the Resident, Buganda.

Article 33

The functions of Consultative Committees shall be:

(a) to enable the Buganda Government to express its views on Protectorate policy;

(b) to secure that Protectorate and Buganda policy are not in conflict;

(c) to discuss all matters of common interest.

The Committees shall meet at regular intervals.

Article 34

The Protectorate Government, through the Departments concerned, shall be entitled to inspect the administration of the services to be transferred.

Article 35

Officers of the Protectorate Government shall be seconded to the Buganda Government for the purpose of giving assistance in the administration of the services to be transferred, under the conditions envisaged by paragraphs 4 and 5 of the Memorandum on Constitutional Development and Reform in Buganda, issued in March, 1953.

Article 36

The functions of officers of the Protectorate Government (other than seconded officers) in their relations with the Buganda Government and its officers shall be those of advice and assistance.

Article 37

If, upon any disagreement arising between the two Governments, differences cannot be resolved by use of the machinery of a Consultative Committee, the matter shall be referred to a joint meeting, under the chairmanship of the Governor, of Members of the Executive Council and the Buganda Ministers. Such a meeting shall not only have regard to the general interests ofthe Protectorate but shall also take fully into account and give due weight to the views of Buganda. Such a meeting may also, if necessary, be convened in order to resolve any disagreement arising out of a reply by the Governor to a resolution of the Great Lukiko, if the matter cannot be settled by the ordinary process of consultation between the Buganda Minister concerned and the Resident.

Article 38

If, after the exhaustion of the above consultative processes, an issue remains unresolved which, in the opinion of the Governor in Council, affects peace, order or good government, it shall be open to the Governor in Council to give formal advice to the Buganda Ministry. If the Ministry then refuses or fails to act in accordance with such advice, it shall be open to the Governor in Council to dismiss the Ministry, as was explained in Article 16. The Governor shall be entitled to act in his discretion in agreeing to laws passed by the Great Lukiko, although upon any question arising out of any such law which he considers to be a question of principle he will consult with his Executive Council.

Article 39

The Resident shall be the Governor's representative in dealing with the Kabaka's Government. His functions shall be to advise and assist the Kabaka's Government, to keep it informed of Protectorate Government policy in so far as this is not covered by the Consultative Committees, and to ensure that the Protectorate Government is kept fully aware of its views and of important developments in Buganda. He shall be assisted by a Deputy Resident.

Article 40

A programme for the development of local government bodies responsible to the Buganda Government in the sazas, in accordance with paragraph 14 of the Memorandum on Constitutional

Development and Reform in Buganda issued in March, 1953, shall be drawn up by the Katikiro and Resident in consultation and considered by the Consultative Committee on Local Government referred to in Article 32. After this programme has been approved by the Buganda and Protectorate Governments and the necessary legislation passed by the Great Lukiko, the Katikiro and Resident shall consult regularly together to ensure that the development of local Government bodies in Buganda proceeds according to the approved programme. The Senior Assistant Residents and Assistant Residents shall advise and assist the Chiefs, and through them the Councils, in the development of local government bodies in accordance with the approved programme, as part of their general function of advising the Chiefs in the different areas of Buganda (East and West Mengo, Masaka and Mubende).

It shall be the aim of policy that, when the system of local government has been firmly established in Buganda, with the devolution by the Buganda Government to the local government bodies in Buganda of appropriate financial and administrative responsibility, the function of guiding and inspecting these local government bodies shall be assumed by the Buganda Government, with whatever secondment of Protectorate officers may at that time be necessary for the purpose. A review of progress in local government in Buganda to determine whether the Buganda Government should then assume this responsibility shall form part of the review, to be undertaken in six years' time, referred to in Article 48. Meanwhile, steps shall be taken as soon as is practicable, in consultation with the Buganda Government, to appoint suitably qualified, Baganda as Assistant Residents so that these officers may be among those seconded or transferred to the Buganda Government when this responsibility is assumed by the Buganda Government.

Article 41

The supervisory powers of the Protectorate Government over expenditure by the Buganda Government shall be limited to approval of the annual estimates and of schedules of supplementary provision submitted quarterly, to audit of accounts and to questions affecting financial grants and loans made by the Protectorate Government to the Buganda Government.

Article 42

The financial needs of Buganda shall be reviewed from time to time by the Protectorate and Buganda Governments so that as far as practicable the grants made to Buganda by the Protectorate Government may be on a firm basis for a period of not less than three years. In accordance with paragraph 6 of the Memorandum on Constitutional Development and Reform in Buganda, issued in March, 1953, the Protectorate Government will ensure that the Buganda Government is placed in no worse position financially than at present by accepting the transfers of services which is to take place in accordance with that Memorandum. The Protectorate Government recognises the need for

adequate remuneration of Buganda Government servants in order that officers of the right calibre may be attracted.

In view of the decision already taken by the Great Lukiko to impose graduated taxation in Buganda, the Protectorate Government, apart from the other measures referred to in paragraph 6 of the Memorandum of March, 1953 and apart from such grants as may be agreed upon between the two Governments in respect of the transfer of services, will recommend that the rate of poll tax payable to it in Buganda shall be reduced from Shs. 11/25 (i.e., Shs. 15/- less the 25 per cent rebate) to Shs. 6/- per annum (on the understanding that this reduction will be absorbed in the graduated tax payable to the Buganda Government). The protectorate Government will also recommend that payments shall be made to the Buganda Government in respect of Crown Land revenue and mining rents and royalties on Crown Land on the same basis as such payments are already made to the District Councils in the rest of the Protectorate. The Protectorate Government will examine the position with regard to Crown Land in Buganda with a view to determining whether the status of any part of that Crown Land can be modified.

Article 43

The Buganda Constitutional Committee recommends in the light of His Excellency the Governor's recommendations to Her Majesty's Government which are set out in Appendix B to these Articles, and the pledge on East African Federation there referred to, that the Great Lukiko agree to the representation of Buganda on the Legislative Council of the Protectorate. The Committee recommends that the representatives of Buganda be elected by the Great Lukiko by secret ballot, and that after the election the Great Lukiko shall assign each of the members elected to a particular area.

CHAPTER III: CITIZENSHIP

Article 44

Her Majesty's Government shall be requested to consider the question of creating a citizenship of Uganda, whereby a sense of unity may be fostered.

CHAPTER IV: ADMINISTRATION OF JUSTICE ANDLOCAL ADMINISTRATION IN BUGANDA

Article 45

The work of separating the Judiciary from the Executive shall be proceeded with immediately.

Article 46

A committee including legal experts shall be appointed to examine means by which the court system in Buganda can be gradually developed into a system of courts of common jurisdiction in

which no distinction will be made between persons of different races or between the inhabitants of urban and rural areas. The committee will also examine methods whereby justice may be dispensed as expeditiously as possible and whereby facilities for legal training may be provided for Africans.

Article 47

A committee including local residents and representatives of the Buganda Government shall be set up to consider, as a question of urgency, the establishment of a new local authority, under the Buganda Government, for the administration of the Kibuga. This committee will be instructed to explore means by which such an authority may include representatives of all sections of the community resident in the Kibuga and may have jurisdiction, for local government purposes, over all sections of the community resident in the Kibuga. After it has completed its work on the Kibuga, this committee, with some revision of membership, will be instructed to report on the establishment of local authorities representing all sections of the community in townships and trading centres in Buganda (other than Kampala, Entebbe, Masaka and possibly Mubende) and to advise on the means of bringing them under the Buganda Government.

CHAPTER V: REVIEW

Article48

In order that a period of stability may be secured, no major changes in the constitutional arrangements prescribed in the foregoing. Articles shall be introduced for a period of six years, after which there shall be a review; that is, in 1961, assuming that the arrangements recommended in these Articles are brought into force in 1955.

CHAPTER VI: UGANDA AGREEMENT, 1900

Article 49

The Uganda Agreement, 1900, shall be amended to the extent that such amendment becomes requisite upon the approval of the foregoing Articles by the parties concerned, but shall otherwise continue in its present form.

Each Member of the Namirembe Conference approves these Agreed Recommendations by appending his signature. The Governor agrees to recommend them to Her Majesty's Government. The members of the Buganda Constitutional Committee agree to recommend them to the Great Lukiko.

The Buganda Constitutional Committee:

M. MUGWANYA	Y. KYAZE.
A. K. KIRONDE	THOMAS A. K. MAKUMBI.
E. M. K. MULIRA	E. B. KALIBALA.

J. P. MUSOKE Y. K. LULE.

J. K. MASAGAZI + J. KIWANUKA.

J. G. SENGENDO-ZAKE Mgr. J. KASULE.

A. B. COHEN,

Governor.

W. K. HANCOCK, *Chairman.*

S. W. KULUBYA.

J. P. BIRCH.

S. A. DE SMITH,

E. Z. KIBUKA,

Secretaries.

15th September, 1954

EXPLANATORY MEMORANDUM ISSUED BY THE NAMIREMBE CONFERENCE

The Agreed Recommendations of the Namirembe Conference are a short document, but they embody three months of intense thought and discussion. The work fell into two stages:

(1) from 24th June to 28th July, during which time the Buganda Constitutional Committee met alone under the chairmanship of Professor Hancock and with Mr. S. A. de Smith. The Buganda Constitutional Committee consisted of:

Mr. M. MupVanya, Omulamuzi.

Bishop J. Kiwanuka.

Mr. A. K. Kironde.

Dr. E. Kalibala.

Mr. E. M. K. Mulira.

Mgr. J. Kasule.

Mr. T. A. K. Makumbi.

Fr. J. K. Masagazi.

Mr. Y. K. Lule.

Mr. J. G. Sengendo-Zake.

Mr. Y. Kyaze.

Mr. J. P. Musoke, Saza Chief, Kyambalango.

Mr. E. Z. Kibuka-Secretary.

The Committee also held meetings at Mengo under the chairmanship of Mr. M. Mugwanya,

Omulamuzi.

(2) from 30th July to 17th September, during which time the Committee held discussions with the Governor and two members of his Executive Council, Mr. J. P. Birch, the Resident, and Mr. S. W. Kulubya.

These meetings, which were also under the chairmanship of Professor Hancock, were called the Namirembe Conference. Forty-nine, meetings in all were held under the chairmanship of Professor Hancock.

2. The forty-nine Articles which make up the recommendations are not the report of an aloof expert or body of experts. They are the agreed proposals of men closely concerned with the public life of Buganda and the Protectorate. By signing the Articles the Governor has undertaken to recommend them to Her Majesty's Government and the Buganda Constitutional Committee has undertaken to recommend them to the body from which it derives its authority, namely the Great Lukiko.

3. The Articles are divided into the following chapters: -

Chapter I- Constitutional Arrangements in Buganda.

Chapter II- Relationship of Buganda with the Protectorate.

Chapter III-Citizenship.

Chapter IV- Administration of Justice and Local Administration in Buganda.

Chapter V- Review.

Chapter VI- Uganda Agreement. 1900.

Chapters III, V and VI each consist of one Article only; Chapters I and II contain the greatest number of Articles.

CHAPTER I

4. Article 1 declares that the Kingdom of Buganda under the Kabaka's Government shall continue as heretofore to be an integral part of the Protectorate of Uganda. Article 2 declares that the term "Buganda Government", wherever it is used shall bear the same meaning as "Kabaka's Government". The Articles immediately following emphasise the monarchical constitution of Buganda and the traditional status of the Kabaka.

5. In recent years political development has been going forward in Buganda and the Great Lukiko now has a majority of elected members. The Conference has had to consider how to safeguard the dignity of the Kabaka's office in these circumstances. The Buganda Constitutional Committee decided to recommend that this should be done by placing responsibility for the conduct of public affairs in the hands of the Kabaka's Ministers so that if mistakes are made, the Ministers and not the Kabaka himself will bear the responsibility for them. Articles 8 to 11 lay down the methods and procedures by which this purpose is achieved. Each Minister will be individually responsible for

the conduct of policy in his own department and the Ministry will together be responsible for the acts of the Kabaka's Government.

6. The Kabaka will formally appoint the Ministry by handing the Ddamula to the Katikiro, in accordance with custom, and by handing to each Minister the seal of his office. Before formal appointment takes place, however, certain things must be done to ensure that the Ministers will be men who possess the confidence of the country. Article 13 establishes a procedure which may appear at first sight to be rather, complicated but in practice the procedure will prove easy to understand and to work.. The Lukiko elects the Governor approves, the Kabaka appoints the Ministry.

7. The arrangements recommended in Article 13 for the formation of a Ministry suit the conditions of the present time, in which political parties are still unformed or in a very early stage of formation. But the arrangements will also remain workable when political parties have been firmly established. However, if and when that time comes, it will be open to the Protectorate and Buganda Governments to consider together whether a different system should be established of finding a Ministry which possesses the confidence of the Lukiko.

8. Great care has been taken to ensure stability of Government. Under the recommendations, a Ministry, like the Lukiko itself, will be appointed for five years. During this period an individual Minister can be dismissed by the Kabaka or the Katikiro only in exceptional cases. Only in exceptional cases (Articles 15 and 16) can a Ministry be obliged to tender its resignation to the Kabaka or be dismissible by the Governor in Council. The former contingency would arise if the Ministry were defeated on a motion of no confidence in an important matter by a two-thirds majority of the whole Lukiko. The latter contingency would arise if a Ministry failed to accept or to act upon formal advice tendered to it by the Governor in Council, thereby endangering peace, order or good government. The Articles in Chapter II establish a new system of consultation between the Protectorate and Buganda Governments, which will in practice enable them to iron out any difficulties and differences, thus making it unlikely that a situation could arise in which the Governor in Council would have to consider tendering formal advice.

9. The Ministers, in assuming responsibility for the conduct of policy of the Buganda Government, will require the support of a strong civil service; and each of the Ministers will be assisted by a Permanent Secretary (Article 19). Permanent Secretaries and all other civil servants must have both security of tenure and the freedom to carry out their administrative duties without political interference, subject of course to the control of Ministers in matters of policy. It is most important that the appointment, transfer, dismissal and. disciplinary control of civil servants should be free from all danger or suspicion of political pressure or influence. For this reason these matters are put

into the hands of an Appointments Board, to be appointed by the Kabaka on the advice of the Katikiro and with the approval of the Governor (Articles 21 to 23). The Appointments Board will act in accordance with Regulations drawn up by agreement between the Protectorate and Buganda Governments and will have the power to make decisions on appointments and the other matters concerned. The appointments Board will be under the chairmanship of the Permanent Secretary to the Katikiro, who will be the Head of the Buganda Civil Service. It will have four other members experienced in public affairs, but not actively engaged in politics. Appointments of Chiefs and Permanent Secretaries to departments will be made by the Kabaka in accordance with the decisions of the Appointments Board, the Governor's approval being required only in the case of Permanent Secretaries, although such approval will not be withheld save in exceptional circumstances.

10. These arrangements for public administration in Buganda will ensure continuity with the past. The Saza, Gombolola and Miruka Chiefs will remain the backbone of public administration and will be given the support of the Protectorate Police which they require for the fulfillment of their responsibilities (Article 24). At the same time the departments of the Kabaka's Government at Mengo (including the three new ones that will be set up in fulfilment of the policy agreed upon in March, 1953) will have the reliable staff which they need for the performance of their responsibilities in the future. In Article 42 in Chapter II the Protectorate Government recognises the need for adequate remuneration of. Buganda Government servants in order that officers of the right calibre may be attracted.

11. The Kabaka's Government needs to be efficient. It needs also to keep in close touch with the Lukiko which has elected it and whose confidence it must strive to retain. Members of the Lukiko themselves have a contribution to make in the formation of policy on such important subjects as finance, education, health, local government, etc. For this reason, Article 27 makes provision for committees of the Lukiko which will meet under the chairmanship of the appropriate Minister and have attached to them the administrative and technical officers who are required for their efficient working. These committees will be advisory. They will in no way detract from the individual responsibility of Ministers for the conduct of policy in their departments or from the general responsibility of the Ministry as a whole. At the same time they will be an effective means both of keeping Ministers in touch with the needs and wishes of the people and of giving elected members of the Lukiko practical knowledge of the business of government.

12. The Buganda Constitutional Committee thought that, while the position of civil servants in the Lukiko would have to be reviewed at the appropriate time, it would be premature at present to make any change in the composition and method of election of the Lukiko. The Conference did however, recommend (Article 25) that certain points (the number of members representing each

saza and the question whether persons not resident in a saza might be elected) should be examined before the next general election. The appointment of a Speaker and a Deputy Speaker, to be elected by the Lukiko is recommended in Article 26.

13. No alteration at all is made in the traditional dignities and ceremonies of the Kingdom of Buganda. The effect of the Articles in Chapter I is to reconcile the high status of the Kabaka with the conduct of a Ministry answerable to a mainly elected Lukiko. Article 4 recognises the Kabaka as the symbol of unity of the people of Buganda and of continuity between their past, present and future. The other Articles which have been explained above raise the Kabaka above the turmoil and danger of political conflict. New conditions are established which bring the principles of monarchy and democracy into harmony.

14. It is essential that these conditions shall be clearly understood and accepted by all the parties concerned. To make certain of this, Article 29 provides for a Solemn Engagement which every Kabaka will henceforward enter into with the Great Lukiko and the people of Buganda and with Her Majesty's Government. Article 30 follows in logic and provides that so long as the Kabaka shall observe his Solemn Engagement, Her Majesty's Government agrees to recognise the Kabaka as the ruler of the Kingdom of Buganda.

CHAPTER II: RELATIONSHIP OF BUGANDA WITH THE PROTECTORATE

15. The Agreement of 1900 recognised a sphere of operation belonging to, the Buganda Government; but this sphere was largely determined by customs of the past. Most of the big changes that have taken place since then in education, medical services, commercial organisation and economic development have belonged to the sphere of Protectorate policy. The Buganda Government and the Lukiko have remained in general concerned with the old order of things, while the Protectorate Government and the Legislative Council have been concerned with the new order of things. Yet this new order of things is of immense importance to every Muganda in his day-to-day tasks of earning a living, bringing up his children and equipping them to make the best of their opportunities in a rapidly changing world.

16. The Conference has considered this state of affairs and recognised that there are three needs. In the first place the Buganda Government and the Lukiko must have a substantial place in the new order as well as in the old order. In the second place there must be intimate contact and consultation between the Buganda Government and the Protectorate Government. In the third place the Protectorate Government and the Legislative Council must become increasingly representative of the people of the country both in Buganda and throughout the Protectorate. This last process cannot be completed immediately; time must be left for growth and change. Nevertheless it is possible to do something immediate and practical to carry the process forward and to make people confident

that, when it is completed, the process will have the results which they desire.

17. The Articles in Chapter I, which have been described already, are a guarantee that the Kingdom of Buganda, while remaining deeply rooted in its own customs and culture, will be in a position to play an increasing part in the new order of things in the Protectorate. Chapter II describes how it will play that part. Article 30 reaffirms the arrangement made with the Protectorate Government in March, 1953, whereby important new functions will be taken over by the Buganda Government. It also makes provision whereby the division of functions may be varied from time to time by agreement between the two Governments.

18. Article 31 provides that the Buganda Government shall administer the services for which it is responsible in accordance with the general policy of the Protectorate Government; subject to this proviso, it will initiate policy within its sphere of operation. At the same time, it will be given new opportunities for bringing its influence to bear upon the policies of the Protectorate.

19. Articles 32 and 33 establish important new procedures through which this influence will be exercised. From henceforward Ministers and permanent officials of the two Governments will be in close touch with each other through Consultative Committees for education, local government and community development, medical and health questions and natural resources. On the Buganda side the Lukiko itself will have a part to play in this process of consultation because each committee will include two or three elected members of the Lukiko. (the committees will discuss all matters of common interest and will enable the Buganda Government to express its views on Protectorate policy. Normally they will prevent conflicts of policy arising between the two Governments. If nevertheless any serious difference should arise between them beyond the competence of a single Consultative Committee to solve, it will be referred to a joint meeting of the members of the Proteatorate Executive Council and the Buganda Government under the chairmanship of the Governor (Article 37). Only if all these processes of consultation fail to (produce agreement -which appears a very unlikely contingency- will it be open to the Governor in Council to give formal advice to the Buganda Government (Article 38).

20. The Protectorate Government will help the Buganda Government and the people of Buganda in their progress forward, through the advice given by Protectorate officers (Article 36), through the inspection of the services transferred to the Buganda Government (Article 34) and through the secondment of Protectorate officers to the Buganda Government (Article 35). The Resident (Article 39) will continue to be the Governor's representative with the Kabaka's Government. Senior Assistant Residents and Assistant Residents (Article 40) will have a specially important part to play in advising and assisting the Chiefs, and through them the Councils, in the development under the Buganda Government of local government bodies in the sazas, along the lines envisaged by the

Memorandum of March, 1953, and in accordance. with a programme to be drawn up by the two Governments in consultation. When these local government bodies have been firmly established and the powers of running local services have been handed to them by the Buganda Government, it is the aim of policy that the function of guiding and inspecting them should be assumed by the Buganda Government itself, with whatever secondment of Protectorate Government officers may at that time be necessary. The progress achieved in local government will be reviewed (as well as all the other subjects dealt with in these Articles) six years from the time when the Articles come into force, to determine whether the Buganda Government should then assume this responsibility. Meanwhile steps will be taken as soon as is practicable to appoint suitably qualified Baganda as Assistant Residents so that these officers may be among those to be seconded or transferred to the Buganda Government when this responsibility is assumed by the Buganda Government.

21. The financial needs of Buganda will be reviewed by the two Governments periodically (Article 42) so that protectorate grants to Buganda may be on a firm basis for periods of at least three years. This Article also proposes that the poll tax payable to the Protectorate Government should be reduced to 6s. per year and that revenue from Crown land and minerals under Crown land should be payable to the Buganda Government on the same basis as in other parts of the Protectorate. The Protectorate Government will re-examine the status of Crown land in Buganda.

22. While these changes are taking place in the structure of the Buganda Government and in its relations with the Protectorate Government, equally important changes will be under way in the Protectorate Government itself and in the Legislative Council. These changes are announced in the statement made by the Governor which is issued as a separate document and also printed with the Agreed Recommendations as Appendix B. This statement deals not simply with Buganda, but with the whole Protectorate.

23. In his Statement the Governor first refers to the declaration by the Secretary of State for the Colonies in the House of Commons on the 23rd February, 1954, that "the long-term aim of H.M. Government is to build the Protectorate into a self-governing state" and that "when self-government is achieved the government of the country will be mainly in the hands of Africans." The Governor then describes the ultimate aim of constitutional development in Uganda as a responsible Government answerable to an elected Legislature of the whole Protectorate, with proper safeguards in the constitution for the rights of the minority communities resident in Uganda.

24. The Governor goes on to describe the recommendations which he proposes to make to the Secretary of State as an immediate step towards this eventual aim. These are designed first to associate representatives of the public more closely with the Executive Government of the country, and secondly to increase the African membership on the Legislative Council.

25. With regard to the Executive the Governor proposes that a Ministerial system should be introduced; and that seven members of the public, of whom five would be Africans, should be invited to join the Government and to sit on the Government side of the Legislative Council; these seven persons would be selected by the Governor. Out of the seven, five, of whom three would be Africans, would become members of the Executive Council with the status of Ministers. Of these five Ministers, two -one African and one other- would have full executive responsibility under the Governor for groups of departments and one, an African, while he would be a full member of Executive Council, would be an Assistant Minister dealing under the Minister concerned with the large portfolio of Social Services covering Education, Health, African Housing and Labour. In addition there would be two African Parliamentary Under-Secretaries. There would be nine official members of the Executive Council as against ten at present of whom six or seven would have Ministerial status. The membership of the Council, including the Governor, would thus be fifteen, with nine official members other than the Governor, and three Africans and two others drawn from the general public, as against one African and four others at present. The Executive Council would be the principal instrument of policy and the members would be required publicly to support any policy decided upon by it.

26. The Legislative Council was enlarged early in 1954 and now has fifty-six instead of thirty-two members in addition to the Governor as President. There are twenty African members on the Council as against eight in the previous Council: The Governor now proposes to increase the membership of the Legislative Council to sixty, of whom half would be Africans.

27. On the representative side of the Council the Governor proposes that instead of fourteen Africans, seven Asians and seven Europeans, there should be eighteen Africans, six Asians and six Europeans. Of the four new African seats two should go to Buganda, provided that the Great Lukiko agrees that Buganda should participate fully in the Legislative Council through elected members. This would increase the number of representative members from Buganda from three to five; in order to make this possible the present European and Asian representative members have stated their willingness each to give up one of their seven seats, the two members concerned transferring to the Government side of the Council on what is at present the cross-bench. One of the other new African seats will go to Busoga, the district with the largest African population outside Buganda; this will be on the assumption that the Busoga District Council will agree to elect members for the Legislative Council. The further new African seat will go to one of the most heavily populated districts outside Buganda.

28. On the Government side of the Council the number of official members would be reduced from seventeen to ten or eleven. The Government side would also include the seven members of the

public, five Ministers and two Parliamentary Under-Secretaries, who would join the Government as explained above. In all the Governor proposes that there should be twelve Africans on the Government side of the Council. With the introduction of a substantial element drawn from the general public on to what has hitherto been the official part of the Council the Governor sees no reason for the retention of the cross-bench in its present form and proposes that it should be converted into a Government back-bench, the members still being free as at present to speak and vote as they like except on a motion of confidence.

29. On East African federation the Governor quotes the solemn assurance given by H.M. Government in November, 1953, the last sentence of which reads as follows:

"But Her Majesty's Government can and does say that, unless there is a substantial change in public opinion in the Protectorate, including that of the Baganda, the inclusion of the Protectorate in an East African federation will remain outside the realm of practical politics even in the more distant future."

The Governor proposes to recommend to the Secretary of' State that it should be laid down now that, should the occasion ever arise in the future to ascertain public opinion in terms of this pledge, the Protectorate Government would at that time consult fully with the Buganda Government and the other Authorities throughout the country as to the best method of ascertaining public opinion.

30. The Buganda Constitutional Committee has studied the Governor's Statement carefully and, in the light of the Governor's recommendations to Her Majesty's Government and of the pledge on East African federation referred to in the statement, has recommended in Article 43 that the Great Lukiko should agree to the representation of Buganda on the Legislative Council of the Protectorate. The Committee has also recommended that the representatives of Buganda should. be elected by the Lukiko by secret ballot.

CHAPTERS III TO VI

31. Chapter III contains only one Article. It deals with the question of citizenship, a complicated matter which concerns all the countries of the British Commonwealth. Article 44 recommends that Her Majesty's Government shall be requested to consider creating a common citizenship for Uganda. Examination of this recommendation must be in the first place a matter for the Colonial Office, but if and when the work proceeds the principle underlying it will be discussed in Uganda also.

32. Articles 45 and 46 recommend that the work of separating the Judiciary from the Executive in Buganda should be proceeded with immediately and that a committee including legal experts should be appointed to examine means by which the court system in Buganda can be gradually developed into a system of courts in which no distinction will be made between persons of different

races or between the inhabitants of urban and rural areas.

33. Article 47 the Conference propose that a representative committee should be set up to consider as a question of urgency the establishment of a new local authority, under the Buganda Government, for the administration of the Kibuga. This authority should it is suggested include representatives of, and have jurisdiction for local government purposes over all sections of the community resident in the Kibuga. The Article goes on to recommend that the committee should later report on the establishment of local authorities representing all sections of the community in townships and trading centres in Buganda other than Kampala, Entebbe, Masaka and possibly Mubende, and should advise on the means of bringing such local authorities under the Buganda Government.

34. In Article 48 the Conference recommends that, in order to secure a period of stability for the country, no major changes in the constitutional arrangements proposed in the Articles should be introduced for a period of six years, after which there should be a review. The Article makes it clear that the review would be in 1961, assuming that the proposals of the Conference are brought into force in 1955. This six-year period of stability, to be followed by a review, is also provided for in the Governor's Statement about the Executive and Legislative Councils of the Protectorate.

35. The Conference expressed the hope during its meetings that the Agreed Recommendations may be accepted without undue delay by the Great Lukiko and Her Majesty's Government and that the Articles may come into effect as soon as the necessary legal instruments have been agreed and in any case not later than, the 1st July, 1955. It was the understanding of the Conference that as soon as the Articles come into effect a new Ministry should be appointed in accordance with the procedure proposed in Article 13, for the remainder of the life of the present Lukiko. Article 14 recommends that the life of the present Lukiko should be extended from four to five years.

36. Finally Article 49 proposes that the Uganda Agreement, 1900, should be amended to the extent necessary to give effect to the recommendations of the Conference, but should otherwise continue in its present form.

37. The Agreed Recommendations of the Namirembe Conference are closely interrelated with one another. It was the understanding of the Buganda Constitutional Committee, of the Governor and of Professor Hancock that these Agreed Recommendations would be considered and decided upon as a whole by the Great Lukiko and Her Majesty's Government.

APPENDIX H

IN CONGRESS, JULY 4, 1776

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA

 hen in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has

utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefit of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies

For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common

kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. — And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

New Hampshire:

Josiah Bartlett, William Whipple, Matthew Thornton

Massachusetts:

John Hancock, Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry

Rhode Island:

Stephen Hopkins, William Ellery

Connecticut:

Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott

New York:

William Floyd, Philip Livingston, Francis Lewis, Lewis Morris

New Jersey:

Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark

Pennsylvania:

Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross

Delaware:

Caesar Rodney, George Read, Thomas McKean

Maryland:

Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton

Virginia:

George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jr., Francis Lightfoot Lee, Carter Braxton

North Carolina:

William Hooper, Joseph Hewes, John Penn

South Carolina:

Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., Arthur Middleton

Georgia:

Button Gwinnett

ABOUT THE BOOK

The story goes that MarcusAurelius hired an assistantto follow him as he walked through the Roman towns square. The assistant's only rolewas to, whenever Marcus Aureliuswaspraised;whisper inhis ear, "You're just a man. You're just a man."

They say two things define us. Our patience whenwe have nothing and our humility whenwe have everything. The first thing I would like to ask my readers is to imaginea different President in office. If they support the current President and believe those who oppose him are doing so for partisan or otherwise illegitimatereasons, they should visualize a President whom they completely distrust. Conversely, if they dislike the current President, they should conceive of thePresident in power as someone they support and that those opposing him are actingillegitimately.This exercise is helpful, I believe, for focusing attention on the underlying constitutional issues rather than upon the wisdom, or lack thereof, of a particular President's policies.

Views as to whether or not an exercise of presidential power is legitimate tend to be based less upon legal abstractions than upon perceptions of the particular President in power. Someone supporting a particular President, for example, is likely to believethat parliament should not have the powerto interfere with the President's unilateral decision to send troops into armed conflict or that parliament should not have the authority to demand the President to extend or remove histerm limits. Conversely, someone who believes a President's agenda is improperly motivated or ill-advised is more likely to support constitutional principles that provide significant checks and balances upon the President's exercise of power.

In this way, views on presidential powertend to be more variablethan views on other constitutional issues because they intuitively relate to who is in power in a waythat views on other controversial constitutional issues – such as freedom of speech and assembly, or freedom of religion – do not. For this reason, this book on presidential power is well timed. Because the question of who will hold the Presidency after the next election should always be much in doubt, this is the perfect opportunity to examine the nature of presidential power as an abstract matter, rather than as a criticismor as an apologia of a specific President's actions. This is what I intend to do in this book. Specifically, I contend that the power of the Presidency has been expanding since the Founding, and that we need to consider the implications ofthis expansion within the constitutional structure of separation of powers. No matter which party controls power.

This book makes the descriptive case by briefly canvassing a series of factors that have had, and continue to have, the effect of expanding presidential power.

It further suggeststhis expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth bythe Framers.

The book offers some suggestions as to how this power imbalance can be alleviated, but it does not presenta silver bullet solution. Because many, if not all, the factorsthat have led to increased presidential powerare the products ofgreed and selfish needs.

Thus, this book ends with only the modest conclusion thatregardless ofwho wins the Presidency,it is critical that those on both sides of theaisle workto assure thatthe growth in presidential poweris at least checked, if not reversed.

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