Uganda

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I. Origins and Historical Development of the Constitution

Before the advent of colonialism, Uganda did not exist as a single entity with defined boundaries and a system of governance. Instead, the area now called Uganda was inhabited by traditional societies characterised either as centralised kingdoms or as decentralised chiefdoms. In 1894, after several contacts that British missionaries had had with the Kingdom of Buganda, Uganda was formally declared a British Protectorate. In 1902, the British government issued an Order in Council that in effect imported to Uganda laws in force in the United Kingdom as at 2 August 1902. The Order in Council also gave the representative of the Crown, designated as the Commissioner, the power to make ordinances for the administration of justice, revenue collection, and generally for the peace, order, and good government of all persons in Uganda. In 1920 another Order in Council was promulgated that established a Legislative Council (LEGCO), defining its membership of seven to include the Governor, the Chief Secretary, the Attorney General, the Treasury, the Principal Medical Officer, and two others. The Order in Council allowed the LEGCO, under the stewardship of the Governor, to make ordinances for the governance of the Protectorate. In later years, the composition of the LEGCO was expanded to include non-Europeans, beginning with Indians, and in 1945 Africans too joined the Council. In 1958, the first direct elections to the LEGCO were held. By this time, when pressure for independence was at its peak, it became clear that the Protectorate would be granted independence and allowed to establish self-rule.

As was done for all colonies being prepared for independence, a constitutional conference for Uganda was convened in Lancaster in the United Kingdom, at which Uganda's Independence Constitution was born, in time for independence on 9 October 1962. Faced with an artificially amalgamated nation, having been pieced together from several kingdoms and chiefdoms with different backgrounds and cultures, the 1962 Constitution adopted a federal and semi-federal approach. The President, who was constituted as the Head of State, was to be elected by the National Assembly from among the rulers of the federal states and the constitutional rulers of the districts.[1] Although the Constitution vested executive power in the President,[2] it also limited this power in a number of ways, the most obvious being the creation of the office of Prime Minister. The powers vested in the President to appoint the Prime Minister were largely ceremonial; the President was obliged to appoint as Prime Minister the leader of the political party with the majority membership in the National

[1] 1962 Constitution, Article 36(1).
[2] 1962 Constitution, Article 61(1).

Assembly.[3] The Prime Minister could only be removed by the President after a vote of no confidence in the government was passed by the National Assembly. The Cabinet was to be constituted by the Prime Minister, together with other ministers appointed by the President, but on the advice of the Prime Minister.[4] The first Prime Minister was Milton Obote, who received the instruments of independence from the British government on behalf of Uganda.

One of the issues which caused tension in the run up to independence was the position of Buganda in independent Uganda. The Buganda Kingdom, which was one of the most powerful kingdoms in the region, had been used by the British colonialists to extend colonial rule to the rest of the region. The Protectorate, later named Uganda, had indeed been built around Buganda as the centre of colonial administration. For this reason, the people of Buganda and their King perceived Buganda as superior to the rest of Uganda and were willing to be amalgamated into Uganda only if Buganda was conferred with special status.[5] This explains why Buganda was accorded special status in the Independence Constitution. Indeed, when it came to the election of the President, the politics of the day dictated that the *Kabaka*, the King of Buganda, be elected President; otherwise Buganda, where the seat of government was located, would not have accepted a President from another region. As a result, the position of Buganda and its monarchical institutions was central to the future relationship between the central government, other regions of Uganda, and Buganda.[6]

A. The 1966 crisis and the birth of the Republican Constitution

Amidst these political events, the army started gaining prominence in Uganda. Having put in an excellent performance in the Congo under the command of Idi Amin against the Katangan rebels, the army's profile had improved. It soon became clear to the political actors that success against their opponents would depend on the relationship they enjoyed with the army. Indeed, when a political dispute emerged between Obote, on the one hand, and the King of Buganda and political actors in the government on the other, Obote acted swiftly by arresting five Cabinet ministers and putting Idi Amin in control of the army. To Obote, the solution for a stable united Uganda was the abolition of kingdoms, including Buganda, and the establishment of a unitary state. On 22 February 1966, Obote took over the reins of government power, arguing that this move was 'in the interest of national unity and public security and tranquillity'.[7] Two days later, Obote suspended the 1962 Constitution.

On 15 April 1966, Obote introduced into Parliament the 1966 'Pigeon Hole Constitution', which was so described because it was never debated; members of the National Assembly were advised they would find the draft Constitution in their pigeon hole, to be adopted the same day. Buganda rose up to oppose the political developments, reviving its secession demands and calling upon the government to

[3] 1962 Constitution, Article 62(3).
[4] 1962 Constitution, Article 62(10).
[5] Phares Mutibwa, *Uganda since Independence: A Story of Unfulfilled Hopes* (Fountain Publishers Ltd, Kampala, 1992) 11.
[6] Mutibwa, n5, at 23.
[7] Mutibwa, n5, at 39.

vacate Buganda's territory. The central government interpreted this as rebellion, which led to the military raid, under the command of Idi Amin, of the Lubiri, the *Kabaka*'s palace, forcing the King to flee into exile. The 1966 Interim Constitution changed the manner of electing the President, by designating the leader of the majority party in Parliament as the President.[8]

On 8 September 1967, the Interim Constitution was replaced by the Republican Constitution, which declared Uganda a Republic. The Constitution declared that '[t]he institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished'.[9] All executive powers were centralised and vested in the President, who was to be elected by adult suffrage. The legislature, too, was to be elected.

Although the 1967 Constitution retained the multi-party political system as had been entrenched in the 1962 Constitution, the practice was quite different. The period from 1967 to 1971 was used by Obote to build a one-party state, with the Uganda People's Congress (UPC) at the helm of state power. A good number of opposition politicians were either imprisoned on flimsy politically-motivated charges or forced into exile, while others were either bribed or threatened into abandoning their parties to join the UPC.

B. The Northern question and its impact

One of the effects of colonialism, and a factor which has had an impact on constitutionalism in Uganda, is the Northern question. The colonial government deliberately marginalised northern Uganda, concentrating its socio-economic development in the southern parts of the country.[10] The Northerners, seen by the colonial state as physically strong and martial, were reserved for the provision of labour, especially on farms in the south. They were also recruited in massive numbers by the army.

At independence, the army was dominated by Northerners, mainly the *Langi* and *Acholi*. This made it possible for politicians from northern Uganda, including Milton Obote, to manipulate the army for their own political ends. However there was in-fighting between the different ethnic groups, including the *Langi*. Obote started encouraging these differences to build his hold on the army by, among other actions, side-lining other ethnic groups in favour of his *Langi* tribesmen to the detriment of the *Acholi* and the *Kakwa*, who were Amin's tribe-mates. Despite the differences described above, what resulted was a strong-hold on the army by Northerners, who considered this to be their institution. This happened at a time when the army had entered the political arena as an important player, having been used by Obote to overthrow the Constitution, which allowed him to consolidate his power.

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[8] For changes introduced by the 1966 Constitution, see HF Morris, 'The Ugandan Constitution, April 1966' (1966) 10 Journal of African Law 112–116.

[9] 1967 Constitution, Article 118(1).

[10] See AG Ginywera-Pinchw, 'Is there a "Northern Question"'?, in Kumar Rupesinghe (ed), *Conflict Resolution in Uganda* (International Peace Research Institute, Oslo, James Currey, London, and Ohio University Press, Athens, 1989) 44–64.

It was this state of affairs which paved the way for Idi Amin, who had exploited these ethnic tensions, to stage a coup in 1971. He thought the ethnic tensions would be defused if he massacred all *Langi* soldiers. This he did immediately after taking power.

C. The dictatorship of Idi Amin (1971 – 1979) and his overthrow

On 25 January 1971, Idi Amin took advantage of the absence of Obote, who was on a state visit to Singapore, to stage a *coup d'état*. Amin immediately dismissed Parliament, suspended the Constitution, and began his rule by decrees passed by the Military Council, which he chaired. The military assumed all powers, including judicial powers exercised through the military tribunals, which exercised jurisdiction over civilians for such civilian offences as smuggling goods or engaging in political activity. Amin then started his reign of terror, brutally murdering all who opposed him, and hordes of politicians and professionals fled into exile.[11]

The overthrow of Idi Amin in 1979 by Ugandan exiles, with the support of Tanzania, was expected to restore democracy and constitutional rule. Unfortunately, this was not the case. The problem that immediately surfaced was the presence of many liberation groups that had different ideologies and plans for the country.[12] The transitional government formed to organise and return Uganda to democracy was characterised by intrigue between the different factions, with the UPC-led faction 'stealing the show' and dominating the scene. Multi-party elections organised in 1980 turned out to make a mockery of democracy. The elections were marred by irregularities and malpractices. The Military Commission, which was controlled by the UPC, usurped the powers of the Electoral Commission. To reverse what many believed to be a victory for the Democratic Party (DP), the Military Commission hurriedly pushed through a law which prohibited presiding officials from announcing the results. Later, in what were believed to be 'doctored' results, the Commission announced that Obote's UPC had won.

The rigged election was justification for Yoweri Kaguta Museveni and twenty-six of his colleagues to take up arms and work towards the forceful overthrow of Obote. The Obote regime (1980 to 1985) was characterised by draconian rule, with the army terrorising civilians. A *coup d'état*, precipitated by ethnic intrigue in the army, saw Tito Okello Luwta, an *Acholi* army official, overthrow Obote, which further weakened the government and created the perfect opportunity for Museveni's National Resistance Army (NRA) to overthrow the government on 26 January 1986, thereby establishing the government of the National Resistance Movement (NRM).

D. Uganda under the NRM government

[11] See Henry Kyemba, *A State of Blood: The Inside Story of Idi Amin* (Grosset & Danlap, 1977).
[12] Mutibwa, n5 at 125.

When the NRM took over government, it declared that its ascendency to power was not 'a mere change of guards', but a 'fundamental change'. The face of government and the army changed, becoming more friendly and non-repressive. The new government announced that its activities would be guided by the Ten Point Programme, a catalogue of ten guiding principles conceived during the armed struggle, as the basis for reform. The ten points comprised (i) democracy; (ii) security; (iii) the consolidation of national security and the elimination of all forms of sectarianism; (iv) defending and consolidating national independence; (v) building an independent, integrated, and self-sustaining national economy; (vi) the restoration and improvement of social services and the rehabilitation of war-ravaged areas; (vii) the elimination of corruption and the misuse of power; (viii) redressing errors that had resulted in the dislocation of sections of the population, and improvement of others; (ix) co-operation with other African countries in defending the human and democratic rights of brothers in other parts of Africa; and (x) following an economic strategy of a mixed economy.

Although the NRM government began its governance under the 1967 Constitution, it made a number of changes of constitutional significance. Although the Constitution made provision for such constitutional institutions as Parliament and a Cabinet, in its first days the NRM used its military structures, including the High Command and the Military Council, as the political decision-making bodies.[13] Also of significance was the regulation of multi-party democracy by the suspension of the activities of political parties and, in its place, the adoption of the 'Movement' or 'No-party' system.[14] The NRM argued that political parties were divisive and partly responsible for the country's historical woes.[15] Elections were also suspended—the country had to wait for ten years before holding a presidential election, in what the NRM described as a period of transition.

One of the developments marking a milestone in constitutional terms was the 1989 appointment of the Uganda Constitutional Commission (widely referred to by the name of its Chairperson as the 'Odoki Commission'). The mandate of the Commission was to traverse all parts of the country and collect people's views on the content of a new constitution to take the country forward.[16] Later, the Report of the Commission was debated by an elected Constitutional Assembly, which in October 1995 adopted the 1995 Constitution, thereby repealing the 1967 Constitution.

Amidst these developments, the 'Northern question' manifested. Some soldiers of the ousted government retreated to northern Uganda, where they exploited the north-south divide to brainwash some Northerners into rebellion. This was how the Lord's Resistance Army (LRA), led by Joseph Kony, was born.

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[13] Dan M Mudola, D M Mudoola, 'Institutional Building: The Case of the NRM and the Military in Uganda 1986–9', in H Hansen & M Twadde (eds), *Changing Uganda: The Dilemma of Structural Adjustment and Revolutionary Change* (Eastern African Studies, James Currey Ltd, 1991) 230, 231.

[14] See Giovanne Carbone, *No-Party Democracy? Ugandan Politics in Comparative Perspective* (Lynne Rienner Publishers, Boulder, 2008).

[15] George Kirya, 'The "No Party" or "Movement": Democracy in Uganda' (1998) 60 The Review 79–101.

[16] See Benjamin Odoki, *The Search for a National Consensus: The Making of the 1995 Uganda Constitution* (Fountain Publishers, Kampala, 2005).

The LRA terrorised northern Uganda in the 20 year civil war by techniques that involved attacks on civilians and abduction as a mechanism of recruitment.[17] However, by 2005 the LRA was weakening, as the political situation in Southern Sudan stabilised. This led to the loss of the LRA's hiding places and the support of the Sudan Khartoum-based government. As a result of this, combined with the indictment by the International Criminal Court of its top commanders, the LRA was forced to a negotiating table.[18] Although no final peace deal was signed, Kony and his men retreated to the Democratic Republic of the Congo and the Central African Republic, where they have continued to commit atrocities.

II. Fundamental Principles of the Constitution

A. National Objectives and Directive Principles of State Policy

Like many constitutions drafted by African countries in the 1990s, the Ugandan Constitution contains 'National Objectives and Directive Principles of State Policy' ('National Objectives'). The National Objectives, which appear immediately after the Preamble, deal with a number of subjects and define the objectives which Uganda is supposed to pursue. The manner in which the objectives are to be implemented is spelt out in Object I, which provides as follows:

> I. Implementation of objectives
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> (i) The following objectives shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

For a long time, questions were raised regarding the legal nature and status of these Objectives and whether or not they are justiciable. The courts in some cases attempted to define the status of the principles. In *Salvatori Abuki & Anor v Attorney General* (*Abuki* case),[19] Justice Egonda Ntende gave meaning to the right to life as including the right to a livelihood, as referred to in the National Objectives. The judge relied on Objective XIV, which compels the state to endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development.

B. Constitutional values

[17] See Lui Institute for Global Issues and Human Rights & Peace Centre, *The Hidden War, The Forgotten People: War in Acholiland and it's Ramifications for Peace and Security in Uganda* (2003).

[18] See Christopher Mbazira, 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda', in Chacha Murungu & Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 197.

[19] Constitutional Petition No 2 of 1997, [1997] UGCC 5 [http://www.ulii.org/ug/judgment/constitutional-court/1997/5] (accessed 20 April 2013).

The Constitution does not have a specific provision which explicitly spells out the values upon which Ugandan society is based. The closest the Constitution comes to an explicit expression of the values is in the Preamble , in which 'The People of Uganda' commit 'to building a better future by establishing a socioeconomic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress'. Constitutional values can also implicitly be picked from various parts of the Constitution, including the National Objectives, which commit the state to being based on democratic principles,[20] the promotion of balanced and equitable development,[21] the recognition of the role of women in society,[22] the recognition of the family as the natural and basic unit of society,[23] and respect for cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy, and the Constitution,[24] among others. Article 7 provides that the state shall not adopt a state religion, while Article 126(1) states that judicial power is derived from the people and shall be exercised in the name of the people and in conformity with the law and with the values, norms, and aspirations of the people.

Outside the Constitution, the country's constitutional values could also be deduced from the jurisprudence of the courts, and particularly from constitutional law jurisprudence. In interpreting the Constitution, and particularly the Bill of Rights, the courts have in some cases been guided by what have been referred to as 'constitutional values'. However, some of the values indicated in the jurisprudence have been informed by foreign case law, which raises questions as to whether these are purely Ugandan values. It should be noted, though, and as will be illustrated later, that the courts have been guided in this regard by, among others, Article 43, which prescribes the general limitation clause and alludes to 'a free and democratic society'. It was in the process of interpreting this provision that the courts have alluded to values found in foreign case law. In the *Abuki* case, for instance, Justice Tabaro, while relying on the South African case of *S v Makwanye*,[25] referred to the African value of *ubuntu*, holding that this value embodies humanness, social justice, and fairness, and permeates fundamental human rights.[26] The Constitutional Court has also alluded to equality as a core value of the Constitution.[27] In the case of *Paul Kafeero and Another v Electoral Commission and Attorney General*,[28] the Court relied on the Canadian Supreme Court decision in *The Queen v Oakes*[29] to find that commitment to social justice and equality, accommodation of a wide variety of beliefs, and respect for cultural and group identity were part of Uganda's constitutional values. In *Charles*

[20] National Objective II(i).
[21] National Objective XII.
[22] National Objective XV.
[23] National Objective XIX
[24] National Objective XXIV.
[25] 1995 (3) SA 391 (CC)
[26] At page 29 of his judgment.
[27] *Uganda Association of Women Lawyers and Others v Attorney General* Constitutional Petition No 2 of 2003 [2004] UGCC 1.
[28] Constitutional Petition No 22 of 2006 [2008] UGCC 3 [http://www.ulii.org/ug/judgment/constitutional-court/2008/3] (accessed on 2 March 2013].
[29] [1987] (Const) 477 at 498–9.

Onyango Obbo and Anor v Attorney General,[30] the Supreme Court alluded to democracy as a fundamental constitutional value and principle in Uganda.

C. Constitutional principles

As with the constitutions of several other countries, the Constitution of Uganda is defined by a number of principles which can be deduced from its provisions. These include the supremacy of the Constitution and the constitutional state; separation of powers; democracy; and social justice. These principles can be derived from a reading of the Constitution and the jurisprudence of the courts. In addition to the body of the Constitution, some of the principles can be found in the National Objectives.

As regards the principle of supremacy of the Constitution and the constitutional state, this is consistent with the country's legal tradition since 1966, when the first Republican Constitution was adopted. Article 2 of the 1995 Constitution proclaims the supremacy of the Constitution. The provision states that the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.[31] It also provides that if any other law or any custom is inconsistent with any provision of the Constitution, the Constitution shall prevail, and that other law or custom shall to the extent of its inconsistency be void. This supremacy clause is bolstered by Article 137(3), which gives the Constitutional Court the power to declare that any law or thing done under the law, act, or omission is inconsistent with the Constitution. This is a power which the Court has exercised in a number of cases. In *Uganda Association of Women Lawyers and Ors v Attorney General* (*Uganda Women Lawyer's Case*),[32] the Court declared void provisions of the Divorce Act which created different grounds for divorce for men and women, and in effect unfairly discriminated against women on the basis of sex. In *Muwanga Kivumbi v Attorney General*,[33] the Court declared void a provision of the Police Act which required protestors to seek the written approval of the chief of police before exercising their freedom of assembly as constitutionally guaranteed. In *Foundation for Human Rights Initiative v Attorney General*,[34] the Court declared null and void various provisions of the criminal procedure laws which stifled enjoyment of the right to bail.

The principle of separation of powers comes across in several provisions of the Constitution. The Constitution creates three organs of the state—the legislature, the executive, and the judiciary—and defines the powers, mandate, and constitutional limits of each of the organs, with appropriate checks and balances. A more detailed discussion below will illustrate the breadth of the power, the nature of the mandate of each organ, and the relevant checks and balances.

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[30] Constitutional Appeal No 2 of 2002, [2004] UGCC 1 [http://www.ulii.org/ug/judgment/supreme-court/2004/1] (accessed on 20 May 2013).

[31] Article 2(1).

[32] Above, n27.

[33] Constitutional Petition No 9 of 2005, [2008] 4 UGCC [http://www.ulii.org/ug/judgment/constitutional-court/2008/4] (accessed on 20 February 2013).

[34] Constitutional Petition No 20 of 2006, [2008] UGCC 1 [http://www.ulii.org/ug/judgment/constitutional-court/2008/1] (accessed on 2 May 2013).

III. Fundamental Rights Protection

A. The introduction of fundamental rights

Uganda has had a Bill of Rights in its Constitution since 1962, when it gained independence and promulgated the Independence Federal Constitution. For the first time after years of colonial exploitation and oppression, Ugandans in 1962 gained constitutionally guaranteed fundamental rights and freedoms. However, it should be noted that, as probably dictated by the conceptions of human rights at the time, the Bill of Rights had its own limitations. First, instead of opening with an assertion of the inherent nature of the rights, the Bill began with a clear caution that the rights were not absolute and that the rights would be enjoyed subject to the rights of others and the public interest.[35] In addition to this, the substantive provisions defining the rights were riddled with a number of limitations. Furthermore, the Constitution guaranteed only civil and political rights, to the exclusion of economic, social, and cultural rights.

Although the 1962 Constitution made provision for the enforcement of the Bill of Rights, it restricted the right to petition the court to those persons who would allege violation of the rights in relation to themselves. Thus only those who had suffered or were likely to suffer damage would have locus before the High Court. The subsequent 1966 and 1967 Constitutions carried on the same approach. These Constitutions also limited their scope of coverage to the classic civil and political rights, to the exclusion of the economic, social, and cultural rights.

In comparison, the 1995 Constitution has a more progressive Bill of Rights, and one which creates a number of enforcement procedures. The Constitution guarantees a variety of rights, ranging from the traditional civil and political rights to rights of such vulnerable groups as women, children, and persons with disabilities. The 1995 Constitution came after a long history of massive violations of human rights, which characterised the leadership of regimes such as that of Idi Amin.

When the NRM government came to power in 1986, it instituted a Commission of Inquiry into Violations of Human Rights.[36] The mandate of the Commission was to inquire into all aspects of violations of human rights, breaches of the rule of law, and excessive abuses of power committed against persons in Uganda by regimes in government, their servants, agents, or agencies, as whatsoever called, during the period from 9 October 1962 to 25 January 1986. This was in addition to finding possible ways of preventing the recurrence of the aforesaid matters.[37] It was the work of this Commission and the recommendations it made, together with those that emerged from the Report of the Uganda Constitutional Commission, that influenced the structure and content of the Bill of Rights.

[35] Article 17.
[36] See Commission of Inquiry Act, Legal Notice No 5 (16 May 1986) (Cap 56).
[37] Id.

The Commission recognised human rights as the basis for human dignity, constitutionalism and the rule of law, and development. It was on the basis of this that a proposal was made for a comprehensive Bill of Rights, which the Commission linked to an attempt by the people to provide both machinery and institutions for the enforcement of human rights and the people at large with all the principles they need to protect human rights, without any further doubt or excuse of ignorance.

Article 20(2) creates both vertical and horizontal obligations to respect, uphold, and promote the rights in the Bill of Rights:

> 20. Fundamental and other human rights and freedoms
>
> (1) ...
>
> (2) The rights and freedoms of individuals and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons

B. The spectrum of rights

Compared to the 1962, 1966, and 1967 Constitutions, which, as indicated above, provided mainly for traditional civil and political rights, the 1995 Constitution has a wider spectrum of rights and, as also mentioned above, extends in a specific manner protection to a number of vulnerable groups.

The rights of women are found in Article 33, which guarantees women the right to be accorded full and equal dignity of the person with men.[38] The state is required to provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.[39] The Article goes on to guarantee women the right to equal treatment with men, which includes the right to equal opportunities in political, economic, and social activities.[40] Also guaranteed is the right to affirmative action for the purposes of redressing the imbalances created by history, tradition, or custom.[41] Other provisions which guarantee the rights of women include Article 31, dealing with 'rights of the family' and which among others guarantees 'equal rights at and in marriage, during marriage and at its dissolution'.[42] The provision also guarantees both men and women the right to marry if they are above the age of eighteen years and to found a family, and requires that marriage shall be entered into with the free consent of the man and woman intending to marry. Article 31(2) enjoins Parliament to make laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children. Article 32(2) prohibits laws, cultures, customs, and traditions which are against the dignity, welfare, or interest of women.

[38] Article 33(1).
[39] Article 33(2).
[40] Article 33(4).
[41] Article 33(5).
[42] Article 31(b).

The Constitutional Court has adjudicated some cases seeking to enforce the rights of women in Article 33, together with Article 21, which guarantees the right to equality and prohibits discrimination on the basis of, among others, sex. This is in addition to Article 31, which guarantees rights of the family. In the *Uganda Women Lawyers* case, the petitioners contested provisions of the Divorce Act,[43] which discriminated against women in various matters regarding divorce, including creating grounds of divorce which disadvantaged women, in addition to differentiated procedures which accorded men more rights. The Court nullified the impugned provisions, having found them discriminatory and inconsistent with the Constitution in a number of respects. Justice Mpagi-Bahigeine opined:

> It is beyond dispute that no area of law impacts on more women with greater force that Domestic Law. The Divorce Act (CAP 249) is, however, archaic in content ... [i]ts substance is a colonial relic whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role, of being a mere appendage of the husband, without separate legal existence.[44]

In *Law & Advocacy for Women in Uganda v Attorney General* (the *Adultery* case),[45] the Court was invited to annul the provisions of section 154 the Penal Code Act, which prescribed the offence of adultery in a manner that criminalised sex by a married man with another married woman not being his wife, but criminalised sex by a woman with another man, irrespective of whether or not the man was married. The Court was also invited to annul various provisions of the Penal Code Act which promoted discrimination against women in matters of succession. Although the state conceded the unconstitutionality of the adultery provision of the Penal Code Act, it invited the Court to read the provision with necessary modifications to bring it into conformity with the Constitution. The Court, however, declined to carry out such modifications, arguing that its constitutional mandate is limited to declaring null and void any unconstitutional provisions. It was on this basis that the Court annulled section 154 of the Penal Code Act, together with a number of impugned provisions of the Succession Act.

In *Mifumi (U) Ltd & Ors v Attorney*,[46] the petitioners challenged the customary practice of paying bride price as a condition for a valid customary marriage, and the refund of the same as a condition for annulling a customary marriage. The petitioners argued that the practice was inconsistent with Article 31, which guarantees the right to marry if both parties consent. It was also argued that payments of bride price degrade women and equate them to goods in the market place, in addition to promoting inequality in marriage. In rejecting some of the arguments, the Court held that the practice of paying bride price is not in itself unconstitutional, and prospective married couples have the option of entering into other forms of marriage which do not require a payment of bride price. The Court also held that although arguments were made with regard to the social ills of bride price, such as domestic abuse, the Court could

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[43] Cap 249, Laws of Uganda.

[44] Judgment of Mpagi-Bahigeine, at 7.

[45] Constitutional Petition No 13/05 & 05/06, [2007] 1 [http://www.ulii.org/ug/judgment/constitutional-court/2007/1] (accessed on 17 March 2013).

[46] Constitutional Petition No 12 of 2007, [2010] UGCC 2 [http://www.ulii.org/ug/judgment/constitutional-court/2010/2] (accessed on 2 December 2012).

not state that such instances occur as a matter of course, or are definitively linked to a bride price arrangement. In any case, there are varied and numerous causes of spousal abuse. The only argument which the Court agreed with was the one concerning the pre-requisite to refund the bride price on dissolution of the marriage. The Court argued that the refund demeans and undermines the dignity of the woman.

The Constitution also protects a wide spectrum of traditional civil and political rights, including such civil liberties as equality and non-discrimination,[47] life,[48] personal liberty,[49] human dignity and protection from inhuman treatment,[50] protection from slavery, forced labour, and servitude,[51] privacy,[52] and a fair hearing.[53] Other rights include the freedoms of conscience, expression, movement, religion, assembly and association,[54] and rights of the family.[55]

Some of the rights mentioned above have been the subject of constitutional litigation and have been dealt with in a number of judicial decisions. Cases implicating the right to equality and the prohibition of discrimination have been dealt with above. In addition to these cases, the courts have ruled on the right not be subjected to forced labour. The Supreme Court held that a letter from the Minister of Defence declining the resignation of a General from the army did not amount to forced labour, since the procedures of resignation had not been followed.[56] In *Attorney General v Susan Kigula*,[57] the Supreme Court ruled that provisions of the law imposing the death penalty did not infringe the constitutional right to life. However, the Court found that provisions imposing a mandatory death penalty were unconstitutional to the extent that they took away the discretion of the Court and compromised its independence. In *Muwanga Kivumbi v Attorney General*,[58] the Constitutional Court annulled provisions of the Police Act which gave the Inspector General of Police unfettered discretion to prohibit a public demonstration or assembly. The Court emphasized the importance to a country of the freedoms of assembly, association, and expression. Similarly, in *Charles Onyango Obbo v Attorney General*,[59] the Court annulled provisions of the Penal Code Act which prescribed the offence of publishing false news. The provision was found to be vague and imprecise and infringed the constitutional right to freedom of expression. The Court held that the right to freedom of expression extends protection even to those expressions which are perceived to be vague or false. In *Dr Sam Lyamoki v Attorney General*,[60] provisions of the law which compelled all trade unions to belong to a statutory federation of unions was annulled as unconstitutional

[47] Article 21.
[48] Article 22
[49] Article 23.
[50] Article 24.
[51] Article 25.
[52] Article 26
[53] Article 27.
[54] Article 29.
[55] Article 31.
[56] *Attorney General v Major-General Tinyefuza* (*Tinyefuza* case), Supreme Court Constitutional Appeal No 1 of 1997.
[57] Constitutional Appeal No 3 of 2006.
[58] Above, n33.
[59] Above, n30.
[60] Constitutional Appeal No 8 of 2004, [2005] UGCC 2 [http://www.ulii.org/ug/judgment/constitutional-court/2005/6] (accessed on 7 December 2012).

to the extent that it in effect amounted to forced association. As regards the freedom of religion, the Supreme Court, in the case of *Sharon Dimanche v Attorney General* (*Dimanche* case),[61] upheld a decision of the Constitutional Court to the effect that the practice of Makerere University arranging exams on weekends was a legitimate limitation of the freedom of worship for students who professed to follow the Seventh Day Adventist religious faith, the University being a secular institution and the students having been admitted on those terms.

Unlike the civil and political rights, the economic, social, and cultural rights (ESCRs) have not attracted many judicial decisions. In the first place, the justiciability of ESCRs in the Constitution is limited; the rights are mainly protected as part of the National Objectives. Nonetheless, there are elements of the rights in the Bill of Rights in provisions which protect the right of all persons to education,[62] the protection of the unique and maternal functions of women,[63] the rights of children to education and not to be deprived of medical treatment, education, or any social and economic benefit by reason of religion,[64] the protection of children from social and economic exploitation,[65] the right to culture and similar rights,[66] the right to a clean and healthy environment,[67] and rights to satisfactory, safe, and healthy working conditions, equal pay for equal work, and rest and reasonable working hours.[68]

The constitutional jurisprudence impugning ESCRs has unfortunately not only been scanty, but it is also incoherent. In the *Abuki* case,[69] the Constitutional Court, while annulling provisions of the Witchcraft Act that allowed for the banishment from his or her home of a convicted witch even after they had served a custodial sentence, found that the provisions infringed a number of rights. The Court found the provision to infringe upon the right to a livelihood, as part of the right to life, to the extent that the banishment denied the convicts a home and access to a garden from which they derived sustenance. In addition to the right to life, the Court relied on National Objective XIV, which provides that

> The state shall endeavor to fulfill the fundamental rights of all Uganda's to social justice and economic development and shall, in particular, ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food, security and pension and retirement benefits.

One would have expected the Court to build on the approach in the *Abuki* case in the subsequent case, and to promote ESCRs. This is especially so after the introduction in the Constitution of Article 8A(1), which provides as follows:

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[61] Constitutional Appeal No 2 of 2004, [2006] UGCC 10 [http://www.ulii.org/ug/judgment/supreme-court/2006/10] (accessed on 9 December 2012).
[62] Article 30.
[63] Article 33(3).
[64] Article 34(2) and (3).
[65] Article 34(4).
[66] Article 37.
[67] Article 39.
[68] Article 40.
[69] Above, n19.

> Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

The Constitutional Court failed to develop the *Abuki* case approach when confronted with a case which raised serious issues pertaining to the state of reproductive health in the country. In the case of *Centre for Health Human Rights & Development and Ors v Attorney General,*[70] the petitioners sought to enforce the right to the best attainable standard of mental and physical health, and particularly reproductive health rights. The petition arose out of the senseless death of expectant mothers at some health facilities as a result of neglect by medical staff and the absence of medical supplies. The two incidents used to challenge the widespread deaths involved the death of two mothers who bled to death at public health facilities because of, among other reasons, deliberate neglect by health workers at those facilities. In the petition, reliance was made, among other claims, on the National Objectives and Article 33(3) of the Constitution which, as indicated above, requires the state to protect the rights of women 'taking into account their unique status and natural maternal functions in society'. After an inordinate delay, when the case came up for hearing the state raised a preliminary objection to the effect that the Court did not have jurisdiction to inquire into health policy matters, as these raised political questions. In upholding the objection and dismissing the petition, the Constitutional Court held that the petition raised political questions:

> Much as it be may be true that government has not allocated enough resources to the health sector and in particular the maternal health services, this court is, with guidance from the above discussions reluctant to determine the questions raised by this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of government, for inter alia, the good governance of Uganda. This duty is the preserve of the Executive and no person or body has the power to determine, formulate and implement these policies except the Executive.[71]

The case has been appealed to the Supreme Court and awaits the hearing of the appeal.

It should also be noted that the Constitution is open-ended in the rights it protects. Article 45 provides that the rights, duties, declarations, and guarantees relating to the fundamental or other human rights and freedoms specifically mentioned in the Bill of Rights shall not be regarded as excluding others not specifically mentioned. Unfortunately, this provision has not been the subject of specific judicial interpretation.

C. Application

[70] Constitutional Petition No 16 of 2011 (unreported).
[71] At p 25.

There are a number of provisions in the Constitution that deal with the application of the Bill of Rights. In what is a prescription of the vertical and horizontal application of the Bill of Rights, Article 20(2) provides that the rights and freedoms in the Bill of Rights shall be respected, upheld, and promoted by all organs and agencies of government and by all persons. The beneficiaries of the rights are various and differ from provision to provision, yet most of the rights are intended for 'every person', in some cases in a specific context, such as when faced with arrest, when detained, or when facing trial.

The specific groups guaranteed rights in specific provisions include women (Articles 31 and 33), children (Article 34), persons with disabilities (Article 35), and minorities (Article 36).

D. Limitation and interpretation

In line with international practice, the rights in the Bill of Rights are not absolute but are limited in a number of ways. The Bill of Rights has a limitation clause contained in Article 43(1), which provides that in the enjoyment of the rights and freedoms, no person shall prejudice the fundamental or other rights and freedoms of others or the public interest. Article 43(2) states that the public interest shall not permit political persecution and detention without trial, and that there shall not be any limitation of the enjoyment of the rights and freedoms beyond what is acceptable in a free and democratic society or what is provided for in the Constitution.

The approach which the courts have adopted in applying the limitation clause are equivalent to the two-stage approach applied by the Canadian courts when giving meaning to the rights in the Canadian Charter. Both the Constitutional Court and the Supreme Court have given meaning to the limitation clause, in the first place, by establishing whether or not the petitioner enjoyed a right which has been infringed, followed by a determination of whether the 'infringement' amounts to a restriction within the provisions of the limitation provision. In the *Abuki* case, Justice Egonda held that the proper approach would be first to test the law complained of against the substantive provisions of the Constitution that protect the right alleged to have been infringed. According to Justice Egonda, if on the face of it the law complained of infringes the substantive right or freedom, the Court would then examine any limitation set by the Constitution or any other law and determine the extent of the limitation permitted by the Constitution.[72]

In the *Dimanche* case, the Supreme Court adopted the same approach, holding that it is always necessary to determine whether the legislative objective is sufficiently important to justify hurting a fundamental right. The Court in this regard held that it must be established that the impugned action has an objective of expressing a substantial concern of society in a free and democratic society. According to the Court, in doing this the courts must strike a balance between the interest of freedom and the social interest and ensure that rights are not suppressed unless there are pressing community interests that are likely to be endangered. The Court also alluded to considerations which must guide the court in determining the proportionality described above: (1) the nature of the right which is limited; (2) the importance of the

[72] *Abuki* case, n19, at p 40.

right in an open and democratic society, based on freedom and equality; (3) the extent of the limitation; (4) the efficacy of the limitation; and (5) whether the desired ends could reasonably be achieved through other less damaging means.

In applying the two-stage approach, the Constitutional Court has alluded to the burden of proof on the applicant and that on the state. According to Justice Egonda:

> Once a petitioner establishes that his constitutional right been infringed, the burden to answer the above question shifts to those asserting that the exclusion order protects the fundamental rights and freedoms of other people or the public interest and that it is acceptable and demonstrably justifiable in a free and democratic society.[73]

As regards interpretation, the courts have adopted the approach that the Constitution is a special instrument which requires a special approach to its interpretation compared to ordinary pieces of legislation. In the *Tinyefuza* case, one of the first constitutional cases under the 1995 Constitution, Justice Kanyeihamba of the Supreme Court adopted reasoning in comparative case law to the effect that the task of expounding a constitution is crucially different from that of constructing a statute, as a statute defines present rights and obligations and can easily be enacted or repealed. In contrast, a constitution is drafted with an eye to the future and cannot easily be amended or repealed, and should therefore be capable of development and growth.[74] The judge added that it is a recognised principle that in interpretation, the constitution must be given a generous and purposive construction. The judge, however, cautioned that this does not mean that the true text of the constitution should be considered irrelevant.

The courts have also endorsed the contextual approach as relevant in interpreting a constitution. In *Hon Zachary Olum & Anor v Attorney General*,[75] the court considered the chequered and repressive history of the country to be relevant. In the *Abuki* case the court construed Article 24, which prohibits torture, by making reference, among others, to the history of torture under dictatorial regimes in Uganda. The provision was also understood in the context of Article 44, which prohibits derogation from freedom from torture.

IV. Separation of Powers

A. The executive and the legislature

There is no provision in the Constitution that expressly prescribes the doctrine of separation of powers as one of the doctrines which should guide the organisation of the state. However, it is clear from the provisions of the Constitution that the organisation of the organs of the state and how they relate to each other has been guided by the doctrine, with appropriate checks and balances. The mandate and powers of the executive (Chapter seven) and the legislature (Chapter six) are

[73] *Abuki* case, n19, at 43.
[74] *Tinyefuza* case, n56, Kanyeihamba judgment, at 7.
[75] Constitutional Petition No 6 of 1999.

adequately defined, with areas of interaction and appropriate checks and balances indicated.

B. The executive

The Constitution vests executive powers in the President, who is also the Head of State, Head of Government, and Commander-in-chief of the armed forces (Article 98(1)). In exercising his executive powers, the President is required to follow the Constitution and is obliged to maintain the Constitution and all laws in force:

> It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.[76]

Uganda follows a multi-party system based on the first-past-the-post electoral system, which allows for individuals to contest the presidency either through their political parties or as independents. The election of the President is by universal adult suffrage through secret ballot (Article 103(1)). Until 2005, Article 105 of the Constitution prescribed a maximum of two terms of five years each as the tenure of office for the President. However, the provision was controversially amended in 2005, which saw the lifting of the term limits in a process which was characterised by political manoeuvring and the outright bribery of Parliament.

The executive power is exercised by the President together with the Cabinet, which consists of the President, the Vice President, the Prime Minister, and such ministers as may appear to the President to be reasonably necessary for the efficient running of the state.[77] The functions of the Cabinet are described as the determination, formulation, and implementation of the 'Policy of Government' (Article 111(2)).

There are a number of checks and balances on the executive as prescribed by the Constitution. In the first place, as indicated above, the President is expected to execute his duties in accordance with the Constitution and has an obligation to uphold the same. In relation to the Cabinet, the Constitution recognises the principles of individual accountability and collective responsibility. It is provided that ministers shall individually be accountable to the President for the administration of their ministries and shall collectively be responsible for decisions made by the Cabinet (Article 117). Nonetheless, ministers still individually remain accountable for their decisions before Parliament, which among others has the power to censure ministers guilty of abuse of office, misconduct or misbehaviour, mismanagement, or incompetence (Article 118(1)). Parliament also has powers to remove the President from office on the basis of the grounds stipulated in the Constitution, which include abuse of office or violation of the oath of allegiance, misconduct, or physical or mental incapacity (Article 107(1)). The process of removal of the President is elaborate, and starts with a notice signed by not less than one-third of all members of Parliament, followed by the appointment of a tribunal by the Chief Justice, which then reports its findings to Parliament. Through its committees, Parliament is empowered to check the ministers, who may be called upon by any committee either to submit

[76] Article 99(3).
[77] Article 111(1).

memoranda or to appear and give evidence on any matter as required by Parliament (Article 90(3)(a)).

C. Parliament

Legislative powers in Uganda are vested in Parliament, which is composed of members directly elected to represent constituencies; one woman representative for every district; the vice-president and ministers; and such members who represent interest groups such as the army, youth, workers, and persons with disabilities.[78]

Although the legislative power generally vests in Parliament, the executive has powers to initiate bills and bring the same for debate in Parliament. When a Bill is passed by Parliament, it only becomes law after being assented to by the President, who must do so within 30 days after the Bill is sent to him or her, unless he or she has reservations, which he or she must bring to the attention of Parliament (Article 91(3)). The President can also notify the Speaker that he or she declines to assent to a Bill. It should be noted that since the promulgation of the 1995 Constitution, there has not been any incident where the President has refused to assent to a bill. This could be explained firstly by the fact that the ruling NRM government has enjoyed an overwhelming majority in Parliament since it came to power. Secondly, the legislative process is tightly controlled by the executive, and on many occasions Parliament has served a 'rubber stamping' role.

Nonetheless, there are a small number of judicial decisions which have contested actions of Parliament and on some occasions have invalidated laws passed by Parliament, on the ground (among others) that prescribed constitutional procedures for legislation have not been followed. In some of these cases, the courts have emphasised the supremacy of the Constitution as opposed to the supremacy of Parliament. *In Paul Ssemogerere & Anor v Attorney General*,[79] the Constitutional Court held that it had powers to inquire into the internal procedures of Parliament. In that case, Justice Kanyeihamba held that:

> It is clear therefore that if Parliament is to claim and protect its powers and internal procedures, it must act in accordance with Constitutional provisions, which determine its composition and the manner in which it must perform its functions. If it does not do so, then, any purported decision made outside those Constitutional provisions in null and void and may not be claimed to be an act of Parliament.

V. Local Government/Decentralisation

Although Uganda has had a history of decentralisation, that system having been used by the colonial state, the system has undergone a number of reforms. At

[78] Article 78(1).
[79] Constitutional Petition No 1 of 2000.

independence, in a bid to hold together a diverse and multi-cultural society, the Independence Constitution created a hybrid federal/semi-federal system. However, as already illustrated, this system did not endure for long and was abolished by the 1967 Constitution, which turned Uganda into a Republic with a highly centralised political system. Reforms started in 1986, when the new government used locally elected councils to manage some of the affairs of the state. In 1993, the Local Government (Resistance Council) Statute[80] was adopted, devolving a number of powers to elected local councils. A more formalised system of local governance came in 1995, with the adoption of the Constitution.

The Constitution now declares in express terms that the state will be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs.[81] In terms of functions, the local governments exercise executive functions, defined legislative powers, and, uniquely, some judicial powers.[82] The system of local government is governed by a number of constitutional principles as prescribed by Article 176(2), and which include devolution and transfer of powers, functions, and responsibilities; decentralisation to apply to all levels of local government; full realisation of democratic governance at all levels; a sound financial base for every local government; local governments to be enabled to plan, initiate, and execute policies and their jurisdictions; local governance to oversee the performance of civil servants; and the system to be based on democratically elected councils.

In terms of the organisation of local government, the country is constitutionally divided into districts, which are further divided into lower local government units (Article 177). Every district is headed by an elected district chairperson, who is elected by universal adult suffrage and serves as the political head of the district (Article 183(1)). The chairperson presides over the district council, which is the legislative, political, and executive decision-making organ of the district (Article 180) and composed of elected councillors. Lower local governments are also presided over by democratically elected chairpersons and operate through the lower local government councils. Other structures of local government include the executive committees, which are constituted by the chairpersons, vice chairpersons, and such number of secretaries as the council may decide (Article 186). The Chief Executive Office (CAO) is constituted as the accounting and finance officer of the district (Article 188).[83] Each district is supposed to have a District Service Commission, which has the power to appoint persons to hold offices in the service of the district and may also remove such persons (Articles 198 to 200).

In what appears to have been designed to undermine the system of decentralisation and entrench the firm grip of the President over local governments, the Constitution creates the office of the Resident District Commission (RDC), appointed by the President for each district (Article 203(1)). The functions of the RDC include monitoring the implementation of central and local government services, acting as chairpersons of the district security committees, and carrying out such other functions

[80] Act No 15 of 1993.
[81] National Objective II(iii).
[82] See Local Council Courts Act, 2006.
[83] See sections 63 and 64 of the Local Government Act, Chapter 243, Laws of Uganda.

as may be assigned by the President or prescribed by Parliament (Article 203(3)). In practice, RDCs have on a number of occasions overstepped their powers, mainly under the illusory perception that as representatives of the President in the district, they are the presidents of the districts.[84]

It should be noted that implementation of the system of decentralisation in Uganda has come with successes and failures. The successes lie in the fact that the system has been used to create democratic structures at the grassroots level through which people can exercise their political rights. Failures of the system have included the contradictions in the design of the local government system, which have left many critical powers held by the central government, a shallow tax base, and the failure of local governments to mobilise resources which they need to deliver services to the grassroots people.[85] Gerrymandering practices and the populist politics of the ruling party have also resulted in the rapid creation of districts without feasibility studies having been carried out regarding their viability and preparation of resources and infrastructure for their functioning, let alone establishing standard criteria for district creation.[86]

VI. Constitutional Adjudication

A. The judiciary

The Constitution states that judicial power derives from the people and shall be exercised by the judiciary in the name of the people and in conformity with the values, norms, and aspirations of the people (Article 126(1)). The Constitution also defines the principles which are supposed to guide the courts in adjudicating cases, and these include the following: (a) justice shall be done to all, irrespective of their social or economic status; (b) justice shall not be delayed; (c) adequate compensation shall be awarded to victims of wrongs; (d) reconciliation between parties shall be promoted; and (e) substantive justice shall be administered without undue regard to technicalities (Article 126(2)).

The courts of judicature are organised in a hierarchal manner descending from the most superior court: the Supreme Court, the Court of Appeal, the High Court, and such subordinate courts as Parliament may by law establish (Article 129). The Supreme Court is the highest and most superior court, with criminal and civil appellate jurisdiction. The Court can also entertain appeals from the Constitutional Court in constitutional matters (Article 132). The only instance in which the Supreme

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[84] See for instance, *Adjumani District Executive wants RDC Sacked* [http://direct.ugandaradionetwork.com/a/story.php?s=21487] (accessed on 11 April 2013); *Kasese Councilors Want RDC to Apologise on Busongora Issue* [http://ugandaradionetwork.com/a/story.php?s=43520] (accessed on 11 April 2013); and *Uganda: RDC Tells Police to Use Bullets On Demonstrators*, The Monitor Newspaper (3 December 2011).

[85] See Laura Nyirikindi, *Economic and Social Rights, Service Delivery and Local Government in Uganda*, Human Rights & Peace Centre Working Paper No 13 (2007) 23.

[86] See E Green, *District Creation and Decentralisation in Uganda*, Development Studies Institute, London School of Economics, Working Paper Series No 2.

Court exercises original jurisdiction is in considering petitions challenging the results of a presidential election (Article 104). Other than in this situation, the cases which the Supreme Court considers come to it by way of appeal from the Court of Appeal. The Court of Appeal also has jurisdiction to sit as a Constitutional Court when faced with constitutional petitions filed under Article 137. This provision provides that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. Appeals in constitutional matters lie from the Constitutional Court to the Supreme Court (Article 132(3)).

One of the subjects of controversy as regards the hierarchy of the courts has arisen from the position of the military courts within this hierarchy. This is in addition to the issue of whether or not the military courts have jurisdiction in criminal matters over civilians. In the case of *Uganda Law Society v Attorney General*,[87] the Constitutional Court had to decide, among other issues, whether or not the concurrent prosecution by the High Court and the Court Martial of persons for offences arising from the same facts was constitutional. This was in addition to the issue of whether or not it was constitutional for the Court Martial to have jurisdiction over civilians who were not in the employment of the army or who were voluntarily serving in the same, and whether it was constitutional for the Court Martial to try offences such as terrorism. The Court held that military courts are special types of courts and different from the ordinary courts. According to the Court, the special courts exercise power over specific matters, which is the trial of members of the armed forces who breach military law. After reviewing the provisions of the Uganda Peoples Defence Force Act, the Court concluded that although military courts had concurrent jurisdiction with civil courts, they were different and belonged to a separate legal regime, that they were not subordinate to the High Court, and that both courts had concurrent jurisdiction and their decisions were both appealable to the Court of Appeal. Nonetheless, the Court found that the concurrent prosecution of the accused who was the subject of the petition was unconstitutional and contravened that person's fair trail rights, as they had been charged with the offences by the High Court in the first place.

Generally, the power to appoint judges of the superior courts, including the judges of the High Court and the justices of the Court of Appeal and the Supreme Court, vests in the President, who exercises the same on the advice of the Judicial Service Commission (JSC). Article 147(3) gives the President the power to appoint the Chief Justice, the Deputy Chief Justice, the Principal Judge, justices of the Court of Appeal, justices of the Supreme Court, and court registrars, including the Chief Registrar. Such power is, however, exercised on the advice of the JSC, which is also mandated to make recommendations on the terms and conditions of service of judicial officers (Article 147(1)(b)). The JSC also has powers to discipline judicial officers.

The jurisdictions of the various courts are prescribed in the Constitution. The High Court has unlimited original jurisdiction and such appellate jurisdiction as is prescribed by the law (Article 139). The Court of Appeal is unique, as it doubles as an appellate court to entertain appeals from the High Court (Article 134(4)) and as the Constitutional Court (Article 137(1)), the latter being constituted by five judges of the

[87] Constitutional Petition No 18 of 2005.

Court of Appeal (Article 137(2)). Appeals in both ordinary cases and in constitutional matters lie from the Court of Appeal to the Supreme Court (Article 132(3)).

Constitutional matters, including cases touching on the Bill of Rights, are brought either under Article 50 or Article 137. Article 50 provides that any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, is entitled to apply to a competent court for redress, which may include compensation. On its part, Article 137 allows any person who claims that an Act of Parliament or anything done under the authority of any law or any act or omission is inconsistent with the Constitution may approach the Constitutional Court for a declaration to that effect. In its initial years, one of the issues that both the Constitutional Court and the Court of Appeal had to contend with was whether the Constitutional Court had powers to entertain matters brought under Article 50. The courts adopted the position that the actions envisaged by Article 50 and those envisaged by Article 137 were of a different character. Actions under Article 50 merely sought to enforce the right in the Bill of Rights and would be brought by those who alleged that their rights had been infringed. In contrast, Article 137 was meant for those cases which required 'interpretation' of the Constitution, as opposed to those seeking 'enforcement' under Article 50. On the basis of this, the courts have concluded that the Constitutional Court does not have jurisdiction to entertain Article 50 matters.[88] Nonetheless, the Constitution allows for constitutional references to be made from the High Court to the Constitutional Court in those cases where a question that requires constitutional interpretation arises (Article 137(5) and (6)).

It should be noted that since its establishment, the Constitutional Court, backed by the Supreme Court, has generally held itself out as a pragmatic court, committed to the enforcement and protection of the Constitution. The Court has adopted an interpretative approach which accords with trends in advanced jurisdiction by, for instance, interpreting limitations restrictively, adopting the two-stage approach, and employing the purposive and generous methods of constitutional interpretation. At the same time, however, the Court, as indicated above, has been incoherent as regards the enforcement of ESCRs. The Court has also not adequately developed and taken advantage of its remedial powers and instead has narrowly construed its mandate to be limited to making declarations of invalidity. The Court has declined to read down provisions even when on some occasions it has been invited by the state to do so.[89]

B. Interpretation

As indicated above, both the Constitutional Court and the Supreme Court have been guided by special methods of interpreting the Constitution. In the *Tinyefuza* case, the Constitutional Court indicated that a constitution ought to be given liberal interpretation, unfettered by technicalities, because the language of the Constitution does not change as society changes. According to the Court, the role of the courts

[88] See *Tinyefuza* case, n56 and *Ismail Serugo v Kampala City Council*, Constitutional Petition No 14 of 1997.
[89] See *Adultery* case, n45.

should be to expand the scope of a provision and not to extenuate it, and that provisions touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution. In the same case, the Supreme Court held that a constitution is not a 'lifeless museum piece' but one which requires life to be breathed into it. The Supreme Court here endorsed the generous and purposive approach to interpretation, but at the same time cautioned that this does not mean that the true text of the Constitution should in any way be considered irrelevant to the interpretation of the Constitution.

VII. International Law and Regional Integration

The Constitution vests the power to enter into treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organization in the President or any person authorised by the President (Article 123(1)). Parliament is, however, authorised to make laws to govern the ratification of treaties or agreements (Article 123(2)). In 1998, Parliament promulgated the Ratification of Treaties Act[90] as the law to provide for the procedure of ratifying treaties. The Act divides the mandate to ratify treaties between Cabinet and Parliament. Cabinet can ratify any treaty other than those that relate to armistice, neutrality, or peace, or those in respect of which the Attorney General has certified in writing that implementation in Uganda would require an amendment to the Constitution.[91]

Although the Constitution, in the National Objectives, states that the country's foreign policy shall be guided by the principle, among others, of respect for international law and treaty obligations, there is nothing in the Constitution which describes the status of international law. Even such principle laws as the Judicature Act,[92] which prescribes the law applicable in Uganda, does not define international law as one of the sources of law in Uganda. This could be explained by the country's legal tradition as a Commonwealth country and one which subscribes to the dualist doctrine. Indeed, the Ratification of Treaties Act requires all treaties ratified by Cabinet to be laid before Parliament, and although the purpose of this is not mentioned, this is presumably for the purposes of domestication.

The approach of the courts on the status of international law in the domestic legal order has been mixed, oscillating between outright rejection of undomesticated international law, a perception of international law as a guide to interpretation, to acceptance of international law as part of the Constitution.[93] In the *Tinyefuza* case, the Constitutional Court listed international law as one of the aids to interpretation of the Constitution.[94] In *Uganda Law Society & Anor v Attorney General*,[95] Justice

[90] Ratification of Treaties Act, Chapter 204, Laws of Uganda, 2000 Edition.
[91] Section 2, Ratification of Treaties Act.
[92] Judicature Act, Chapter 13, Laws of Uganda, 2000 Edition.
[93] Busingye Kabumba, 'The Application of International Law in the Ugandan Judicial System: A Critical Enquiry', in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, 2010) 83.
[94] See *Tinyefuza* case, n56, decision of Justice Egonda-Ntende, at 18.
[95] Constitutional Petition No 2 and 8 of 2002.

Twinomujuni of the Constitutional Court maintained that the African Charter on Human and Peoples Rights was part and parcel of the Constitution. The judge went further to underline the relevance of the Charter as not only being an aid in the interpretation of the Constitution but as a source of rights not expressly provided for under the Constitution. In *Uganda v Tesimana Rosemary,*[96] the High Court referred to a decision of the Human Rights Committee made under the International Covenant on Civil and Political Rights, reasoning that Uganda, having ratified that instrument, had made the decisions of the Committee persuasive authority.

As regards regional integration, Uganda is one of the countries forming the East African Community (EAC), which is a regional economic and political block governed by the Treaty for the Establishment of the East African Community (1999). This Treaty has been given the force of law in Uganda by virtue of the East African Community Act of 2002, which also domesticates the Acts passed by the East African Legislative Assembly (EALA). In the case of *Testimony Motors Ltd & Ors v the Commissioner Customs, Uganda Revenue Authority,*[97] one of the issues the High Court had to contend with was whether it had jurisdiction to render an interpretation of the East African Customs Management Act (EACMA) (2004) in a manner that would make its decisions bind all EAC countries. The EACMA is legislation passed by EALA. The Court held that for all intents and purposes, the EACMA was a creature of the EAC Treaty and was part of international law, and that its provisions have to be applied uniformly across all member states. However, according to the Court, its jurisdiction was confined to matters in Uganda and it could not extend its jurisdiction to other countries.

VIII. Conclusion

Uganda has had a tumultuous and politically unstable history that has seen all kinds of regimes, from outright dictatorial regimes to undemocratic and pseudo democracies. Although the country has witnessed the progressive and steady development of its constitutional law, constitutionalism still eludes the country. There remains a big disparity between what the law prescribes and what happens in practice. Violation of all categories of rights continues, characterized by political high-handedness, which has resulted in the suppression of voices of political dissent. Court decisions are largely disrespected by the executive, which has also on several occasions blatantly assaulted the independence of the judiciary.

There is a need for concerted civic action to prevail over the state to uphold the Constitution in order to realize constitutionalism in the country. As the judiciary struggles to uphold the Constitution, its struggles need to be bulwarked by civic engagement and increased pressure for political accountability. Realizing this requires, among other things, the promotion of participatory democracy, most particularly at the local government level.

[96] Criminal Revisional Cause No. msk 00 cr cv 0013 of 1999.
[97] Civil Suit No 004 of 2011.

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