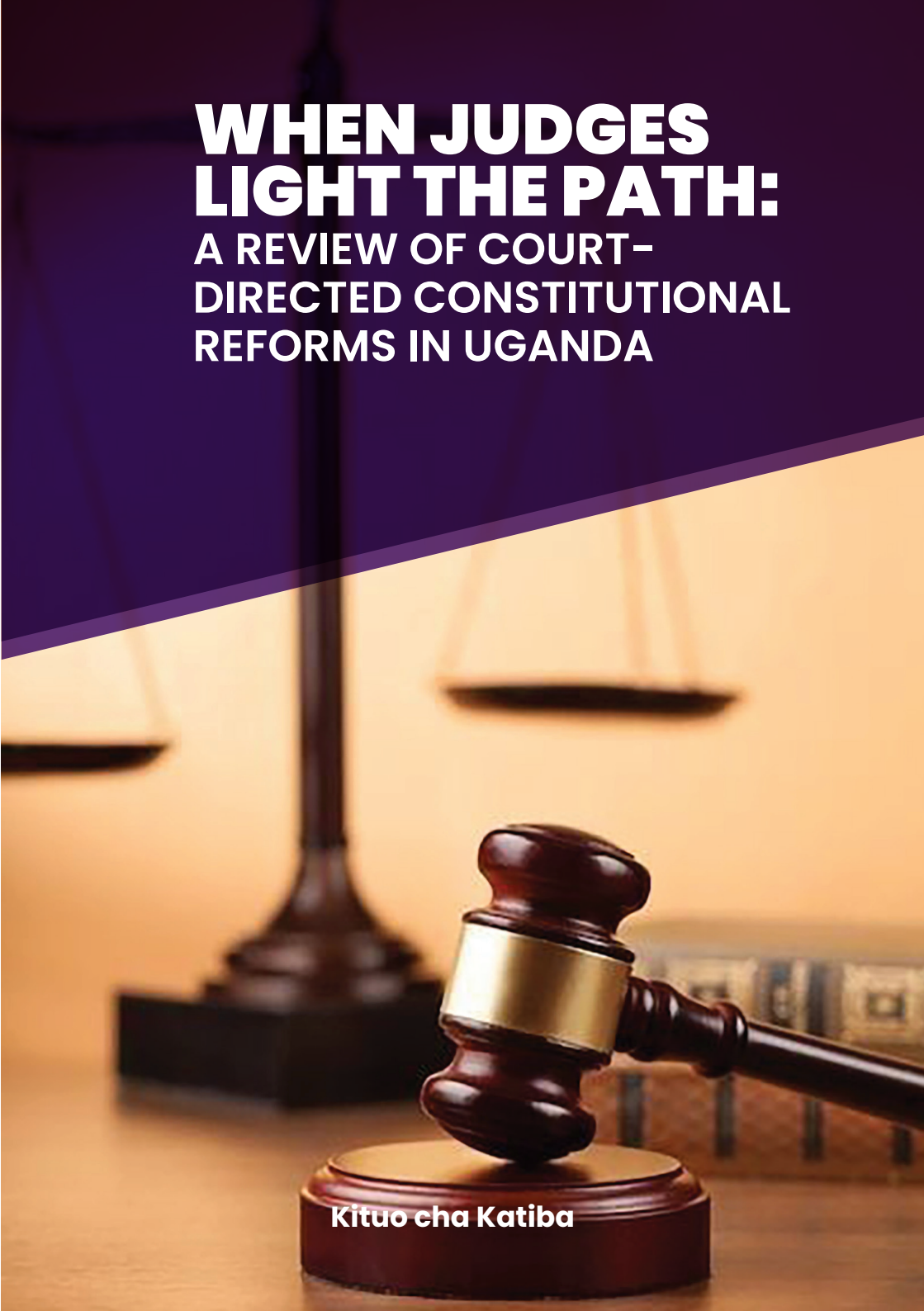
# WHEN JUDGES LIGHT THE PATH:

## A REVIEW OF COURT-DIRECTED CONSTITUTIONAL REFORMS IN UGANDA



Kituo cha Katiba

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## A REVIEW OF COURT-DIRECTED CONSTITUTIONAL REFORMS IN UGANDA

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# Abbreviations and Acronyms

| | |
|---|---|
| **ACDEG** | African Charter on Democracy, Elections and Governance |
| **ACHPR** | African Charter on Human and People's Rights |
| **AIDS** | Acquired Immune Deficiency Syndrome |
| **BVVK** | Biometric Voter Verification Kit |
| **Cap** | Chapter |
| **CCTV** | Closed Circuit Television |
| **CEHURD** | Centre for Heath, Human Rights and Development |
| **CEON-U** | Citizens Election Observers Network of Uganda |
| **CJ** | Chief Justice |
| **CSSA** | Civil Society Strengthening Activity |
| **DP** | Democratic Party |
| **EC** | Electoral Commission |
| **EWMI** | East West Management Institute |
| **FDC** | Forum for Democratic Change |
| **ICCPR** | International Convention on Civil and Political Rights |
| **JA** | Justice of Appeal |
| **JSC** | Justice of the Supreme Court |

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|---|---|
| **NEC** | National Executive Council |
| **NGO** | Non Government Organisation |
| **NRM** | National Resistance Movement |
| **NRMO** | National Resistance Movement Organisation |
| **PAFO** | Parliamentary Advocacy Forum |
| **Rtd.** | Retired |
| **UDHR** | Universal Declaration of Human Rights |
| **UHRC** | Uganda Human Rights Commission |
| **UN** | United Nations |
| **UPC** | Uganda Peoples Congress |
| **UPDF** | Uganda People's Defence Forces |
| **USAID** | United States Agency for International Development |

# Acknowledgement

The role of the judiciary in the promotion and upholding of constitutionalism, human rights and rule of law cannot be over stated. It is the final custodian in matters of constitutionalism, human rights and the rule of law. As this work aptly captures, 'Courts do not just decide cases; they ultimately ensure that the other organs and agencies of government and, indeed, the populace as a whole observe, respect and uphold the Constitution, the laws and human rights'. It is this important role of the judiciary that inspired the analysis and indeed entire work this publication encapsulates.

The work specifically seeks to equip key stakeholders with critical information relating to the important role of the judiciary with regard to constitutional reform exhibited through judicial decisions. It is one of the outcomes of the project titled, *Strengthening Civil Society Organizations Engagement on the Constitutional Reform Process (SCEC),* supported by the United States Agency for International Development (USAID) /Uganda Civil Society Strengthening Activity (CSSA) and hosted by the East West Management Institute (EWMI).

This initiative would not have been realized without the generous support of USAID and technical guidance of the EWMI, both of which Kituo cha Katiba is greatly indebted to. Our special gratitude goes to Dr Benson Tusasirwe, Lecturer, and Head, Department of Public and Comparative Law at the School of Law, Makerere University; and Advocate of the Courts of Judicature of Uganda, for his invaluable expertise and effort in

authoring this publication. We also thank the project team for reviewing and enriching this work.

It is our hope that this work will add to the existing body of constitutional knowledge; and inform, stimulate and foster constitutional reform and practice in Uganda.

# Introduction

In the classical Montesquieuan tradition of separation of powers, modern government operates under three branches: the Executive, the Legislature and the Judiciary and, as much as possible, these must be kept institutionally autonomous, with the powers of the three being held and exercised independently and separately.[1] Parliament must confine itself to making laws; the judiciary to the settlement of disputes; while the Executive sticks to initiating policies and implementing them and actually governing the country.

However, the world over, it has long been accepted that strict separation of powers is neither possible nor desirable. There is need for a "functional relationship between the three arms of the state."[2]
Over the centuries, separation of powers has given way to the more realistic doctrine of checks and balances.

In this regard, Parliament does not just make laws, it also exercises the oversight function and, through appropriation, controls the purse, so to say. Moreover, through legislation, it sets the boundaries within which the courts exercise their dispute-resolution function,

1 Montesquieu, *The Spirit of the Laws*, translated by Anne M. Cohler et al., Cambridge Texts in the History of Political Thought, Cambridge: Cambridge UP, 1989; George W. Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to the Present*. Kampala: Renaissance Media Ltd, 2002, p. 146; Benson Tusasirwe, "Implications of the Unfolding Political Transition in Uganda vis-à-vis the Doctrine of Separation of Powers." A paper presented at the Uganda Human Rights Commission Constitutional Day Conference, Hotel Africana, Kampala on October 6–7, 2004, p.4.

2 Apollo Nsibambi, "A Comment on the Functional Relationship Between the Three Arms of the State." In *East African Journal of Peace and Human Rights*, Vol. 7, No. 2, p. 154.

which involves the application of the law to facts to pronounce the rights, obligations, responsibilities and liabilities of parties.

By the same token, courts do not just decide cases; they ultimately ensure that the other organs and agencies of government and, indeed, the populace as a whole observe, respect and uphold the constitution, the laws and human rights. They ensure that in executing their mandates, the Executive and the Legislature do so within the law.

In this respect, judges and courts have been variously described as guardians of constitutionalism and human rights,[3] as centurions of justice[4] and as protectors of the people.[5] In matters of constitutionalism, human rights and the rule of law, the judiciary is the final gatekeeper.

In the execution of this role, courts do not just have to limit themselves to rendering interpretations of the constitution and the laws; they also often champion reforms aimed at growing and nurturing the constitution so that it is kept in tune with changing times. As was aptly stated by Aguda, JA in *Dow v. Attorney General (of Botswana)*:[6]

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3 Martin Scheinin et al., *Judges as Guardians of Constitutionalism and Human Rights*. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2016.

4 Peter M. Walubiri, "Towards a New Judicature in Uganda: From Reluctant Guards to Centurions of Justice." In Peter M. Walubiri (Ed.) *Uganda: Constitutionalism at Crossroads.* Kampala: Uganda Law Watch, 1998, pp. 135–208.

5 Helle Krunke, "Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy, and Human Rights." In Martin Scheinin et al., *Judges as Guardians of Constitutionalism and Human Rights*. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2016.

6 (1992)LRC (Const) 623, at p. 668.

> 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 continue to breathe life into it from time to time as the occasion may arise, to ensure the healthy growth and development of the state through it… The primary duty of the judges is to make the Constitution grow and develop to meet the just demands and aspirations of an ever-developing society…

One way the courts grow and develop the national constitution is by giving its provisions an interpretation that takes into account changing circumstances and looks to the future.

The other and more direct, though not common, way is by directing the other arms of government to effect reforms deemed necessary for the actualisation and furtherance of the rule of law, promotion and protection of human rights, and national development and transformation.

Since the coming into force of Uganda's current constitution in 1995, the various courts have directed the Executive and Parliament to effect constitutional reforms, with varying outcomes.

This study seeks to document select court-directed constitutional reforms under the 1995 Constitution. It also assesses the extent to which these reforms have been implemented, and the impact their implementation or non-implementation has had on constitutionalism in Uganda.

It deals mainly with court-directed electoral reforms, reforms related to the operation of political parties, reforms aimed at peaceful transition or transfer of power, the system of government, and those aimed at furthering the promotion and protection of human rights.

# Chapter 1

# Court-Directed Electoral Reforms

Throughout Uganda's post-independence history, the quest for credible, transparent, free and fair elections has been elusive. This is so, notwithstanding the fact that since 1986, Uganda has signed, ratified or acceded to at least 15 international and regional treaties, 12 non-treaty standards and nine political commitments providing for the legal protection and promotion of democratic electoral processes.[7] These include the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Civil and Political Rights (ICCPR) 1966, the African Charter on Human and Peoples' Rights (ACHPR) 1981, and the African Charter on Democracy, Elections and Governance (ACDEG) 2007.

Pursuant to its treaty obligations, and in its own interest of ensuring representative government and the attendant political stability and socio-economic development, Uganda has put in place and repeatedly reformed its domestic legal framework governing elections. At present, the framework is contained in the Constitution, the Electoral Commission Act, the Presidential Elections Act, The Parliamentary Elections Act, the Local Governments Act, the Political Parties and Organisations Act, and the various statutory instruments enacted under those laws. These are expected to deliver free, fair, transparent and credible elections at all levels of the political spectrum.

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7 European Union, *Compendium of International Standards for Elections: Status of Ratification.* Luxemburg: Publication Office of the European Union, 2016, pp. 104, 126.

When they fail, in the sense that parties interested in the various elections feel that the outcomes of such elections have not been fair, those dissatisfied are expected to resort to court for appropriate remedies.

In entertaining and determining election disputes, the court's primary obligation is to declare whether or not the contested election and its outcome were valid, and whether or not the same should be upheld or set aside. But often the courts go beyond this basic mandate and identify shortcomings in the legal and institutional framework. Having done so, the court may leave it at that, or may go even further and make recommendations for rectifying the shortcomings.

However, until the coming into force of the 1995 Constitution, the courts were rarely resorted to as an arena for electoral contestations. Then in the wake of the 1996 elections, a handful of election petitions were filed with respect to parliamentary elections. With every passing electoral cycle since then, the number of parliamentary and local government election petitions has been on the rise, and so, too, have been appeals to the Court of Appeal from the former.[8] Meanwhile, out of the five presidential elections held during the present century, four have been challenged in the Supreme Court, namely the elections of 2001, 2006, 2016 and 2021, the only exception being the 2011 election.

In the High Court where local government and parliamentary election outcomes were contested, and in the Court of Appeal, the courts almost invariably confined themselves to pronouncing whether the election results should be upheld or annulled and, even where they found

8 See Benson Tusasirwe, *The Judicial Enforcement of the Rights to Freedom of Political Assembly and Association in Uganda*, LLD Thesis, Kampala: Makerere University, 2019, p. 144.

a lot of legal, structural or institutional shortcomings, opted not to make any recommendations to address these. It is in the presidential election petitions where the Supreme Court has increasingly gone out of its way to call for reforms, and to do so in an increasingly assertive manner with every passing electoral cycle.

Hence in 2001, in *Col. Dr. Besigye Kiiza v. Museveni Yoweri Kaguta and the Electoral Commission*,[9] the very first presidential election petition in the history of Uganda, the Justices of the Supreme Court unanimously found that the Electoral Commission (EC) did not conduct the election in compliance with the provisions of and principles laid down in the Presidential Elections Act. However, by a majority of three to two, it dismissed the petition on the grounds that the petitioner had not proved *to the satisfaction of the court* that the non-compliance had *affected the outcome of the election in a substantial manner* or that electoral offences had been committed by Yoweri Museveni, the successful candidate, in person or by his agents with his knowledge and consent.

The Justices pointed at a number of shortcomings, but made no remedial recommendations to the Executive and/or Parliament. Oder, JSC., who went closest to doing so in his closing remarks, stated:

> Before I leave this petition, I wish to say first, that there are certain flaws in the presidential election laws, some of which I have pointed out in the course of the reasons. I hope the authorities concerned will study the laws with a view to amendments for improvements.

---

9 Election Petition No. 1 of 2001 [2001] UGSC 4 (July 6, 2001).

He left it at that, while the rest only pointed at the shortcomings in the traditional way. So, while there were a number of electoral reforms around that time, they were not driven by the decision of the Supreme Court. In 2005, when the Presidential Elections Act[10] was repealed and replaced with a new Act, this was not in reaction to the court's findings in the 2001 petition.

Rather, it was as a consequence of independent constitutional and political developments, to take into account the transition from the one-party "Movement" system to a multi-party dispensation which had been adopted following the referendum conducted that year, as discussed below. When the Constitution was amended[11] to repeal Article 105(2), to remove presidential term limits, and to provide for a multi-party dispensation, for example by providing for a Leader of the Opposition,[12] it was definitely not because the court had so ordered.

In 2006, another general election was held in an environment that was just as acrimonious as before. President Museveni, who in 2001 had claimed in the full glare of the media that Col. (Ret.) Dr. Kiiza Besigye, his main rival, was not fit to govern because he had AIDS and that he would put him "six feet under" if he messed with the army, this time around had him arrested and sent to Luzira Prison on rape and later treason and related charges that were later exposed as being trumped-up. Besigye ended up being nominated in absentia, while on remand. Museveni was once again declared the successful candidate. And again, Besigye petitioned the Supreme Court.[13]

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10 Cap. 142, Laws of Uganda 2000.
11 See the Constitution (Amendment) Act, 11/2005.
12 Article 82A, introduced the Constitution (Amendment) Act, 11/2005.
13 *Rtd. Col. Kizza Besigye v. Electoral Commission & Yoweri Kaguta Museveni*, Election Petition No. 1 of 2006 [2007] UGSC 24 (January 30, 2007).

The complaints of the petitioner and the findings of court were a mirror image of those of 2001, except that this time around, by way of a preliminary point, Besigye made an application under Article 137 (5) of the Constitution for the constitutionality of Section 59 (6) of the Presidential Elections Act 2005 to be referred to the Constitutional Court for determination. The impugned portion of Section 59 (6) provided:

> 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 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; ...

Besigye's lawyers contended that this provision contravened Article 104 (1) of the Constitution, which only requires proof that the person declared as elected was not validly elected and does not require proof of "substantial effect".

Dismissing the application, the court pointed out that Article 104 (9) of the Constitution expressly empowered Parliament to make such laws as are necessary for giving effect to the Article, including laws setting out the grounds for annulment of elections and rules of procedure.

Again the Justices unanimously found that the elections were not conducted in accordance with the provisions of and principles laid down in the Presidential Elections Act and the Constitution, but by a majority of four

to three, upheld the election on the grounds that the petitioner had failed to prove to the satisfaction of the court that the non-compliance affected the outcome of the election in a substantial manner.[14] Both in their summary judgment delivered on April 6, 2006, and in their detailed reasons, pronounced severally on January 30, 2007, the Justices pointed at certain shortcomings. But this time around, they went a step further and made a list of recommendations.

In his lead judgment Odoki, CJ, stated the court's concerns as follows:

> In our summary judgment announcing our decision in this petition, we observed that we were constrained to comment on a number of matters which had given us grave concern. The first matter was the continued involvement of the security forces in the conduct of elections where they committed acts of intimidation, violence and partisan harassment. While the involvement of the security forces was less than in 2001, I think that every effort be made to reduce their involvement except where they are required to provide security necessary to ensure free and fair elections. The security agencies should strictly carry out their duties in accordance with the law.
>
> The second matter was the massive disenfranchisement of voters by deleting their names from the voters' register, without their knowledge or being heard. While there

14 For an analysis of the "substantiality test", see Busingye Kabumba, "How Do You Solve a Problem Like 'Substantiality'? The Supreme Court and Presidential Elections." In J. Oloka-Onyango and Josephine Ahikire (Eds.), *Controlling Consent: Uganda's 2016 Elections*. Trenton: Africa World Press, pp. 477–501.

was marked improvement in the compilation of the voters' register, the 1st Respondent should take measures to ensure that the procedure for de-registration of voters is fair and transparent and that efforts are made to publish in good time new polling stations so that voters are able to ascertain where they are expected to vote. But the voters also have a duty to participate in the updating of the register and to ensure that their names are on the register, as well as to ascertain where they are expected to vote.

The third matter was the apparent partisan and partial conduct of some electoral officials like presiding offers and other polling officials who engaged in electoral malpractices like multiple voting and vote stuffing. The 1st Respondent needs to provide suitable training as well as effective supervision of such officials.

The fourth matter of concern was the apparent inadequacy of voter education. This appears to have contributed to the disenfranchisement of voters who should be empowered through civic competence to better exercise their rights and meet their obligations during the electoral process.

The Court also noted with dismay the failure of the 1st Respondent to avail to the Court Reports of Returning Officers on the ground that they were not available while it is mandatory for the Returning Officers to transmit them to the 1st Respondent. I

think that the reports should be submitted as soon as the elections are completed. The 1st Respondent should determine the period having regard to the need to have the reports available in case results of the election are challenged in Court and the reports are required as evidence.

Finally, the Court found that certain provisions in the electoral law were contradictory and inadequate, such as Sections 24(5 and 59(6)(a) of the Presidential Elections Act, and Section 25 of the Electoral Commission Act, and recommended that they should be reviewed.

***The Court was of the considered opinion that all institutions should urgently address the above concerns in order to improve electoral democracy in the country*** (emphasis added).

In my view, there is also a need to review and increase the period of ten days within which to file the petition and the period of thirty days within which the Court is to declare its findings, as provided for in Article 104 of the Constitution and Section 59 of the Presidential Elections Act. The period within which the petition should be determined should be increased to at least sixty days to give the parties and the Court sufficient time to prepare, present, hear and determine the petition.

> The Presidential Elections (Electoral Petitions) Rules 2001 which require evidence at the hearing of the petition to be presented by affidavit should be reviewed to provide for the calling and examination of witnesses instead of relying on affidavits, many of which may be false or are made under suspicious circumstances and therefore not safe to be relied upon, without cross examination of the deponents.[15]

Katureebe, JSC, as he then was, added:

> In my view, every organ of the state must play their part in the organisation of elections. It is wrong to conceive of elections as being solely the responsibility of the Electoral Commission. Article 66(1) of the Constitution for example states "Parliament shall ensure that adequate resources and facilities are provided to the Commission to enable it perform its functions effectively." Article 66(2) makes the Commission one of the self-accounting institutions that deals with Ministry of Finance directly on matters of its finances. The Constitution provides for Presidential Elections every five years. So, it was a well-known obligation that there had to be elections. Yet all the observers point out that money to organise election was given to the Commission very late. In my view, Parliament must pass the budget in time and government must provide funds necessary to organise elections that are truly free and fair…

15 Judgment of Odoki, CJ, at pp. 152–3.

Another aspect pointed out by the observers is the late passing of the necessary electoral legislation. Again, this is matter that the Government and Parliament must address. All the necessary legislation must be put in place in good time to enable the Electoral Commission to organise a truly free and fair election. When the electoral laws are passed late and with little or no time to correct anomalies and contradictions in them, the Electoral Commission is left with no time to attend to all the issues and problems that arise since it is trying to beat the constitutional deadline of holding the elections. State organs must, in my view, perceive of elections as an event that must be preceded by deliberate processes carefully thought through and put in place to ensure that the event does produce free and fair centers.

The other aspect commented on is that of the use of the public media. Article 67(3) of the Constitution provides as follows: ***"All Presidential Candidates shall be given equal time and space on the* state-*owned media to present their programmes to the people"*** (emphasis in the original). In my view, this is a constitutional command to the state organ concerned. It is not a matter for the Electoral Commission to negotiate on. The people in charge of the state-owned media have the duty to ensure compliance.

Perhaps in future petitions, the law should provide for the Government (Attorney

General) to be made a party to the petition so that such complaints if pleaded by a petitioner can be answered and be fully inquired into by the court.

Finally, I am of the view that Parliament must take a fresh look at the Constitutional provisions regarding the challenging of election results. There appears to be constraints of time in respect of filing and hearing the Petition. Reasonable time is needed to enable the parties file their pleadings and for the court to have reasonable time to inquire into all the matters alleged. Also, the provision that where the Presidential Election is nullified by Court, a fresh election must be held within twenty days should be examined. It may well be that at the time the framers of the Constitution made this provision, there was an assumption that all the fundamental processes would have been put in place, e.g the relevant laws were in place in time, funds were provided in time, voter education was done, the electoral register had been properly prepared and was not open to challenge, etc. Where all these were inadequate and a subject of challenge, it may be too much optimism to expect that the Electoral Commission would then organise a truly fair and free election within 20 days of the nullification of an election. A situation where a subsequent election ends up being the same or worse than the one challenged should be avoided.

> Parliament should therefore consider a longer period, realistic enough for the Electoral Commission to address what had gone wrong and make adequate preparations for a free and fair election superior to the one nullified. Perhaps an expansion on the principle contained in article 104(7) should be studied.[16]

On his part, Kanyeihamba, JSC, stated that the non-compliance with and violations of the principles of the Constitution and the electoral laws which the court had unanimously found to have occurred, were caused principally by the continued existence and sustenance of electoral structures created and personnel appointed originally to serve the one political organisation, being called upon and entrusted in 2006 with the responsibility to organise and conduct elections in which more than one political party, including that one organisation, were seriously and acrimoniously competing for power. He dismissed the suggestion that the malpractices were "few and far between".[17]

It should be noted that though the Justices pointed out the shortcomings that needed to be addressed, they did not specifically command the Executive and Legislature to address them. This was a major shift from the 2001 position but, as the court would observe ten years later, it did not go far enough. Out of the above can be filtered nine points which the court required to be addressed as a matter of urgency, namely:

(1) Continued involvement of the security forces in the conduct of elections;

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16 Judgment of Katureebe, JSC, pp. 402–4.
17 Judgment of Kanyeihamba, JSC, p. 234–5.

(2) Massive disenfranchisement of voters through deleting their names from the voters' register without their knowledge or being heard;

(3) Partisan conduct of some electoral officials;

(4) The apparent inadequacy of voter education;

(5) Contradictions between some provisions of electoral laws;

(6) The period for filing a petition challenging a presidential election, and for the court to declare its findings;

(7) The restriction of the nature of the evidence in election petitions;

(8) The timing and adequacy of the financing of the Electoral Commission; and

(9) Access to state-owned media for all candidates.

In the years that followed the court decision, no visible electoral reforms were pursued. The recommendations were simply disregarded. Then in 2010, some amendments to the electoral laws were made, to pave way for the 2011 elections.

By the Presidential Elections (Amendment) Act 2010, Section 3 of the Presidential Elections Act 2005, which allowed a presidential aspirant to consult the electorate in preparation for nomination only within 12 months before the nomination date, was amended to remove the time limit, leaving the right to consult open-ended.

However, considering that the amendment was assented to on June 5, 2010 and came into force on June 25, while the elections were to take place on February 11, 2011, the amendment was of no use to the aspirants for that election.

Section 39(2) of the Act, which had provided that an area provided for voting by members of the Uganda People's Defence Forces (UPDF) shall be outside the barracks, was replaced with one which only provided that "the commission shall not create special or separate polling stations exclusively for the army or other security personnel." Technically, it was now possible to have polling stations inside barracks and other "operation" areas, which were defined as including "an area where soldiers and other security personnel are deployed on special duty during an election period and may include restricted areas." Restricted areas were, in turn, defined to include areas experiencing an epidemic, disaster or insecurity. This amendment did not address the suspicion held with regard to the military and other security forces as being partisan; it instead made their place in the electoral process more suspicious.

Finally, Section 64 of the Act was amended, to add subsections (7), (8) and (9). The new subsection (7) provided that "a candidate shall not carry out fundraising and the giving of donations during the period of campaigning." Subsection (8) made it an offence to do so, while subsection (9) provided that "for purposes of this section, fundraising shall not include soliciting of funds for a candidate to organise an election *or donations given by the president in the ordinary course of his or her duties*." The last leg of the proviso was problematic. The president could easily abuse it by providing inducements to the electorate and thereby

gain favour. Indeed, while during the 2011 elections there was markedly less violence than in the previous ones, the elections were marred by massive bribery and other abuses of incumbency.[18] The incumbent simply raided the treasury and went on a spending spree, with the result that the national economy almost crashed, triggering massive unrest and the walk-to-work protests of later that year. Not surprisingly, Section 64(9) triggered a furore in the years that followed and has since been repealed.

Clearly, the 2010 amendment to the Presidential Elections Act did not address any of the concerns raised by the Supreme Court in 2006. It was not meant to. It is the Electoral Commission (Amendment) Act which made an attempt to address the concern about massive deregistration of voters without their knowledge or being heard. The Act now made elaborate provision for the display of voters' registers before the elections,[19] and put in place complaints and objections procedures in relation to names.[20] It also made provision for tribunals to be set up by Chief Magistrates to entertain such complaints.[21] These amendments were insignificant and, not surprisingly, the 2011 elections that came in their wake were as discredited as the earlier ones.

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18 Commonwealth Secretariat, *Report of the Commonwealth Observer Group: Uganda Presidential and Parliamentary Elections: February 18 2011*. London: Commonwealth Secretariat, 2011; Daniel Kalinaki, *Kizza Besigye and Uganda's Unfinished Revolution*. Kampala: Dominant Seven Publishers, 2014, p. iv; Ben K. Twinomugisha, "Courts Did Not Come from God: Judicial Power and Electoral Competition in Uganda", in Oloka-Onyango, Joe and Josephine Ahikire (Eds.), *Controlling Consent: Uganda's 2016 Elections*. Trenton: Africa World Press, pp. 431–53. 2017; Ogenga Otunnu, (2017) *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*. Hampshire and New York: Palgrave Macmillan, 2027, p. 208.

19 Section 25 of the Electoral Commission Act, as amended.

20 Ibid.

21 Section 25(5) of the Electoral Commission Act, as amended.

In 2015, again on the eve of a general election, both the Constitution and the and the Presidential Elections Act were amended. The provisions of the Constitution relating to removal of members of the Electoral Commission were strengthened to mirror those for removing judges.[22]

This would hopefully give them the security of tenure and confidence to perform their duties and take tough decisions without fear of losing office. The Presidential Elections Act was also amended, to add the requirement for government to facilitate presidential candidates.[23]

By the 2016 elections, the electoral terrain was pretty much what it had been in 2006. The reality of a multi-party dispensation had been established, but the fusion of the ruling party and the state, and its ability to use the state apparatus to overawe the other parties during elections, was an established fact. The electoral reforms earlier recommended by the Supreme Court had not been effected.

Notwithstanding that on paper, presidential aspirants were entitled to make countrywide consultations in preparation for nominations, the police and other security forces were out to ensure that that did not happen, as Amama Mbabazi, one of the contenders, found out when he tried to travel to Eastern Uganda to carry out consultations.[24]

As the campaigns gained pace, the leading challengers to Yoweri Museveni, namely Kiiza Besigye and Amama Mbabazi, were subjected to the now standard treatment

22 The Constitution of the Republic of Uganda 1995, Article 60, as amended.
23 The Presidential Elections (Amendment) Act, 2015, amending Section 22 of the Act.
24 See "Police arrest former Prime Minister Amama Mbabazi." *Daily Monitor*, Thursday, July 09, 2015. At https://www.monitor.co.ug/uganda/news/national/police-arrest-former-prime-minister-amama-mbabazi-1617458. Accessed November 26, 2023.

of being denied space on government-owned media or media owned or controlled by those sympathetic to the regime; canvassing for votes within a severely restrict space and timelines; taking on an incumbent with unlimited access to public resources; and the ever-present menace of the army, police and paramilitary forces.[25] Polling day itself witnessed the usual practices: partisanship of electoral officials, deployment of security forces to give the incumbent an advantage, suspect tallying and announcement of results, and complaints of ballot stuffing and other malpractices.[26]

Not surprisingly, Yoweri Museveni was declared the winner, this time with 60% of the valid votes cast. Besigye was put under "house arrest", to prevent him from "causing confusion". He therefore could not prepare for and file an election petition to challenge the outcome, even if he had wanted to. It was left to Amama Mbabazi to do so. In its joint decision delivered in *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Others*,[27] on March 31, 2016, the court, after dismissing the petition, stated as below:

> Before we take leave of this matter, we would like to point out a number of areas of concern:
>
> Some of the areas that seem to come up at every presidential election include:

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25 See Amnesty International, Country Reports: Uganda, 2016; Human Rights Watch, "Dispatches: Police Brutality Spells Trouble for Uganda's Elections." At https://www.hrw.org/news/2015/10/14/dispatches-police-brutality-spells-trouble-ugandas-elections. Accessed November 26, 2023.

26 Ogenga Otunnu (2017), op. cit., p. 235, Oloka-Onyango and Mbazira, "Befriending the Judiciary: Behind and Beyond the 2016 Supreme Court Amici Curiae Rulings in Uganda." *Africa. Journal of Comparative Constitutional Law*. Vol.1, p. 1–22.

27 Election Petition No. 1 of 2016.

(i) An incumbent's use of his position to the disadvantage of other candidates

(ii) Use of state resources

(iii) Unequal use of state-owned media

(iv) Late enactment of relevant legislation etc. We must also note that in the past two Presidential Petitions, this Court made some important observations and recommendations with regard to the need for legal reform in the area of elections generally and Presidential elections in particular. Many of these calls have remained unanswered by the Executive and the Legislature.

We have looked at some of the election Observer Reports. Although the Reports point to several instances where the Observers found irregularities and malpractices, the main thrust of these Reports must be seen to be directed at the need for structural and legal reforms that would create a more conducive atmosphere that would produce genuinely free and fair elections.

The Citizens Election Observers Net-work – Uganda (CEON -U) makes this very important Observation:

"***Uganda's legal framework limits the foundation for conducting credible elections. These limitations prompted civil society to produce the Citizens' Compact on Free and Fair Elections, which includes recommendations for legal reform: overhauling the Electoral Commission to ensure independence and impartiality; reforming the demarcation of electoral boundaries; ensuring recruitment of Polling officials is done in a transparently, competitively and based on merit; and the establishment of an independent judiciary to adjudicate on electoral disputes impartially. These recommendations were not taken up for the 2016 elections".***

At the hearing of this Petition, we allowed, as ***amici curiae,*** a group of prominent constitutional scholars from Makerere University. They have given us a brief on issues pertaining to the holding of free and fair elections in Uganda. Suffice to say at this point that it is high time that the Executive and the Legislature started seriously to think about the crucial need to address legal reforms in our electoral laws. We shall consider these proposals in deeper detail when we give our full opinion.

Then, on August 26, 2016, the court rendered its full judgment, setting out the detailed reasons for their decision. As in the earlier decision of court, the Justices of the Supreme Court pointed out a number of "areas of concern". This time around, they set out ten key areas in

respect of which they made specific recommendations, namely:

1. That the period of ten days within which a person intending to challenge the outcome of a presidential election is required to put together the necessary evidence and file his or her petition, and of thirty days within which the Court must analyse the evidence and make a decision as provided under Article 104(2) and (3) of the Constitution and Section 59(2) and (3) of the Presidential Elections Act is inadequate and should be reviewed to increase the latter to 60 days to give the parties and court sufficient time to present and determine the petition, while at the same time being mindful of the time within which the new president must be sworn in.

2. That the rules be amended to provide for the use of oral evidence in addition to affidavit evidence, with leave of court.

3. That the requirement under Article 104(7) of the Constitution that where a presidential election is annulled, a fresh election must be held with 20 days is unrealistic, and a longer and more realistic time frame should be put in place.

4. While the introduction of technology in the election process should be encouraged, a law to regulate its use in the conduct and management of elections should be enacted and should be introduced well within time to train the officials and sensitise voters and other stakeholders.

5. The electoral law requiring state-owned media to give equal time and space to all candidates to present

their programmes to the people should be amended to provide for sanctions against any state organ or official that violates this constitutional duty.

6. Any election-related law reform should be undertaken within two years of the establishment of the new Parliament in order to avoid last-minute hastily enacted legislation on elections.

7. Section 64(9) of the Presidential Elections Act, which provides that a candidate may solicit funds to organise for elections during the campaign period, and which permits the president in the ordinary course of his or her duties to give donations during the campaign period, should be amended to prohibit the giving of donations by all candidates, including a president who is a candidate, in order to create a level playing field for all.

8. The law should make it explicit that public servants are prohibited from involvement in political campaigns.

9. Considering that the Attorney General is the principal legal advisor of Government, that Rule 5 of the Presidential Elections (Election Petitions) Rules requires the Attorney General to be served with the petition, that several complaints were raised against public officers and security personnel during the electoral process, and that when a petitioner wants to withdraw a petition, the Attorney General can object to the withdrawal, yet the definition of "respondent" under the existing law does not include the Attorney General, the law should be amended to make it permissible for the Attorney General to be made a respondent where necessary.

10. The Attorney General is the authority that must be served with the recommendations of the court for necessary follow-up.

The court then directed the Attorney General to follow up the recommendations with the other organs of the state, namely Parliament and the Executive, and report to court within two years from the date of judgment the measures taken to implement the recommendations.[28] The court indicated that it may thereafter make further orders and recommendations as it deemed fit.

Though the decision was unremarkable in the way it dismissed the petition relying on the "substantiality" test, the court, in making the recommendations, broke new ground, in important ways. First, it exhaustively filtered out what was structurally and institutionally wrong with the electoral framework. Secondly, this time around, it expressly ordered the Executive and Parliament to address the concerns.

Thirdly, it appointed a specific officer, the Attorney General, to oversee the implementation of the recommendations, meaning that this time around, there would be someone identifiable to hold to account if the recommendations were again allowed to gather dust. Fourthly, it set a time frame within which the recommendations had to be implemented and a report made to court. Finally, it promised to make further orders if necessary. In requiring the implementer to report to court, and in promising to make further orders, the court had not simply made a decision and closed the file the traditional way, but had embarked on the uncommon path of a structural interdict.[29]

28 That is to say, by August 26, 2018.

29 A structural interdict is an order of court which is structured in such a way that the court continues to oversee and control compliance with the order.

By 2019, there was nothing to show that the recommendations had been implemented. This impelled two senior members of the legal fraternity, Professors Frederick E. Ssempebwa and Frederick W. Jjuuko, and Kituo cha Katiba, a non-governmental organisation (NGO), to file a public interest application before the Supreme Court on March 24, 2019, seeking to have the Attorney General cited for contempt of court.[30] The applicants contended that the bulk of the recommendations required the enactment of laws. And since no such laws had been enacted, the Attorney General had thereby disobeyed the orders of court. In the absence of justification, the disobedience was *mal-fide* and amounted to contempt of court.

In answer, the Attorney General showed that the recommendations for enlargement of the time for filing and determining presidential election petitions, and for holding fresh elections in the event that an election was annulled, had been taken care of when the Constitution was amended through a private member's Bill.[31] With regard to recommendations 2 and 9, the Attorney General explained that the necessary rules had already been

For a discussion of the operation and importance of structural interdicts, see Chris Mbazira, "From Ambivalence to Certainty: Norms and Principles of the Structural Interdict in Socio-Economic Rights Litigation in South Africa." *South African Journal of on Human Rights*, Vol. 24, p. 1; Emmanuel Candia, "The Effectiveness of Structural Interdicts in Uganda: An Assessment of Some Key Judicial Decisions." Available at https://www.academia.edu/38138360/The_Remedy_of_Structural_Interdicts_in_Uganda_docx. Accessed November 26, 2023; Benson Tusasirwe & Robert Kirunda, *Electoral Reform in Uganda: Emerging Jurisprudence on Structural Interdicts and Contempt of Court*. Kampala: Kituo cha Katiba, 2021; Sylvie Namwase, "Securing Legal Reforms to the Use of Force in the Context of Police Militarization in Uganda: The Role of Public Interest Litigation and Structural Interdict." *African Human Rights Law Journal*, vol. 21 No. 2, 2021, pp. 1203–1229.

30 *Prof. Frederick Ssempebwa & 2 Others* v. *Attorney General* (Civil Application No. 05 of 2019) [2019] UGSC 9 (June 25, 2019).

31 Indeed, The Constitution (Amendment) Act, No. 1/2018 had amended Article 104 by extending the time for filing presidential election petitions from 10 to 15 days, for determining the petitions from 30 to 45 days, and for holding fresh elections from 20 to 60 days.

passed and signed by the Chief Justice and returned to the Attorney General for gazetting. With regard to the rest of the recommendations, which required amendment of existing laws, the Attorney General presented before court Bills which, he claimed, were expected to be passed into law within four months.

The court pronounced itself satisfied that the Attorney General's explanations for the delay to pass the necessary legislation were not far-fetched, and that he did not act wilfully or *mala-fide* in disobedience of the court's orders and was, therefore, not in contempt of court. Referring to their promise to make further orders, if necessary, the Justices then proceeded to make further/fresh orders:

1) That the Attorney General must in consultation with the Executive and Parliament, ensure that priority is given to the implementation of all the court's recommendations;

2) That the proposed legislation should be laid before Parliament for enactment within one month from the date of the ruling;

3) That the Attorney General should report to court on the progress of the proposed legislation within three months from the date of the ruling;

4) That the Attorney General should in any case make a final report on the progress of the proposed legislation within six months from the date of ruling.

The court was clearly not prepared to go the distasteful route of holding the Attorney General in contempt. It therefore decided to consider itself satisfied that the Attorney General had tried his best, and to give him

more time to comply, in effect watering down its own recommendations.

For our present purposes, the important thing is to consider whether the recommendations were finally implemented, and with what outcomes.

Recommendations number 1, 2 and 3 had already been implemented, as already pointed out. Indeed, they duly played a role in the 2021 general election when the runner-up sought to challenge the outcome of the election.[32] The Attorney General was made a party to the petition, this time with the full blessing of the court, unlike in the Mbabazi petition, when the propriety of adding him as a party was debatable. The advocates who handled the petition must have had more leeway to prepare a good case than those in the earlier petitions.[33]

However, they still found the time inadequate and actually tried to seek an extension of time and leave to amend their pleadings, to be able to do a proper job.[34] The court adopted a rigid approach to the timelines and denied the application. Frustrated, the petitioner withdrew the petition. Consequently, the question of whether the extended time for hearing and determining the petition would have been adequate was never tested. Of course, the adequacy of the time for holding fresh elections has also never been tested.

The other pieces of legislation were subsequently passed in June 2020, taking nearly twice as long after the two

32 *Kyagulanyi Ssentumu v. Yoweri Museveni Tibuhaburwa & 2 Others* (Election Petition No. 1 of 2021).

33 Confirmed by Sulaiman Kakaire, one of the advocates who represented Robert Kyagulanyi Sentamu in the petition, in an interview at Kampala, November 3, 2023.

34 *Kyagulanyi Ssentamu v. Yoweri Museveni Tibuhaburwa and 2 Others* (Civil Miscellaneous Application No. 1 of 2021) [2021] UGSC 9 (March 18, 2021)

years originally given by the Supreme Court in August 2016, and long after the additional six months given in 2019 in the *Ssempebwa* case. Coming into force shortly before nominations and less than eight months before the 2021 elections, they defeated the logic and purpose of the recommendations, in particular recommendation number 6, which expressly stated that any legal reforms should be effected within two years of the establishment of the new Parliament to avoid last-minute hastily enacted legislation. The idea that the reforms should be effected long before the elections to help address the shortcomings of the existing electoral framework was already defeated.

We now proceed to examine the content of the 2020 amendments.

The Electoral Commission (Amendment) Act 2020 was assented to by the president on June 17, 2020, and came into force on July 27, 2020. It amended Section 12 of the Electoral Commission Act, Cap. 140, by adding after subsection 1 the following:

(1a) The Commission may, in exercise of its powers under subsection (1), adopt technology in the management of elections.

(1b) Notwithstanding the general effect of subsection (1a), the Commission shall put in place an electronic display system at every tallying centre on which the votes being tallied shall be displayed to the general public.

(1c) The Minister shall, in consultation with the Commission, by statutory instrument, make regulations prescribing the manner in which technology will be used in the

management of elections.

(1d) The statutory instrument referred to in (1c) shall be laid before Parliament for information.

The amendment also added subsection (7) to Section 30 of the Act. It states:

(7) Where in any election petition, the court finds the Commission to have committed an election irregularity or an illegal practice and awards compensation to the successful party, a returning officer who is found to be personally liable for that election irregularity or illegal practice shall pay a portion of the compensation, as may be determined by court.

The bland provision that the commission "may" (optional) adopt technology in the management of elections was too minimalist to be of much use. The lone specific provision, which related to electronic displays at tallying centres, did not go far enough. No effort seems to have been invested to explore and provide for other aspects in which technology could advance the efficiency and transparency of the electoral process. No provision was made, for example, for electronic voting including the use of technology to ensure that a registered voter could not vote more than once. This should have provided the opportunity to entrench into law and improve the use of the Biometric Voter Verification Kit (BVVK), the use of which met with controversy when first attempted in the 2016 elections without putting in place enabling laws and controls to prevent abuse.[35]

35 See Unwanted Witness, *Legalizing digital technology in Uganda's electoral process, but are privacy rights and freedoms protected? A*t https://www.unwantedwitness.org/legalizing-digital-technology-in-ugandas-electoral-process-but-are-privacy-rights-and-freedoms-protected/ Accessed on November 26, 2023.

No provision was made for monitoring polling stations using closed circuit television (CCTV) cameras. It should be recalled that in the past elections and, indeed even in those of 2021, members of the public were administratively prohibited from using their phone cameras to record goings-on at polling stations. The amendment simply left it to the Minister to make a statutory instrument to guide the use of technology. The Minister had not put in place the statutory instruments by the time of the 2021 elections, and none are known to have since been enacted and or laid before Parliament as commanded by the amendment or at all.

The bulk of the rest of the provisions in the Electoral Commission (Amendment Act) were largely in the form of renaming lower-level electoral officials (registrars) as election administrators, and restructuring the establishment of the Electoral Commission at the district and constituency levels. They did not go towards improving the quality and credibility of the elections, presidential, parliamentary or local government and fell short of the 4th recommendation of the Supreme Court.

On the other hand, as regards presidential elections specifically, section 56(2) of the Presidential Elections Act 2005 was substituted to provide for the electronic transmission of electoral results to the Commission by returning officers, with copies being made available to political parties and candidates. Apparently, hard copies could follow later. This ought to enhance speedy and efficient transmission of results.

The amendment also did away with Section 4(1)(b) of the Presidential Elections Act, 2005 which had stipulated age limits for candidates in presidential elections. The amendment simply aligned the Presidential Elections

Act with the amendment to Article 102 of the 1995 Constitution already referred to.

With regard to the 1st and 3rd recommendations, the amendment revisited the timelines for the holding of presidential elections. Section 2 of the Presidential Elections Act was amended to expand the period within which the presidential election should be held before the expiry of an existing term, from 90 days to 122 days. This was possibly designed to accommodate the revised timelines for filing and deciding presidential election petitions and conducting fresh elections in the event of annulment.

The Presidential Elections (Amendment) Act also amended subsections (2) and (3) of Section 59 of the 2005 Act by expanding the time frame for the filing of a presidential election petition from 10 to 15 days and for the hearing and determination of the petitions from 30 to 45 days. It also expanded the time for carrying out a fresh election, in the event of annulment of the election, from 20 days to a more realistic 60 days. These amendments were simply intended to align the Act with the amendment to Article 104 of the Constitution.

On the 5th recommendation, the Presidential Elections Act already provided that "all presidential candidates shall be given equal treatment on the state-owned media to present their programmes to the people."[36] However, in the course of the several presidential election petitions, it had emerged that when such access was not granted, it was hard to pin the blame on any specific person or institution, as the law was silent on who had the responsibility to ensure compliance with the provision.

36 Section 24(1) of the original PEA, 2005.

Section 24(1) was now amended to expressly assign that duty to the Electoral Commission. Subsection (1a) was added, obligating state-owned media to notify within 14 days after nomination day, all candidates of the availability of time, the broadcasting schedule and the cost of presenting their programmes, and to allocate time to the candidates. The section further helpfully defined a state-owned media house as "a media house in which the controlling interest is held by the State".[37] More importantly, it prescribed sanctions against offending state-owned media houses and persons in charge of them.[38]

In response to the 7th recommendation, the amendment deleted the proviso introduced by the 2010 amendment as Section 64(9) of the 2005 Act, which had allowed the president to give donations during campaigns "in the course of his or her usual duties." This goes a long way towards levelling the ground for all candidates, though it certainly cannot be claimed that it totally does away with the advantages of incumbency.

On the 8th recommendation, which prohibits public servants from involvement in political campaigns, it should be noted, first, that the recommendation missed the opportunity to single out the involvement of the military and security forces in elections, as the court had done in the 2006 petition. Traditionally, the term "public servant" does not include members of the armed forces. So, in effect, the Supreme Court never made recommendations on the role of the military and other security agencies, which was a great disservice indeed.

37 PEA as amended, Section 24(1b).
38 PEA as amended, Section 24(1c) and (1d).

The closest the 2020 amendment gets to referring to the armed forces with regard to electioneering is in Section 39. Neither the section nor any other part of the amendment dealt with the partisan role of the military in elections.

The amendment to Section 39 simply tinkered with the provisions of the section on voting in restricted areas. It retained the original prescription that an area provided for voting by members of the UPDF shall be outside of any barracks as well as the subsequent prohibition of the creation by the Electoral Commission of special or separate polling stations exclusively for the army or security personnel. It would appear that the amendment was aimed more at addressing the challenges of voting by security personnel within the restrictions necessitated by the COVID-19 pandemic.

To conclude, on electoral reforms, as aptly noted by Alp East Africa, "the electoral reforms continue to be a ritual during each election cycle, without very often comprehensive and durable reforms."[39] Unfortunately, owing to that history of ritual amendments on the eve of every general election, and the seeming reluctance with which they were made, whereby it took the threat of being cited for contempt of court in order to have the amendment Bills presented, the amendments ran the risk of being dismissed as "routine run-of-the-mill amendments to electoral laws as the country gears(ed) for the 2021 general elections."[40] That unfortunate history should not take away the substance of the amendments and the reforms they represent.

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39 Alp East Africa, Electoral Law Reforms in Uganda as Country Prepares for 2021 Elections, July 23, 2020. Available at https://alp-ea.com/electoral-law-reforms-in-uganda-as-country-prepares-for-2021-elections/ Accessed November 26, 2023.

40 Ibid.

# Chapter 2

# Safeguarding Peaceful Transition

It is a sad irony that since its creation as one polity, Uganda only witnessed a relatively peaceful transfer of power when the British colonial government handed over power at independence. That a foreign occupying and supposedly exploitative hegemon could oversee a peaceful transition to indigenous rule, while all the post-independence regimes have come and gone only after ruinous bloodletting or, at the very best, after extremely tense though "bloodless" extra-legal processes, is an unflattering commentary on the politics of the country.

Coming at the tail-end of a tumultuous 31-year period,[41] the 1995 Constitution was expected to herald a new era. Article 1 of the Constitution waxed lyrical about the sovereignty of the people: that all power belongs to the people;[42] that all state authority emanates from the people; [43] that all governmental power and authority is derived only from the Constitution;[44] and that all authority is to be exercised with the consent of the people, expressed through regular, free and fair elections or referenda.[45] Article 3 went a step further and outlawed extra-constitutional capture of power and granted anticipatory absolution to any person who resisted attempts to suspend, overthrow or abrogate the constitution. It was tacitly understood that unless the

41 See Benson Tusasirwe, "Political Succession in Uganda: Threats and Opportunities." In Chris Maina Peter & Fritz Kopsieker, *Political Succession in East Africa: In Search of a Limited Leadership*. Kampala, Nairobi: Friedrich Ebert Stiftung/Kituo cha Katiba, 2006, pp.83–108.

42 Art. 1(1).

43 Art. 1(2).

44 Art. 1(3).

45 Art. 1(4).

Constitution managed to underwrite a smooth transfer of power from time to time, the longed-for peace and stability would not endure.

Thus, into the fabric of the Constitution were in-built guarantees for democracy and, more important, for peaceful transition, particularly at the very top. Among these were the right of the people to choose a political system of their choice;[46] the idea that whichever system the people chose must have an in-built democratic character;[47] and provisions for a smooth transition from one system to the other, through referenda.[48] If these were somehow unable to ensure periodical renewal and/or transfer, then Article 105 would come in handy, to limit to two the terms a president could serve. Alternatively, Article 102(b) would put an end to longevity in power.

The original Article 105(1) and (2) provided as follows:

> (1) A person elected under this Constitution shall, subject to clause (3) of this Article, hold office for a term of five years.
>
> (2) A person shall not be elected under this Constitution to hold office as president for more than two terms as prescribed in this article.

And Article 102(b) provided:

46 Art. 69.

47 Articles 70 and 71 require both the "Movement" political system and individual parties within the multi-party political system to possess a democratic character. As to whether there is such a thing as a "Movement political system" or whether by its nature the "Movement" is or was in fact, for all intents and purposes, a one-party state, the provisions of Article 75 prohibiting a one-party state notwithstanding, see John-Jean Barya, "Political Parties, the Movement and the Referendum on Political systems in Uganda: One Step Forward, Two Steps Back." In Justus Mugaju and J. Oloka-Onyango, *No Party Democracy in Uganda: Myths and Realities*. Kampala: Fountain Publishers, 2000.

48 Art. 74.

> 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.

From these provisions, the term "transition" may be considered to involve several facets:

- Transition from one political "system" to another;

- Transition from one ruling political party to another, within a chosen political system;

- Transition from one presidency to another, which may be within the same ruling party, or may involve a simultaneous transition to another ruling party. Such transition could also conceivably involve change of the structure of Government, for example, from the presidential model to the "Westminster" model, following a constitutional review.

With regard to the first type of transition, from one "political system" to another, Article 74 of the Constitution anticipated a referendum to be held in the 4th year of the term of any Parliament. Alternatively, the "system" could be changed by a resolution moved by a petition supported by two-thirds of the members of at least one-half of all the districts in the country, and passed by least two-thirds of all members of Parliament.[49] In 1999, a decision was made to hold a referendum for the purpose, and an enabling law was passed under which to do so, namely, the Referendum and Other Provisions Act.[50] However, in the case of *Paul Kawanga Ssemogerere & Another v. Attorney General*,[51] the validity of the Act

49 Art 74(2).
50 Act 2 of 1999.
51 Constitutional Petition No. 3 of 1999.

was contested, on the grounds that it was passed by a Parliament which lacked quorum. The Constitutional Court initially dismissed the petition on a technicality, but following a successful appeal to the Supreme Court,[52] which directed the Constitutional Court to hear the petition on its merits, the Act was struck down.

The ruling National Resistance Movement (NRM) mobilised demonstrations to denounce the courts as having usurped the power of the people.[53] But rather than appeal the decision of the Constitutional Court, the Government decided to push through a Constitution (Amendment) Act,[54] the effect of which was to nullify the judgment of Court. Ssemogerere again petitioned the Constitutional Court challenging the validity of the amendment.[55] The Constitutional Court, in a bizarre judgment, held that as the amendment was now part of the Constitution, the court could not enquire into its constitutionality, as that would be tantamount to interpreting one provision of the Constitution against another. He appealed,[56] and the Supreme Court declared the amendment unconstitutional and void.

While the appeal challenging the amendment was still pending in court, Government decided to abandon the futile amendment and passed another Act, the Referendum (Political Systems) Act, under which the referendum was held in 2000. Ssemogerere again challenged the new Act.

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52 *Paul Ssemogerere & Anor v. Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2000.
53 "Judges Favour Semo, says Museveni", *The Daily Monitor*, June 30, 2004, p.4.
54 Act 13 of 2000.
55 *Paul Kawanga Ssemogerere v. Attorney General* [2000] 1 EA 302.
56 *Paul Kawanga Ssemogerere v. Attorney Genera*l, Supreme Court Constitutional Appeal No. 1 of 2002.

The case went up to the Supreme Court,[57] which agreed with the Constitutional Court that the new Act was also unconstitutional. However, the court, apparently tired of locking horns with the Executive, held that the referendum held under the void Act was itself valid. With the results of the referendum upheld, the Movement system was retained, though the credibility of the referendum was cast in doubt by the boycott of those who were in favour of a return to the multi-party system but dared not voice their views.[58]

In 2001, even as the second elections under the new Constitution were held, a Constitutional Review Commission (the Ssempebwa Commission) was appointed. In 2003, the Ssempebwa Commission published its report, wherein it recommended a return to the multi-party system.[59] By this time, other political developments, including the emergence of Col.(Ret.) Dr. Kiiza Besigye as a political factor, had led the leaders of the NRM to conclude that as part of the package for removing term limits so as to extend President Museveni's stay in power, it might be necessary to open up the political space by allowing a transition to the multi-party system.

Meanwhile, in March 2003, the Movement National Conference had been convened at Kyankwanzi where, virtually out of the blue, a resolution to lift presidential term limits enshrined in the erstwhile Article 105(2) was passed.[60]

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57 *Attorney General v. Paul Kawanga Ssemogerere & Another* [2004] 1 EA 23.

58 Michael Bratton, "Uganda's Referendum 2000: The Silent Boycott." *African Affairs*, 100 (400) July 2001, p. 429-452.

59 Uganda Constitutional Review Commission 2003, *The Report of the Commission of Inquiry (Constitutional Review): Findings and Recommendations*. Kampala: Ministry of Justice and Constitutional Affairs, para 7.93.

60 See J. Oloka-Onyango, "Dictatorship and Presidential Power in Post-Kyankwanzi Uganda." Unpublished, 2003.

The resolution was later endorsed by the National Executive Council (NEC) of the NRM and then submitted to the Constitutional Review Commission to be considered for incorporation into its report.[61]

In the wake of the Kyankwanzi resolutions, and without bothering to first amend the Constitution to suspend Articles 69–73 under which the ban on political party activity had been enforced, political parties were, almost overnight, allowed to operate openly. Reform Agenda, led by Kiiza Besigye, allied with the Parliamentary Advocacy Forum (PAFO) to form the Forum for Democratic Change (FDC) which, for many years after, was Uganda's largest opposition party. The old parties, the Uganda Peoples' Congress (UPC) and the Democratic Party (DP), which had for long been suppressed, came out into the open.

Tens of other "one-man" parties also sprang up.
Then, when all these parties were fully in operation, the Government tabled before Parliament a motion for a resolution directing the Electoral Commission to hold a referendum to open up political space and allow political parties to operate.[62] The motion was defeated and, in breach of the rules of procedure of Parliament, was shortly thereafter reintroduced and passed.

In July 2005, the second referendum was duly held, in which the voters overwhelmingly made an about-turn and now voted for a transition to the multi-party system.[63] Only 47% of the registered voters turned up for the referendum.[64] Before long, the real reason for opening up space for multi-party politics soon became

61 Benson Tusasirwe (2006), op. cit. p. 93.
62 Ibid., p. 103.
63 Uganda Electoral Commission, *A Brief History of Elections in Uganda*. Kampala: Uganda Electoral Commission, p. 4.
64 See *Daily Monitor*, July 31, 2005, p. 1.

clear, when the amendment to the constitution came with the additional provision repealing Article 105(2). On the eve of the vote, members of Parliament were each paid a sum of Ushs. 5,000,000/=[65] and they duly obliged. The Constitution (Amendment) Act was overwhelmingly passed.[66] It provided for the registration and full operation of political parties. But, more importantly for our present purposes, it repealed Article 105(2) of the Constitution.[67]As widely expected, President Museveni, who would not have been eligible to stand under the Constitution in its pre-amendment state, now offered himself for re-election for a third term under the Constitution and, as they say, the rest is history.

The important thing to note is that the referendum of 2001 was not a result of a court order. Moreover, notwithstanding that a number of ground-breaking cases were decided in between that referendum and the one of 2005, the latter, which delivered the transition to a multi-party dispensation, was also not a result of a court order, but was dictated by political developments, namely, the emergence of Besigye as a political factor, which led the NRM insiders to realise that without Museveni, they were not assured of holding on to power; the unrest within the NRM itself which led President Museveni to declare that the time had come to get rid of those who opposed from within; the fact that it was increasingly difficult to keep all Ugandans under the NRM on the pretext that political parties were to blame for Uganda's past woes;

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65 Busingye Kabumba, *Restraining the Imperial President: Term Limits and the Consolidation of Democracy in Uganda.* Nairobi: Katiba Institute, p. 5.

66 Act 11 of 2005.

67 Fred Sekindi, "Presidential Election Disputes in Uganda: A Critical Analysis of the Supreme Court Decision." *Journal of African Elections*, Vol. 16, No. 1, pp.154–179, at p. 163.

the prevailing situation in the region and Africa as a whole, in which all countries were abandoning the one-party system, leaving Uganda as the odd man out; and, relatedly, the international (donor) pressure on Museveni's Government to embrace multi-party democracy.

While the first transition succeeded for the reasons mentioned above, the second, from one president to another, has been a stillbirth. Following the removal of term limits, for various reasons, including his success in fusing the ruling party with the state and its financial and military/security apparatus, Museveni has been able to win one election after another and retain the presidency. After the 2016 elections, which witnessed the phenomenal collapse of the Amama Mbabazi bid for the presidency, it became clear that only the age limit, contained in Article 102(2), could now stand in the way of a Museveni life presidency.

By 2017, it became clear that Museveni was in the process of going back on his word – that he would never consider continuing to lead the country after 75 years of age.[68] Then on December 20, 2017, amidst much acrimony, including security personnel invading the chamber of Parliament to manhandle, beat up and forcefully remove members of the opposition who tried to filibuster the debate on the amendment of the Constitution, the Constitution (Amendment) Act was passed,[69] repealing Article 102(b) and thereby removing the "age-limit" qualification for one to stand for president. Incidentally, the amendment also contained an interesting trade-off, a clause restoring term limits. A week later the president assented to the Bill and it became law.

68 See Musa Ladu, "I won't lead Uganda beyond 75, says Museveni." Quoted in Busingye Kabumba, op. cit., p.5.

69 Act 1 of 2018.

In the days that followed, five constitutional petitions were filed challenging the amendment.[70] The petitions presented the court with an opportunity to restore Uganda onto the path to a smooth transition. The petitions were consolidated and heard together and, on July 26, 2018, the court delivered its verdict, dismissing them, thereby endorsing the amendment, with Justice Kenneth Kakuru alone dissenting.

Three separate appeals were filed.[71] The appeals were consolidated and, on April 18, 2019, by a majority of four to three, the Supreme Court upheld the decision of the Constitutional Court and, therefore, the amendment. Ironically, the provision in the amendment that would have restored hope of a smooth transition, the one restoring the term limits provision and entrenching it, had, strangely, been omitted by the Speaker of Parliament from the certificate accompanying the Bill when it was sent to the president for assent, and was therefore struck out by the court.[72]

It follows, therefore, that the Courts of Uganda have not championed the cause of ensuring a smooth and peaceful transition. On the contrary, they have found themselves having to decide in favour of the forces that militate against the transfer of power, forces that seek to entrench a life presidency.

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70 *Male Mabirizi Kiwanuka v. Attorney general*, Constitutional Petition No. 49 of 2017; *Uganda Law Society v. Attorney General,* Constitutional Petition No. 3 of 2018; *Gerald Karuhanga v. Attorney General*, Constitutional Petition No. 5 of 2018; *Prosper Busingye v. Attorney General*, Constitutional Petition No. 10 of 2018; and *Abaine Jonathan Buregyeya v. Attorney General*, Constitutional Petition No. 13 of 2018.

71 By Male Mabirizi, Gerald Karuhanga and Uganda Law Society.

72 For an analysis of the decision, see Benson Tusasirwe, "The Basic Structure Doctrine and Constitutional Restraint in Uganda: The 'Age-Limit' Case. *East African Law Review*, Vol. 46, No. 1, June 2019, pp. 29 – 53.

Now, as Uganda becomes increasingly insular, and descends deeper into family rule, the question is whether the country will manage the third type of transition, to another party, or another president from within or outside the same party. Or worse still, will the country simply implode and experience an extra-constitutional transition, with the attendant troubles? The lessons of history demonstrate that if you make it impossible to have a normal transition within the framework prescribed in the existing law, you risk a transition that is not provided for in the constitution or the law. In either scenario, it is not likely that the courts of the land, which have been unable to play a positive role in laying the ground for a peaceful transition, will have any role in a chaotic one.

# Chapter 3

# The Courts and Political Party Organisation

Although the 1995 Constitution recognised political parties under Sections 71 and 72, the political parties only existed in name. They were prohibited to do most of the basic things parties normally do, namely, holding rallies and meetings, fielding candidates in elections, holding delegates conferences, opening branches, and "carrying on activities that may interfere with the movement system".[73] Right from the coming into force of the Constitution, the leaders of the old political parties, the DP and UPC, continued to agitate for a return to pluralism, but they were often brutally suppressed.

In the process, the old parties could not expand their membership, renew their leadership, or champion causes dear to them or programmes that would garner them support. Not surprisingly, they lost relevance and became shadows of their former selves.

The legal battles between the Government and the DP leadership, exemplified by the cases discussed above, demonstrate the attempts by that party to use courts to advance the causes of the political parties. There were also other cases, for example by the leaders of UPC.[74] In these cases, the courts never ordered any reforms. And in the short run, those court battles did not manage to dislodge the Movement. However, they were a major part

73 Ben K. Twinomugisha (2017), op. cit., p. 437.

74 For example, *Dr. James Rwanyarare & Another v. Attorney General*, Constitutional Petition No. 11 of 1997.

of the pressure that showed the Government's foreign funders that the regime was far from democratic.
They also forced the NRM government to abandon its stance against the political parties, to appoint a Constitutional Review Commission, and to hold the referendum of 2005 that led to the restoration of pluralism.

The referendum of 2005 having paved the way for a transition to a multi-party system, and the old parties having reasserted themselves as new ones sprang up, the NRM (hitherto "the Movement") initially labelled itself "an Organisation" as it still laboured under the illusion that "parties" was somehow a dirty word, hence for some time referred to itself as NRMO. Shortly, the NRM accepted the reality that it was a party like any other and quietly dropped the "O".

In November 2005, the Political Parties and Organisations Act was passed. It repealed and replaced the Political Parties and Organisations Act, 2002.[75] Under the new Act, the Electoral Commission was the body mandated to register political parties, for which purpose it was to maintain a register of political parties and organisations.[76]

The conditions a political party had to observe for it to be registered and allowed to operate, which are set out in Article 71 and 72 of the Constitution, were reiterated in the Act. In spite of these provisions, political parties in Uganda have notoriously continued to lack internal democracy. Not only is change of leadership extremely hard across the board, but parties often fail to democratically choose presidential or parliamentary flag-bearers, with matters sometimes ending up in court.

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75 Section 29.
76 Sections 4 and 6 of the Act.

This malady affects the opposition parties as well as the ruling party. Hence in 2010, one retired Capt.
Ruhinda Magulu dared stand against Yoweri Museveni in the NRM party primaries, but the party locked him out of the race and picked Museveni as its unopposed flag-bearer.

He brought a suit against Museveni and the NRM.[77] The suit was settled by way of consent, by which he was awarded Ushs. 200,000,000/=. The party refused or failed to pay the agreed sum. When he stormed the NRM party caucus at Kyankwanzi to ask for payment, he was arrested and detained at Mbuya Military Barracks on charges of trespass with intent to annoy the president. There is no record of where the matter ended.

In *Dr. Benjamin Alipanga v. NRM & 6 Others*,[78] the petitioner sought a declaration that the resolution of the NRM caucus sitting at Kyankwanzi, which had endorsed Yoweri Museveni as the party's sole candidate, was unconstitutional. Later, in *Dr. Benjamin Alipanga v. The Electoral Commission, NRM & 4 Others*,[79] the same gentleman contended that the Electoral Commission irregularly issued Yoweri Museveni with a certificate of recognition as the NRM flag-bearer, when the party had never elected him as such. These cases were not heard until after the 2016 elections, when they were apparently settled out of court. There have been such similar cases within the NRM challenging internal procedures of arriving at persons given party backing to stand for elections.[80] Similar wrangles have unfolded in UPC[81] and

77 "Ruhinda Maguru Seeks to Block NRM Delegates Conference." Ugandaradio-network.net.
78 Constitutional Petition No. 41 of 2014.
79 Civil Suit No. 271 of 2015.
80 See, for example, *Niwabine Jossy & 22 others v. NRM and NRM Electoral Commission,* Miscellaneous cause No.143 of 2022.
81 *Uganda Peoples Congress & Anor v. Prof Edward Kakonge* (Civil Application No.

DP[82] and, most recently, in the Forum for Democratic Change (FDC)[83], all of which have split into factions.[84]

The Political Parties and Organisations Act, 2005 made additional provisions, beyond the basic ones set out in the Constitution, for example, provisions prohibiting foreigners from holding office in political parties, those restricting foreign financial or material contributions, as well as those requiring political parties to declare their assets and liabilities to the Electoral Commission, to submit to audits, and render disclosure to the Commission. Under Section 16, the Act prohibited members of the UPDF, Police, Prisons, and public officers from founding, promoting or joining political parties, holding offices therein, or speaking in public or publishing anything involving matters of political party or organisation "controversy", whatever that meant.

In the years that followed, this provision would be applied in a manner deemed selective, whereby it was

22 of 2020) [2020] UGSC 46 (September 30, 2020); *Uganda Peoples Congress & Anor v. Kakonge* (Civil Appeal No. 20 of 2016) [2020] UGCA 2087 (September 7, 2020); *Amongi & Anor v. Olara Otunnu & 2 Ors* (Miscellaneous Cause No. 35 of 2015) [2015] UGHCCD 86 (May 6, 2015); see, also, "Fight for legitimacy at UPC: Otunnu vs Akena", *The Daily Monitor*, Monday, August 31, 2015 – updated on February 02, 2021. https://www.monitor.co.ug/uganda/special-reports/elections/fight-for-legitimacy-at-upc-otunnu-vs-akena-1622532. Accessed on December 3, 2023.

82 See, for example, *Akampurira v. The Democratic Party & 10 Ors* (Civil Suit No. 157 of 2015) [2017] UGHCCD 100 (June 8, 2017); *Ssemwanga & 31 Ors v. Democratic Party* (Miscellaneous Cause No. 59 of 2020) [2020] UGHCCD 196 (September 18, 2020).

83 *Dr. Tindyebwa v. Forum for Democratic Change (FDC) and Another* (Misc Cause No. 120 of 2022) [2022] UGHCCD 203 (October 6, 2022); Juliet Kigongo, "Court order puts brakes on FDC delegates meet", *The Daily Monitor,* September 17, 2023. https://www.monitor.co.ug/uganda/news/national/court-order-puts-brakes-on-fdc-delegates-meet-4371010 . Accessed on December 3, 2023; Kenneth Kazibwe, "Court throws Erias Lukwago out of FDC delegates conference case", *The Nile Post*, September 19, 2023. https://nilepost.co.ug/2023/09/19/court-throws-erias-lukwago-out-of-fdc-delegates-conference-case/ Accessed December 3, 2023; The Observer, "High court blocks FDC extraordinary conference." September 17, 2023. Accessed on September 3, 2023.

84 "DP leaders sue party as wrangles deepen." *The Daily Monitor*, Friday, March 13, 2020 — updated on July 19, 2020. Accessed December 3, 2023.

permissible for serving military or police officers to make public pronouncements in favour of the ruling party, but not against it. Finally, Section 19 empowered the Minister of Justice and Constitutional Affairs, in consultation with the Electoral Commission and with the approval of Parliament, to prescribe a code of conduct for political parties and organisations.

The amendment that formed part of the 2020 package of pre-election reforms which finally dealt with political parties was the Political Parties and Organisations (Amendment) Act 2020. It only limited itself to amending Section 19 of the Political Parties and Organisations Act 2005, to prescribe, by way of a Fourth Schedule, a code of conduct for political parties and organisations.

Looking at the code of conduct in detail, one notes that it paints a double picture. On the one hand, it infuses discipline into the operations of political parties and, to that extent, arguably introduces necessary and permissible limitations on their operations. However, its provisions requiring all parties to be national in character, the prohibitions on discrimination, and those on funding, could easily be used by the state to either outlaw unwanted or troublesome political parties or severely restrict the way they operate.

In all their struggles and tribulations, the important point to note, for purposes of this discussion, is that the courts have not used the cases that have been brought before them involving political parties, to try to help the parties reform and position themselves to execute their mandates, or to order the Government to enact laws that would enable a multi-party dispensation to thrive.

# Chapter 4

# Human Rights

When it comes to the promotion and protection of human rights, the role of the courts in spearheading reforms is just as marginal. The 1995 Constitution contains one of the most elaborate human rights charters ever. It also provides forums for their enforcement, including the Uganda Human Rights Commission (UHRC) and the traditional courts. The constitution provided for the Court of Appeal to serve as a standing Constitutional Court, in which capacity it is mandated to interpret the Constitution.[85] In its early days after the Constitution had come into force, in petition after petition, the Constitutional Court was moved for declarations that certain statutory provisions were inconsistent with the Constitution or that certain actions violated the Constitution. But the court demonstrated the utmost reluctance to make such declarations in a manner that would promote and protect human rights, claiming that what the litigants before it were seeking was not interpretation of the Constitution but, rather, enforcement of their rights, in which case the appropriate procedure was under Article 50, before courts other than the Constitutional Court.[86]

However, in due course, the Constitutional Court and the Supreme Court made a number of important pronouncements that extended the frontiers of judicial protection of human rights. A number of leading cases illustrate this point.

85 Article 137(1) and (5).

86 See *Dr. James Rwanyarare & Another v. Attorney General (Supra)*, *Uganda Journalists Safety Committee & Another v. Attorney General*, Constitutional Petition No. 6 of 1997.

In *Charles Onyango Obbo and Another v. Attorney General,*[87] the Supreme Court declared Section 50 of the Penal Code Act, which criminalises the publication of "false news", unconstitutional. In *Mifumi (U) Ltd & Anor v. Attorney General & Anor,*[88] the same court declared that the payment of bride price as a condition precedent to a valid customary marriage and the demand for its refund as a condition precedent to the dissolution of a customary marriage undermine the dignity and status of women and are, therefore, inconsistent with Articles 32(2), 33(1) and (4), and 21(1) & (2) of the Constitution. And in J*ulius Rwabinimi v. Hope Bahimbisomwe*,[89] the court made declarations having far-reaching consequences for property rights in marriage, and the distribution of family property at the dissolution of marriages.

Likewise, the Court of Appeal as such and as the Constitutional Court has often made decisions declaratory of the rights of the individual. Hence in *Centre for Health, Human Rights and Development (CEHURD) & 3 Others v. Attorney General*[90] the court made declarations having far-reaching implications for maternal health rights. In an earlier case, the court had made declarations having equally far-reaching implications in relation to the rights of persons with disabilities.[91]

And in *Muwanga Kivumbi v. Attorney General*,[92] decided in 2008, the court struck down Section 32 of the Police Act, on the grounds that, to the extent that the section purported to confer on the Inspector General of Police

87 Constitutional Appeal No. 2 of 2002.
88 Constitutional Appeal No. 2 of 2014 [2015] UGSC 13 (August 6, 2015).
89 Civil Appeal No. 10 of 2009) [2013] UGSC 5 (March 20, 2013).
90 Constitutional Petition No. 16 of 2011 [2020] UGCC 12 (August 19, 2020).
91 *Centre for Health, Human Rights and Development (CEHURD) & Another v. Attorney General, Constitutional Petition No. 64 of 2011.*
92 Constitutional Petition No. 9 of 2005.

the right to authorise or prohibit assemblies, it went beyond the permissible limitations to the enjoyment of the right to freedom of assembly enshrined in Article 29(1)(d) and was therefore unconstitutional. Then, in 2019, in *Mwandha Moses v. Attorney General,* the court, in the wake of the *Muwanga Kivumbi* decision, held that Sections 33, 34, 35 and 36 of the Police Act were likewise unconstitutional. In a strong-worded lead judgment, Justice Kenneth Kakuru, referring to Section 36 of the Police Act, stated, at page 20 of the judgment, stated:

> Section 36 of the Police Act gives power to a senior police officer to disperse an assembly by force and *may do all things necessary* for dispersing persons continuing to assemble or for apprehending them, and shall not be liable in any criminal or civil proceedings for having by the use force caused harm or death to any person.
>
> This is nothing but a licence to shoot and kill citizens who are peacefully gathered to voice their concerns or grievances, a right guaranteed under the Constitution.
>
> A law such as section 36 of the Police Act, which permits the police to do all things necessary to disperse a crowd that is not rioting, violent or armed goes beyond the powers of Parliament to enact.

In all these decisions, the two courts made important pronouncements relating to rights and freedoms of the individual, but they stopped short of making explicit policy directives on how the state was to deal with the impugned laws in the future. More importantly, they

never ordered any legal reforms in the sense in which the Supreme Court did in the *Amama Mbabazi* election petition. The furthest the Constitutional Court has gone in making actionable directives is in cases like *Behangana Domaro and Anor v. Attorney General*.[93] In that case, the petitioners, being husband and wife, were arrested by the police, detained and severely tortured and their phones, money, business stock and other property confiscated. The court found for the petitioners, awarded them damages, and ordered that a copy of the judgment be served upon the Inspector General of Police, with directives to investigate and act on the matter, and report to the court within six months the results of the investigations and actions taken.

Likewise, the furthest the Supreme Court has gone is in cases like *China Road and Bridge Corporation v. Welt Machinen Engineering Ltd & Another*[94] where the court, having found that the definition of "mineral" in the Mining Act did not cover certain substances, which were therefore left unregulated by the existing law, ordered that "Parliament ***may*** pass a law to regulate the exploitation of any substance excluded from the definition of 'mineral' when exploited for commercial purposes in accordance with Article 244(6)." Such a provision does not order reforms – it only offers suggestions. And more often than not, such 'guidance' is disregarded, without attracting any consequences.

Interestingly, it is the High Court which has ventured into ordering policy actions, by way of structural interdicts similar to that given in the *Amama Mbabazi* case. Hence in *Centre for Health, Human Rights & Development & 2 Others v. The Executive Director, Mulago Referral*

93 Constitutional Petition No. 53 of 2010 [2015] UGSC 6 (October 12, 2015).
94 Consolidated SCCA No. 13 &14 of 2019.

*Hospital & Anther*[95] where the hospital was found to have acted recklessly leading to the death of one of a set of twins, whose body could not even be traced, Justice Lydia Mugambe ordered Mulago Hospital to take steps to ensure and/or enhance the respect, movement and safety of babies, dead or alive, in its facilities. She further ordered the hospital to make reports to court every four months over the next two years, detailing the steps and measures taken to fulfil the above order. She further ordered the hospital to grant the petitioner full access to the hospital to monitor the implementation of the measures. Finally, in the language of the Supreme Court in the *Amama Mbabazi* case, she stated that court reserved the right, where necessary, to make further orders regarding the implementation of its orders.

Likewise, in *Muhindo James & 3 Others v. Attorney Gener*al,[96] the applicants sought an order compelling the Government to make comprehensive guidelines on land evictions. They pointed out that 21 years after the coming into force of the constitution and 18 years after the enactment of the Land Act, the Government had neglected, ignored or failed to develop guidelines for evictions and the resettlement of evictees, in violation of their right to life, dignity and property. Justice Musa Ssekaana ordered the Government to develop the guidelines as a matter of urgency, to protect the human rights of those faced with eviction, and to report back on the progress in doing so within seven months from the date of the decision. He directed that the process should be consultative and participatory. He directed that the state should refer to the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement for guidance on best practices. He further directed that in addition to the guidelines, "Government

95 Civil Suit No. 12 of 2013 [2017] UGHCCD 10 (January 24, 2017).

96 Miscellaneous Application No. 127 of 2016.

should come up with clear legislation with sanctions that should address the current problem of illegal land evictions in Uganda by both the state and private actors."

However, to this day no comprehensive guidelines seem to be in force as a statutory instrument, and evictions are reaching pandemic levels, with most of them being dealt with politically and not legally, meaning there is no consistency in the management of evictions. However, amidst this malaise, the Judiciary emerged as a safe haven for the victims of potential illegal and inhumane eviction when, in January 2021, the Chief Justice issued the Constitution (Land Evictions) (Practice) Directions.[97] One of the objectives of the directions is to "promote uniformity and consistency in handling evictions and demolitions" and the promotion of respect of the fundamental principles of natural justice in such processes. Whereas the directions did not emerge from a court decision, it is evident that the Judiciary was partly influenced by the increase in the cases it was receiving concerning evictions and thus sought to provide a quick fix to the problem, at least within its mandate.[98]

Notably, therefore, in the area of human rights, the High Court seems to be ahead of the upper courts on proactive decision-making but, even then, it is nowhere as categorical as the Supreme Court was when it came to electoral reforms. It would be interesting to test whether the High Court is prepared to cite the state players for contempt, where they fail to enact suggested laws, or even policies or specific actions affecting specified individuals.

97 Legal Notice No.2 of 2021.

98 Malaba T, Judicial officers propose land eviction guidelines, *The Daily Monitor*, Thursday, August 01, 2019 – updated on September 15, 2020. https://www.monitor.co.ug/uganda/news/national/judicial-officers-propose-land-eviction-guidelines-1840830. Accessed 3/12/2023.

# Chapter 5

# Conclusion

In the newly emerging approach to the exercise of judicial power, the common understanding is that courts of record are not confined to receiving complaints, applying the law to the facts and coming up with decisions that are limited to the litigants only. The courts are expected to embrace an expansive mandate, which may often involve making decisions whose reach goes way beyond the litigants themselves.

Where the cases before the courts involve the other branches of Government – the Executive and Parliament – the court, in line with the doctrine of checks and balances, is expected to take decisions that seek to curtail overreach by those branches. Often, it is not enough to merely declare legislative enactments or Executive actions or omissions as unconstitutional and/or void. A time comes when the courts are called upon to prevent future recurrence of the impugned acts, by seeing to it that necessary reforms, including legal ones, are rolled out.

Judicial intervention in the area of legal and other reforms is, of course, no licence to usurp the roles and powers of the other arms of the state. It should only be done in circumstances where it is justified, where it is not possible to redress the identified wrongs the usual way. But once court is convinced that there is need for reforms, it must be prepared to order them, and to oversee their implementation. After all, when it comes to protecting the rule of law, courts are the final frontier. As Kanyeihamba, JSC., stated, in *Paul*

*Kawanga Ssemogerere v. Attorney General*,[99] "It is the solemn duty of Courts in Uganda to uphold and protect the People's Constitution".

99 Constitutional Appeal No. 1 of 2004.




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