



BREAKING THE CONFLICT TRAP IN UGANDA

Proposals for Constitutional and Legal Reforms



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List of Acronyms

ACODE	Advocates Coalition for Development and Environment
CRC	Constitutional Review Commission
CSOs	Civil Society Organisations
DPP	Directorate of Public Prosecutions
EAC	East African Community
EC	Electoral Commission
HRC	Human Rights Commission
IGG	Inspector General of Government
MPs	Members of Parliament
NGOs	Non-Governmental Organizations
NRM/A	National Resistance Movement/Army
UPC	Uganda People's Congress
UPDF	Uganda Peoples Defense Forces
USAID	United States Agency for International Development

Acknowledgement

This policy briefing paper is aimed at identifying key constitutional issues that would inform the constitutional reform process facilitated by civil society organizations in Uganda. The paper benefited from the input of civil society leaders who spent one and half days in a workshop at Serena Resort Hotel deliberating about Uganda's legal, constitutional and political challenges that need to be addressed in order to deepen democratic governance.

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1. Introduction

“Promotion of rule of law and good governance in post conflict situations ... require, inter alia, building the capacity of the state institutions to address the root causes of conflict, building of institutions for the delivery of services such as health, education, justice and dispute settlement and the police and correctional services to maintain law and order. In sum, the rule of law and good governance entails first and foremost a government that lives up to its responsibilities by ensuring the effective delivery of public goods and services, the maintenance of law and order, and the administration of justice. It also involves the creation of an efficient and dynamic market that secures economic growth and property, as well as a vibrant civil society, which facilitates interaction between the state and economic and social actors within the state”¹

When the National Resistance Movement/Army (NRM/A) captured power in 1986, it immediately embarked on a constitutional reform process. Through its Ten Point Programme, the National Resistance Movement (NRM) sought to establish democratic governance, constitutionalism and the rule of law.² This process began in earnest as early as 1989 with the establishment of a constitution commission that sought views from the population throughout the country and drafted a constitution. The draft constitution was to form the basis for discussion and subsequent promulgation of a new constitution in 1995. Unlike its predecessor, most observers hailed it as a progressive constitution.³ This was partly because it was a result of a countrywide consultative and inclusive process, its gender responsiveness, and sensitivity to other marginalized groups such as persons with disability, workers, minority groups and youths. Most critically, the framers of the 1995 constitution were informed by the country’s political history and set out to make a constitution that would stand the test of time, promote political unity and stability and heal the past political wounds.⁴

1 Ndulo, M. (2009) Rule of Law Programs; Judicial reform, Development and Post Conflict Societies, ANLEP Working Paper No. 2, Available at: www.sum.uio.no/research/networks/anlep, Accessed on 25/8/2011

2 The Ten Point Programme.

3 See, Kanyeihamba, W.G. (2005) Constitutionalism and Political History of Uganda: From 1894 to the Present. Kampala: Centenary Publishing House Ltd.

4 The preamble of the Constitution of Uganda 1995 notes that recalling our history which has been characterized by political and constitutional instability; recognizing our struggles against the forces of tyranny, oppression and exploitation; committed to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress... solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda

However the much-hailed constitution was quickly to be amended even before some of its provisions had been tested. The first amendment was by way of a referendum, which returned the country to political pluralism, which had been suspended by the NRM upon capture of power. The NRM/A had upon ascent to power in 1986 suspended political party activities on the basis of the need to promote national unity, reconciliation, stability and reconstruction.⁵ Political parties were blamed for being divisive and sectarian and responsible for the past political woes that had afflicted the country.

While the constitutional amendment in 2005 was positive to the extent that it restored political pluralism, it was largely interpreted by analysts and the political opposition as an attempt to water down the sanctity of the constitution,⁶ an allegation that government denies. It was also viewed as political opportunism by the NRA/M that had remained opposed to political pluralism in favour of the movement political system of governance.

There were three other amendments subsequent to the 2005. These amendments have not only been contentious and controversial in their contents and manner of passing but were also rushed through parliament in the months preceding elections. These amendments inter alia scrapped presidential term limits (the famous article 105 (2)) and introduced the position of leader of opposition in parliament.

Deeper reflections of their consequences were replaced by political expedience and convenience. Political consensus and ownership were not sought and in cases where they were proposed, completely ignored. It is against this background that this working paper is written in the hope that it can be a springboard for early, consultative and inclusive constitutional reform debate. Overall, this paper seeks to facilitate a participatory, inclusive and issue based constitutional reform process in order to deepen democratic governance in Uganda.

This working paper proposes key constitutional reforms for discussion by civil society leaders to pave way for a national constitutional reform process. This initiative is proposed to feed into and influence the proposal by the President to amend the constitution. While the President's proposal seeks to deny bail for murder, rape, treason, defilement and riot suspects, this process is intended to facilitate a progressive, broader, participatory and inclusive constitutional reform process that will address the country's democracy deficits, resolve political conflicts and widen the democratic space for political processes in Uganda.

The paper is structured into four major sections. Section one is the background and a brief constitutional and political history of constitutional reforms in Uganda, section

5 This was later included in the Constitution that introduced the movement political system, a de facto one party system. The constitution provided at the time that the country would be governed under the movement political system. Political party activities were confined to their headquarters and an informal de facto moratorium on the registration of new political parties was in force. Parties such as the UPC and DP maintained head offices in Kampala but were not allowed to carry out branch activities.

6 Kanyeihamba, op cit.

two is the conceptualization of constitutionalism and rule of law which is the expected outcome of the process, section three examines the past constitutional reform processes and draws lessons for the current process. Section four focuses on the constitutional reform proposals while section five focuses on constitutional trends in the East Africa Community region followed by a conclusion.

2. Background and An Overview of Constitutional and Political History of Uganda

“Recalling our history which has been characterized by political and constitutional instability; recognizing our struggles against forces of tyranny, oppression and exploitation; committed to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress; exercising our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;do hereby in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995”

The political and constitutional history of Uganda has been characterized by political violence, dictatorships both military and civilian, contested electoral outcomes, civil wars and military coups.⁸ There were eight changes of government within a period of twenty-four years of independence (from 1962-1986), five of which were short termed, violent and unconstitutional. *The preamble to the constitution captures this turbulent past and sets out the overarching goal of the constitution, which is a commitment to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.*

Although pre independent Uganda was characterized by ethnic conflicts, the foundation of political and constitutional [dis] order in Uganda can be traced to the independence constitution. It was a constitution superimposed in a situation where neither a constitution

7 The Preamble to the 1995 Constitution of the Republic of Uganda.

8 Golooba-Mutebi, F., (2008). Collapse, War and Reconstruction in Uganda; An Analytical Narrative of State Making, Crisis State Research Centre (LSE), Working Paper 27, Series No. 2

nor constitutionalism had attained any significant growth. The Independence Constitution has been described as a mere 'Elastoplast' over a system that had been held together largely by a mixture of force and occasional expeditious compromise.⁹ It lacked political legitimacy and did not last long before it became unworkable. It was described as a triumph of hope over experience.¹⁰ Post independence civilian governments were proto-democratic civilian governments, which were experimental, inefficient, corrupt and incapable of creating any kind of political culture. They therefore bequeathed a political culture that was to become the root of contemporary democratic challenges.

Soon after independence, Uganda was plunged into political and constitutional chaos as the implementation of the independence constitution became impracticable. The fusion of a cultural leader as a political head of state with an executive prime minister presented a conflict of interest in respect to the lost counties of Buyaga and Bugangaizi which subsequently led to the abrogation of the independence constitution. The constitution was suspended and replaced with the interim constitution popularly known as the Pigeonhole Constitution of 1966 which itself was replaced with the Republican Constitution of 1967.

The constitutional order ushered in by the Republican Constitution was violently replaced by the rule by decree under the Idi Amin's military dictatorship of 1971-1979 and the equally repressive civilian regimes of Obote II of 1980-1985 respectively.

It is discernable from the above that while the independence constitution provided a foundation for constitutional instability, the immediate post independent governments made little if any attempt at generating an acceptable constitutional order. Instead most of the post-independence leaders became pre-occupied with regime perpetuation and entrenching their grip on power. The constitutional order vested executive powers in the ruling class to ensure their longevity in power. Unfortunately, these actions have always plunged the country into political instability and undermined rule of law and constitutionalism as evidenced by the abrogation of the independence constitution by Obote in 1966, the 1967 by Idi Amin and the repressive Obote II regime (1980-1985).

It is no wonder that the obtaining constitutional order designed to serve individual interests of seating leaders has consistently delivered flawed or contested electoral outcomes. For example, the 1980 general elections were widely viewed as flawed. A hotly contested Uganda Peoples Congress (UPC) victory led to a guerilla war that brought into power Yoweri Museveni's National Resistance Movement (NRM) government five years later which was heralded as a 'fundamental change'¹¹ in the governance of the country.

9 Oloka-Onyango, J, *Judicial Power and Constitutionalism in Uganda: A Historical Perspective*, in Mahmood Mamdani & Joe Oloka Onyango (eds.), *Uganda Studies in Living Conditions, Popular Movements and Constitutionalism*, Jep Book 2, at p. 478

10 Karugire, S., R., (1980). *The Political History of Uganda*. London: Heinemann Publishers Ltd.

11 Kayeihamba, G.W argues that fundamental change only occurred between the periods Jan. 26, 1986 to 1995. See G.W Kanyeihamba, *Constitutional and Political History of Uganda; From 1894 to Present*, 2nd Edition (2010) at p. 195.

The political victory of the NRM arguably produced a shift from a vicious to a virtuous circle in Uganda¹² and the greatest of which was the making and promulgation of the 1995 Constitution¹³ which vested all powers in the people of Uganda who must be governed according to their will and consent expressed through regular, free and fair elections.¹⁴

The new constitutional dispensation thus became the ambulatory instrument for good governance and the exercise of the rule of law. It provided the parameters for the protection, promotion and guarantee of fundamental human rights. A stable constitutional order was established through a constitution arrived at after countrywide consultations by the Odoki Commission. It set the stage for the first presidential and parliamentary elections paving a way for the return to a system of checks and balances among the three arms of government.¹⁵ However, elections held under the new constitutional order have also been contested as being unfair. The Supreme Court has on two occasions found the elections to have neither been free nor fair.¹⁶

The above notwithstanding, the constitution was found needing of amendment only ten years later. In 2005, the process of deconstructing the constitution commenced in July 2005 with an amendment to pave way for the return of the multiparty democracy and to address other political issues and challenges that had come up in the course of its implementation. This was indeed ironical for a constitution that had been hailed as the finest and most progressive to require a comprehensive review 10 years later. Political analysts have for example observed that the sighs of relief and jubilations expressed after the promulgation of the Constitution were suddenly silenced by a series of legal, political and administrative decisions that watered down the quality of the Constitution.¹⁷

In February 2001, Government of Uganda set up the Constitutional Review Commission that was chaired by Prof. Fredrick Ssempebwa. Legal Notice No. 1 of 2001 issued by the Minister of Justice and Constitutional Affairs established the commission. The need for setting up the Constitutional Review Commission was justified on the basis of experience, which showed that operating the 1995 Constitution had several defects and several areas of inadequacy that needed to be addressed in the interest of proper governance of the country.¹⁸ It should be noted that spite of the weaknesses inherent

12 Bret, E.A., (2006). *State Failure and Success in Uganda and Zimbabwe; The Logic of Political Decay and Reconstruction in Africa*, Crisis State Research Centre (LSE), Working Paper No 78, Series 1 at p.12

13 Kayeihamba, op cit.

14 Article 1 of the Constitution of the Republic of Uganda, 1995 (as amended).

15 Oloka-Onyango, J, *From Whence We Come and Where Exactly are we Going? The Politics of Electoral Struggles and Constitutional [Non] Transition in Uganda*, Rights Democratic Working Paper Series No.1 of 2005 at p.7

16 Mwesige, P., and Muyomba, L., (2007). *Deepening Democracy in Uganda: Legislative and Administrative Reforms Ahead of 2011 Elections*. ACODE Policy Briefing Paper No.19.

17 Kayeihamba, G.W., *There have been three amendments to the Constitution to wit; The Constitutional (Amendment) Act, Act No 132000 (which was declared null and void in the case of Ssemogerere and others v. Attorney General Constitutional Appeal No. 1 of 2002); The Constitutional (Amendment) Act, Act No. 11 of 2005; and The Constitutional (Amendment) Act, Act No. 21 of 2005*

18 Republic of Uganda, (2003). *Government White Paper on The Report of the Commission of Inquiry (Constitutional Review) & Government Proposals not Addressed by the Report of the Commission of Inquiry (Constitutional*

in the 1995 Constitution, the country had enjoyed relative peace, stability, economic growth and stable predictable constitutional order. Hope had been restored in the rule of law. Nonetheless the work of the commission set in motion the process of amending the constitution.

3. Understanding Constitutionalism and Rule of Law

Democracy is more than mere rituals of voting and elections. It is the plurality of opinions, freedom of expression, multi-party political system, political competition, free and universal multiparty elections, fundamental and human rights, rule of law and accountability of the rulers which constitute democracy.¹⁹

From the onset, it is imperative to distinguish between constitutionalism, rule of law and rule by law. This is important because broad concepts such as democracy, constitutionalism and rule of law can easily be distorted. The presence of a constitution does not necessarily connote constitutionalism because even totalitarian regimes frequently use the law as a tool in their arsenal of mechanisms for social control.²⁰ For example the Nazis clothed many of their atrocities with a veneer of legality while the Soviet constitution of 1936 reads like a litany of legal entitlements, yet it served Stalin well with its wide loopholes for contortion. These concepts can therefore be manipulated to serve the interests of tyranny. It is therefore essential to clearly define key concepts particularly the constitution, rule of law and democracy to provide a clear understanding about the issues for constitutional reform.

As a concept, constitutionalism means minimally that the polity must recognize the nature of political power, its distribution and its limits.²¹ Consequently, a constitutional government is one where government has certain powers that are set within more or less defined limits. In a democracy, it is the courts of law that state when these limits have been violated or exceeded. A constitution is understood to be a set of norms, conventions, rules and procedures that has the objective of defining the behavior of its constituents, whether these are individuals, groups of people, or special decision-making

Review).

19 Gebreworld, B. (2008) Democracy and Democratization in Africa, New York: Zed Books, p. 149.

20 For a detailed discussion of this concept see Kritz, N. J. (2001) The Rule of Law in the Post conflict Phase; Building a Stable Peace, in, Crocker, C. A. (eds.), Turbulent Peace, The Challenges in Managing International Conflict, Washington: United States Institute of Peace.

21 See, Wengi, R.O. (1994) Founding the Constitution of Uganda, Kampala: Uganda Law Watch.

and implementing institutions. A constitution sets the tone, the spirit and the framework from which all other laws and the form of government draws its legitimacy.

It is therefore a rule setting instrument from which all laws and policy derive their legitimacy and are considered as such grand law-giving edifices. The constitution, as a fundamental law, provides the framework within which laws have to be passed and policies have to be applied. The role of constitutions is to ensure the smooth operation of the political system by channeling the expression of politics through prescribed institutions in accordance with clearly understood and valued procedures, as well as facilitating the resolution of the differences and disputes that inevitably arise. The legality of state as well as of private action is determined by reference to its norms and standards. A constitution also plays an ideological role by inculcating the values that it enshrines.

Rule of law does not simply provide yet one more vehicle by which government can wield and abuse its power. On the contrary rule of law establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules, and, in the post-conflict setting, enable wary former adversaries to play a vital role in keeping the new order honest and trustworthy.²² Adherence to rule of law entails more than the mechanical application of static legal technicalities. It involves an evolutionary search for those institutions and processes that best facilitate authentic stability through justice.

Apart from focusing on limiting government, rule of law protects rights of all members of society and establishes rules and procedures that constrain the power of all parties, hold all parties accountable for their actions, and prohibit the accumulation of autocratic or oligarchic power. Most critical, rule of law provides a variety of means for the non-violent resolution of disputes between groups or between actors and the government. In a nutshell, establishment of rule of law and not rule by law is very crucial in rebuilding war-torn societies such as Uganda. Establishing a legal regime and legal institutions to deliver equitable justice in the aftermath of conflicts ensures a smooth transition from war to peace.

Constitutional reform is therefore considered a rule changing process. Although considered as a grand norm, constitutions are not static but evolving instruments that are continuously modified to reflect the change in circumstances. These modifications can be either cataclysmic or gradual. Cataclysmic constitution changes are normally dramatic and violent on account of the accumulated, frustration and need. They are a stupendous event, the pinnacle of an acrimonious or violent struggle.

22 Kritz, N. J. (2001) *The Rule of Law in the Post conflict Phase: Building a Stable Peace*, in Crocker, C., A., Hampson, O., and Aall, P., *Turbulent Peace: The Challenges in Managing International Conflict*, Washington: United States Institute of Peace.

The more desirable constitution change process is the gradual and continuous modifications of rules and addition on new ones. Constitutional reforms therefore encompass the embracing of new values that reflect the people's new choices.²³

Thus, constitutional reforms are not inherently bad for they reflect a realization of the change in the aspirations of the people. It is a popular method of addressing past institutional failures, reconstructing political structures, and ensuring better governance for the future. It is also a vital tool for the promotion of good governance and deepening democracy. Through rule change, constitutional reforms ultimately strengthen and promote more accountability, transparency, participation, and predictability. Many states have tended to adopt the rigid method of formal constitutional changes and modifications, not out of a jealous protection of an important historical legacy, but because constitutions are now regarded as such grand law-giving edifices that they should be tinkered with only rarely, and in the most compelling of circumstances.

4. Past Constitutional Reform Processes: Lessons for the Proposed Reform Process

The immediate post independence constitutional amendment was in 1967 when the then Premier abrogated the constitution and replaced it with a pigeonhole constitution. The legislature was cajoled and threatened to adopt a new constitution, which exalted the executive prime minister into the presidency abolishing the rotational arrangement between cultural leaders that had been agreed to before independence.

In 2005, ten years after its promulgation, the 1995 Constitution was amended to pave way for the return of political parties. Following the decision of the National Executive Committee of the Movement, of March, 2003 to open the political space, Government set up the Constitutional Reform Commission (CRC) with the mandate to review the entire constitution. Unlike the pigeonhole constitution and the 1967 constitution making processes, the CRC was consultative and collected views from across the country. The CRC was mandated to examine the consistency and compatibility of the constitutional provisions relating to the sovereignty of the people, political systems, democracy and good governance and make recommendations as to how best to ensure that the country is governed in accordance with the will of the people at all times. Its terms of

²³ Oloka-Onyango, J, *Judicial Power and Constitutionalism in Uganda: A Historical Perspective*, in Mahmood Mamdani & Joe Oloka Onyango (eds.), *Studies in Living Conditions, Popular Movements and Constitutionalism*, at p.500.

reference provided for a very wide mandate to consider matters significantly relevant to the Constitution for good governance, the rule of law and affordability by the country of the implementation of the constitution.

The CRC was a first attempt at reviewing the 1995 constitution. However, from the very onset the opposition largely interpreted the CRC as a political ploy by government aimed at responding to a political sentiment during an election cycle. Critics of the CRC have argued that the process lacked the competence to execute its mandate, as it was largely constituted by NRM sympathizers.²⁴ These critics further observe that in respect to key political issues, the CRC proposals were ignored and a parallel process initiated which came up with possible amendments. For instance on the matter of which political system to adopt, the NRM set up a Movement Committee (chaired by Dr. Crispus Kiyonga) to consider whether to revert to a multiparty system of governance or not. This was in spite of the fact that the issue of opening up the political system was a key term of reference for the CRC.

The Kiyonga committee submitted its report at the end of 2002 in which they recommended the retention of the Movement Political system. The committee's report was however opposed by President Museveni who argued for the restoration of the multiparty political system. The main reason underpinning his proposal was to be delivered at the NRM retreat in Kyankwanzi in 2003 in which the third term debate was also introduced. President Museveni argued that in order to satisfy the demand of the donor community and to rid the Movement of internal dissenters, it was necessary to open political space and restore a multiparty political system.

The Government subsequently developed a government White Paper, which was submitted to the CRC, the very body it had set up to explore recommendations for amendment. The government white paper included the proposal to lift the presidential term limits. The CRC final report submitted in 2003 was largely seen as a failure to address serious constitutional issues that would help consolidate democracy, rule of law and constitutionalism in Uganda.²⁵ The process nonetheless, set in motion a process of constitutional amendments, which changed the constitutional landscape in Uganda,²⁶ which most observers interpreted to constitute a democratic reversal of the democratic gains. Critical among the constitutional amendments was the lifting of presidential terms limits. To some observers, in several respects, the CRC was a missed opportunity for meaningful reform of the constitutional order. As Kanyeihamba (2005) noted, the amendments were manipulative, transitory and in some instances motivated by personal reasons.²⁷

24 Ibid Onyango O., J.

25 Ibid Onyango, O., J.

26 Onyango, O., J., (2005). *Liberalisation Without Liberation: Understanding the Paradox of the Opening of Political Space in Uganda*, Rights Democratic Working Paper Series No.2.

27 Kanyeihamba, G.,W., op cit.

It could be argued that the post 1995 constitutional amendments were in their nature no different from the immediate post independence abrogation of the constitution. They were manipulative and aimed at perpetuating the rule of the powers of the day. While the post independence change exalted the premier to the presidency and concentrated powers in the executive, the post 1995 removed terms limits for the sole benefit of the sitting president. All of these amendments have not enjoyed the support of the majority and failed to rally consensus across the political aisle. They did not entrench constitutionalism but personal rule through legalese.

These amendments may in theory be argued as lawful but are not legitimate as they betrayed the popular view of the population, but adherence to the rule of law entails far more than a mechanical application of static legal technicalities.²⁸ It involves an evolutionary search for those institutions and processes that will facilitate authentic stability through justice. The observation by Kritz is a post conflict response which maintains that a constitution is a living document not frozen in time and history does certainly hold true in all democratic societies. In all democratic societies, there is always a constant attempt at improving the constitutional framework to address institutional failures, reconstruct political structures and ensure better governance for the present and the future. Constitutional reforms are viewed as a necessary function of a democratic process. The need for national peace and stability dictate that constitutional moderations are incremental, gradual and continuous as opposed to cataclysmic; the process should be consultative and inclusive to ensure that the citizens own up the outcomes. Thus a constitutional reform process should involve a process of national dialogue which allows competing perspectives to be debated and incorporated in the constitution which is critical for national stability, respect for human rights and deepening of democracy.

During the last concluded general elections President Museveni promised to amend the constitution to address some of the social, economic and political challenges facing the country. In order to avoid the pitfalls of the past constitutional reform processes of manipulative, hurried and non-consultative processes and supplement government efforts, this paper generates proposals for amendments.

5. Proposals for Constitutional Amendment

We the people of Uganda, recalling our history which has been characterized by political instability.....Do hereby, in and through this Constituent

28 Kritz, N., J., op cit.

Assembly solemnly adopt, enact and give to ourselves, our posterity, this Constitution.....this 22nd day of September, in the year of 1995.²⁹

The first quotation is a snapshot of what democracy is all about. It serves to inform the proposed constitutional reform process to focus on the highest quality of democracy than 'mere' regular and periodic elections. The second quotation is also important in a sense that it reminds us of our political history characterised by political anarchy which greatly inspired the framers of the 1995 Constitution to try and bequeath to the country a constitution that would heal and resolve political grievances and differences and set the stage for the country's economic growth and sustainable development.

5.1. Electoral Reforms

5.1.1. Independence and Competence of the Electoral Commission

A key tenet of any democratic society is the sovereignty of the people and the power to express their will and consent on who shall govern them and how they should be governed through regular free and fair elections. This requires the adoption of laws and procedures that are conducive to and do not obstruct the expression of the people's will and consent. The system, laws and institution must facilitate the expression of the people's will through periodic and genuine elections conducted in accordance with the law.

The ambulance to the free expression of the will of the people is the Electoral Commission (EC), which is mandated by the constitution to organise and conduct free and fair elections.³⁰ In order for the free expression of the people's will and consent, the EC is supposed to be independent and not subject to the control or authority of any person.³¹ In other words, the people's will on how to be governed cannot be freely expressed if the elections are presided over and conducted by a partisan [and incompetent] EC.³² The electoral history of Uganda points to the fact that the failure to conduct free and fair elections has been because of either partial or incompetent ECs and has led to violent confrontations and wars. It is therefore imperative to have an EC that can deliver a free and fair election and breakdown the vicious cycle of election induced conflicts.

The independence of the Electoral Commission is not only a question of theory, or laws being in place but also a matter of practical application of required standards. At a practical level however, the independence and competence of the EC has been questioned because of its conduct in the past elections. The elections were marred by several irregularities and illgalities. In the two presidential election petitions of 2001 and 2006, the Supreme Court found that the EC had failed to administer free and fair elections.³³

29 The Preamble to the Constitution of the Republic of Uganda 1995.

30 Article 61 (1) (a) of the Constitution and section 12 of the Electoral Commission Act Cap 140, as amended.

31 Article 62 of the Constitution; see also section 13 of the Electoral Commission Act Cap 140, as amended.

32 Kayeihamba, G.W, op cit.

33 Presidential Election Petitions No 1 of 2001 and 2006 respectively.

The opposition political parties have always expressed misgivings about the independence and competence of the EC. The manner in which the EC was constituted, its conduct in administering elections has eroded the citizen's trust that it is a neutral body.³⁴ The nomination, appointment and removal from office procedures are but the most critical means to guard against impartiality, ensure greater independence and attainment of acceptable levels of competence of the EC. A review of these processes will not only enhance confidence in the democratic process but also ensure that elections reflect the true will of the citizens.

5.1.2. The Nomination and Appointment of the Commission

Besides the conduct of its functions, the process of constituting the commission under a multiparty political system has a direct bearing on how the political actors, civil society and the general voting public perceives the EC. Under the current constitutional framework, the nomination and appointment of members of the EC is a preserve of the President. Although parliamentary approvals are required for actualisation of the appointment, this has often than not been a formality devoid of any critical evaluation of the appointees.

This kind of procedure for nomination and appointment makes members of the commission serve at the pleasure and pressure of the executive in the conduct of its functions. It is such pleasure and pressure that the EC has been accused of being unwilling to upset. Analysts argue that in the obtaining framework of appointment of the EC, it cannot be any less than rubber stamp for the incumbent president.

Indeed, reviews of past nomination and appointment process of the members of the EC lend some credence to the criticism above. For instance, the process of appointing the Kigunddu led EC was riddled with accusations of bias and incompetence. Save for one addition, the entire EC was retained by the executive in spite of the scathing findings by the Supreme Court ruling in respect to its conduct of the 2006 elections.

In order to ensure the independence of the EC, the nomination and appointment of its members should be subjected to a much more open and critical process that takes into account individual person's antecedents, their suitability for the performance of the functions entailed as well as their ability to subject their political interest to the general good of the country and or their ability to resist political interference during the execution of their duties. It is also important that such a process be taken in consultation with all key political actors including political parties and CSOs.

The second way of ensuring independence of the EC is the inclusion of members of professional organisations and political parties on the commission and in appointment process of commissioners. Including political opposition and civil society voices in the

³⁴ See Makara, S., (2007). Deepening Democracy through Multipartyism: The Bumpy Road to Uganda's 2011 Elections, at p. 91 *AfricaSpectrum*2/2010:81-94 (also available online at www.africa-spectrum.org).

appointment process increases the legitimacy of the commission and is likely to achieve greater consensus.³⁵

Uganda can also learn from the experiences of other countries in regard to the manner in which they constitute their commissions. In Ghana, the procedure of appointing members of the commission is consultative in nature. The Council of State recommends to the president the members for appointment. The Council of State itself is a representative body comprising of a cross section of the political actors. The members are then appointed by the President and confirmed by the parliament.³⁶ Wider consultations rather than an exclusive appointing process ensures acceptability of the results of elections and could build confidence of the people in the electoral Commission and the entire electoral process.

Consequently, article 60 of the constitution should be reviewed to ensure that the nomination of members of the commission should be done through a consultative process with civil society organisations and political parties. Consideration should also be given to the expansion of the numbers from seven to 11 in order to accommodate representatives of political parties, civil society and professional organisations.

5.1.3. Competence of Commissioners

The appointment to office of the members of the commission should be based on clearly defined criteria that ensures competence and accountability. Although the constitution provides that members of the commission shall be persons of high moral character, proven integrity and possess considerable experience and demonstrated competence in the conduct of public affairs³⁷ such qualifications have rarely informed the nominations and approvals by the President and Parliament. Rather, political underpinnings have always appeared to take greater considerations.

In other jurisdictions, the chairperson of the commission should be a person qualified to be a judge of the High Court. In Mozambique for instance the commission consists of twenty-one members whose professional and personal qualities afford guarantees of balance, objectivity and independence in relation to all political parties participating in an election. In Tanzania, the Chairperson of the commission must be a person qualified to be a judge of the High Court or Court of Appeal.³⁸

In contrast to other statutory bodies such as the Directorate of Public Prosecution (DPP), chairperson of the Human Rights Commission (HRC), the Inspectorate of Government (IGG) whose chairperson must be a person eligible for appointment as a High Court Judge, the chairperson of EC is not subjected to such standard. While this does not make the

35 European Union, Election Observation Mission Report, March 2011.

36 Article 43 (3) of the Constitution of the Republic of Ghana.

37 Article 60 (2) Of the Constitution of Uganda, 1995.

38 See, Kanyeihamba, G., W., op cit.

position any less important, it does make qualification to the post a little less demanding compared to other statutory bodies. Consequently, the provision of article 60 (3) of the constitution should be amended to provide for qualification of the EC Chairperson to preferably be a retired judge or a person with equal or similar qualifications.

Similarly, the process of appointment should be more open, inclusive and democratic so as to ensure public scrutiny and accountability and not at the pleasure of the President. The process of nominations, vetting, approving and appointment should provide for public participation.

5.1.4. Tenure of office

The security of tenure empowers the holder of the office to perform his/her function with some degree of comfort and shields them against any undue interference. In terms of the EC, the constitution provides that members of the EC can only be removed from office by the President for physical and mental incapacity, misconduct or misbehavior and incompetence. The import of that provision is that members of the EC hold their office at the President's calling. They can therefore be subject to the overbearing pressure of presidency to which they hold their office. This can negatively impact on their impartiality and independence.

This provision has not been put to test in recent history but it remains a threat hanging over the members of the EC and its reform is necessary and urgent. The proposal in this case is to draw lessons from other statutory commissions such as the Human Rights Commission and the Judicial Service Commission. In the case of the Human Rights Commission, the removal of its commissioners is similar to the removal of a judge of the High Court³⁹ that requires a tribunal hearing.⁴⁰

Members of the commission should enjoy similar security of tenure as is the case with the other constitutional commissions. Article 60 (8) should therefore be amended to ensure that the removal from office of the members of the commission should be through a process that accords fair hearing, transparency not at the pleasure of a political party or individual. A judicial process through a tribunal in much the same manner as that of other constitutional commissions would not only bring parity but ensure the security of tenure of the commissioners, shield them from interferences and influence and enhance their independence. It is recommended that the EC commissioners should be appointed for a period of seven years renewed for one term. Two terms of 14 years is intended to give commissioners security of tenure to exert their independence over undue interference from the executive arm of government.

39 See, Article 56 of the Constitution of Uganda, 1995.

40 See, Article 144 (2), (3), (4), (5) & (6) of the Constitution of Uganda, 1995.

5.1.5. Post Polling Reforms

Another important electoral reform should be in the area of post polling period and the handling of electoral petitions. This proposal is twofold. The first proposal relates to people found to have committed electoral offences while the second proposal is in respect to the required period for disposal of electoral petitions especially presidential electoral petitions. Whereas this has little to do with the independence of the commission, it relates to the conduct of a free and fair election. The electoral laws provide for grounds for nullification of electoral results and one of the grounds is the commission of illegal practices or electoral offense under the law.⁴¹ These illegal offences include bribery of voters, publication of false statements as to illness, death or withdrawal of a candidate among others.

Interestingly, many elections have been annulled for the commission of electoral offences. At the same time no person who committed the offences has been prohibited from contesting for the same seat again. This has been described as iniquitous, a mockery of the laws of Uganda and justice and as undermining the work of the judiciary.⁴² In most election petitions, the judges do not have the power to pass criminal sanctions and seldom, if at all, refer the perpetrators for criminal prosecution. This has encouraged election malpractices and undermined the freeness and fairness of elections.

Consequently, the Presidential Elections Act and the Parliamentary Elections Act should be reviewed to prohibit persons found to have committed election offences and malpractices from contesting in a re-run for the same seat at least for a period of 10 years. This would deter candidates from indulging in illegal practices to win elections. Most worrying is that the continued impunity of offenders renders elections a joke and meaningless to the citizens. This in the long-run undermines democracy and the rule of law.

Secondly, the law should also be reformed to give presiding judicial officers in election petition concurrent jurisdiction over criminal acts during elections. Alternatively, the law should as a command provide for a referral to the DPP for prosecution on the basis of the evidence against all persons found to have committed electoral offences.

5.1.6. Regulation of Financing and Monetization of Elections

The electoral laws prohibit bribery of voters, raising and donating funds from sources hostile to Uganda during election periods.⁴³ In the case of presidential elections, solicitation of funds from countries declared hostile to Uganda is prohibited. There is also a further limitation on the amount of money a political party can raise from individuals and strict requirements for accountability of monies received and used in political contest. These financial restrictions notwithstanding court findings and the reports of election

41 See, Section 61 (1) (c) of The Parliamentary Elections Act, as amended by Act 17/2005; see also section 59 (6) (c) of the Presidential Elections Act, as amended by Act 16/2005.

42 Kanyeihamba, G., W., op cit.

43 See, Section 68 of the Parliamentary Elections Act as amended by Act 17/2005.

observers do almost unanimously agree that the political landscape is riddled with voter bribery, lavish spending, use of state resources during campaigns and a monetization of politics. The use of money has undermined the credibility of the electoral process.

The use of state resources by the sitting president is a provision that appears to have been abused to the detriment of the other candidates. There is an outlay of state structures for the use of the president during elections. The provision should be amended so that the president retires before going into election to provide a level playing field for all parties. Secondly, political parties' books of account should be audited by the Auditor General so as to ensure compliance with the law on financial reporting and accountability regulations under the law.

5.2. Restoration of Presidential Term Limits

Nothing is more perilous than to permit one citizen to retain power for an extended period. The people become accustomed to obeying him, and he forms the habit of commanding them; herein lays [sic] the origins of usurpation and tyranny.... Our citizens must with good reason learn to fear lest the magistrate who has governed them long will govern them forever.⁴⁴

Term limits are a typical feature of a presidential system of governance in contrast to a prototypical parliamentary system in which the executive may be removed by the legislature at any time. It's origin dates back to the ancient Republics. In one of the earliest definition of democracy, Aristotle listed a key definition of democracy that 'no office should be held twice by the same person.'⁴⁵ It has thus become a common feature of many democracies across the world. It ensures a smooth transition of government.

The 1995 constitution imposed term limits of the presidency. The debate about term limits received an almost unanimous approval. In its report, the Uganda Constitution Commission (the Odoki Commission) concluded that an overwhelming majority was in favor of limiting the term of office of the president to a two-year term of five years each. It thus included in the draft constitution article 108 (2), which provided that 'no person shall stay in office for more than two terms.'

The commission observed that the danger of an indefinite election system was due to personal ambitions of leaders. The commission noted that there had been concerns about orderly transitions of governments. The recommendation of the commission was adopted by the Constituent Assembly (CA), which enacted article 105 (2) limiting the terms of the president to a two-year term of five years each.

44 William, C., S., (ed.) (2009) The Reelection Debate in Latin America, in Latin American Democratic Transformations: Institutions, Actors and Processes.

45 Aristotle, (1976). The Politics of Aristotle 258 (Ernest Barker eds. & Trans., London: Oxford University Press.

The considered observations of the constitutional commission and the people of Uganda were however discarded shortly after the promulgation of the constitution when a proposal to lift presidential term limits was made by the Executive in the government White Paper. Although earlier not included in its report, the lifting of presidential term limits was subsequently included in the CRC report at the insistence of the executive. It was subsequently to form the basis of the amendment of article 105 (2) of the constitution paving way for President Museveni to contest for a third term in office in the 2006 elections.

It is important to note that the removal of term limits opened the possibility of a life presidency with all its attendant problems. Commenting on the removal of term limits, Eriya Kategaya, once considered as number two to President Museveni in the NRM leadership observed that he was shocked by the constitutional amendment. In his book, ‘Impassioned for Freedom’ Kategaya observed that,

‘In my naïve thinking, I believed that President Museveni will live up to the stature of a statesman and be the first President of Uganda to retire as per the Constitution and thereby set a constitutional precedent. I strongly believe that this should be done for the sake of the future stability of this country. I have spent most of my youth running up and down and even went into exile because of bad politics and I don’t wish my children to experience the same problems.’

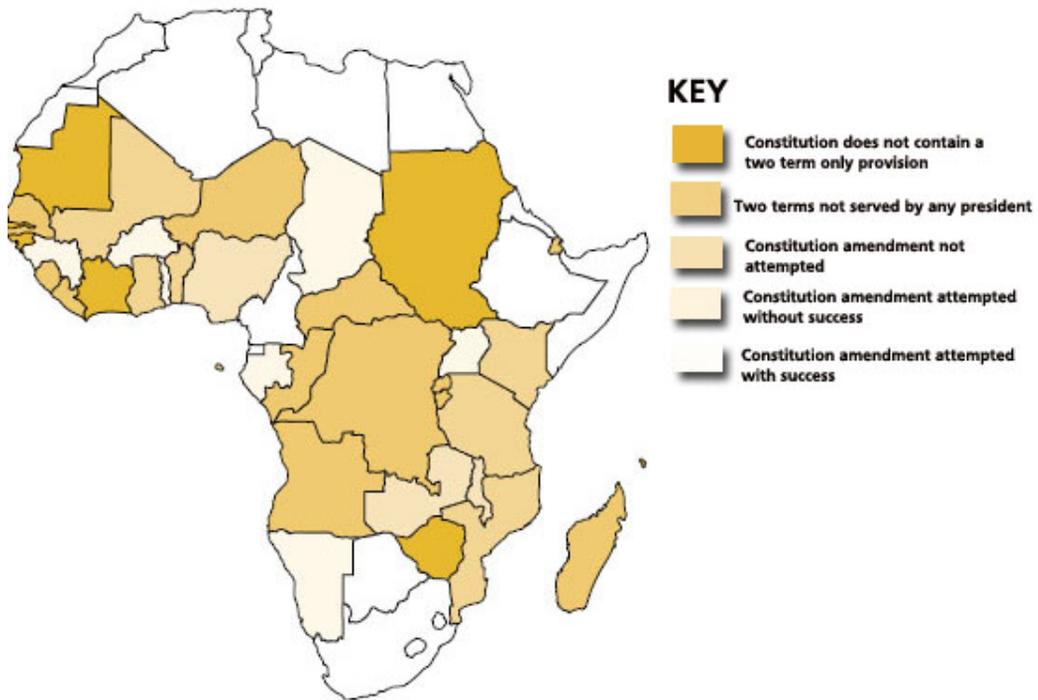
Table 1: Third Term Amendments in Sub-Saharan Africa Since 1990⁴⁶

Constitution does not contain a two-term only provision (8 countries)	Constitution contains a two-term limit on the presidency (30 countries)			
	Two terms not served by any president (12 countries)	Two-term limit was reached (18 countries)		
		Constitution amendment not attempted (8 countries)	Constitution amendment attempted (10 countries)	
			Without success (3 countries)	With success (7 countries)
Côte d’Ivoire Eq. Guinea Gambia Guinea-Bissau Mauritania Sudan Seychelles (3-term limit) Zimbabwe	Angola Burundi C.A.R. Congo Djibouti D.R.C. Liberia Madagascar Niger Rwanda Senegal Sierra Leone	Benin (Kerekou) Cape Verde (Monteiro) Ghana (Rawlings) Kenya (Moi) Mali (Konare) Mozambique (Chissano) São Tomé e Príncipe (Trovoada) Tanzania (Mkapa)	Malawi (Muluzi) Nigeria (Obasanjo) Zambia (Chiluba)	Burkina Faso (Compaore) Chad (Deby) Gabon (Bongo) Guinea (Conte) Namibia (Nujoma) Togo (Eyadema) Uganda (Museveni)

46 See, Vencovsky, D., (2007). “Presidential Term Limits in Africa” in the Journal of Democracy Vol. 18, No. 3 July 2007.

The proposed constitutional amendments therefore should be able to revisit the issue of presidential term limits with the intent to restore the two presidential term limits. The two term limits has two advantages for the democratization process. First, the two-term limit has the potential of ensuring certainty that by this date a leader will leave office and this is essentially useful for proper planning. The second advantage is that term limits ensure peace, security and stability as it gives hope and possibilities to people with political interests to wait. In Africa, it has become very difficult to compete with the incumbent president for political power. They always use state resources to retain power and in the process create many enemies, which makes them fear to leave power because of possible repercussions. It is against this background that the proposed reforms should also grant general amnesty to leaders from possible prosecution, which would allow a smooth political transition.

Map of Africa Showing Third Term Amendments in Sub-Saharan Africa Since 1990



5.3. Separation of Powers

The other reform that will need to be considered is the separation of powers. The principle of separation of powers is premised on the basis that when a single person or group has a large amount of power, it can threaten citizens. Separation of power is a method of

checking the amount of power in any institution, individual or group's hands, making it more difficult to abuse such power. Protection of the people against misuse of power by the state itself is, in the first instance, secured when the functions of the government are kept separate and when ultimate power of the state vests with the people, who exercise it through election of representatives in regular, free and fair elections. The principle of separation of powers relates to the very heart of a constitutional government, which structures political institutions with the requisite powers and independence to make judgments that respect equal rights of free people, while at the same time promoting the public good.

Separation of powers means that the legislative, executive and judicial branches of government are independent in exercising their discretionary powers. They are essentially measures and mechanisms calculated to inhibit the tendencies for the excessive use of power and regulate the exercise of discretionary authority of the institutions of governance within the constitutional provisions and political culture of a country.

The constitution of Uganda sets out three arms of government i.e. the executive, legislature and the judiciary.⁴⁷ At a practical level however, it is apparent that the separation of powers between the executive and legislature is blurred. Although complete separation of power is not an attainable virtue in modern day democracies, measures to ensure its near attainment are necessary if we are to avoid an overbearing and controlling tendency by one arm of government over the other. In the Ugandan parliament, members of the executive sit, deliberate and vote on the floor of the house. Only ex-official members, appointed to cabinet from outside of parliament cannot vote but are also involved in the deliberations in parliament. With a bloated cabinet size, the same people who initiate policies and laws in cabinet, not only debate over them again in parliament but have a numerical number that makes it almost certain to pass in parliament hence fusing the legislature and executive in the performance of their functions. There is therefore an overlap in function and composition between the executive and the legislature. For instance, the president is empowered to appoint members of the cabinet from among members of parliament or any other person qualified to be a member of parliament.⁴⁸ Secondly, the composition of parliament includes ministers; the unelected being ex-official members of parliament.⁴⁹ This undermines the independence of the legislature and erodes the principle of separation of powers.

The other issue that has undermined the independence of parliament in the current political dispensation under NRM leadership is the increasing transfer of debate from the floor of the legislature to caucuses. Members of parliament are summoned by their party and they are cajoled into adopting a party position that should not be contradicted on the floor of the house. If one contradicts the party position, they are labeled 'rebel

47 Chapters 6, 7 and 8 of the Constitution of Uganda 1995.

48 Article 113 (1) of the Constitution of Uganda. 1995.

49 Article 78 (1) (d). op cit.

MPs' – a term that almost pushes the MPs to the disliked column of the party. The NRM party has particularly been guilty of this because of its large numbers in parliament.

While caucusing is not a bad idea for considering various mutual interests, its practice since the return to multiparty politics in Uganda has had the effect of not only undermining the role of parliament but raised the question of representation. It has raised the debate on whether MPs represent their parties or the interests of their constituents. There will be need to resolve this question through a constitutional amendment providing clearly the relations between parliament and caucuses. A clear provision should be provided for MPs not to be bound or restricted in the conduct of their functions by decisions of caucuses. This is because MPs represent their constituents, both those who have voted for them and those who have not voted for them. They do not represent political parties or caucus interests. Parties are merely a vehicle for attainment of that end.

The second challenge for the independence of both parliament and Judiciary has to do with the overbearing influence of the presidency over parliament and the judiciary. Whenever the president wants a government decision to pass, he uses all possible ways to succeed instead of investing in rigorous sometimes frustrating ways of negotiations that characterize democratic processes. In recent days, most critics have complained of staffing Judiciary with people who are politically linked to the ruling NRM party. The appointment of the so-called carder judges would ultimately undermine the independence and integrity of the courts of law and rule of law. The allegation of interference by the Executive in the independence of Judiciary has also been voiced by the Chief Justice, Benjamin Odoki who recently decried the magnitude of such interference. The Chief Justice for example cited the State's refusal to obey and enforce decisions of courts of law. To this end, there is need to provide more scrutiny and transparency in the appointment of judicial officials with a view of insulating them from undue interference by the executive.

An attempt by two members of parliament, the Hon Mughisha Muntu and Hon Onapito Ekomolit to move a motion that bars MPs from being appointed ministers was defeated in the 6th Parliament. There is need to revisit the Onapito/Muntu motion during the proposed constitutional reform process so as to give the principle of checks and balances any meaning in the constitutional framework.

5.4. Role of the Army in Elective and Partisan Politics

The constitution provides that the Uganda People's Defence Forces (UPDF) shall be non-partisan, national in character, patriotic, professional, disciplined, productive and subordinate to civilian authority.⁵⁰ This provision would presuppose that the army should not get involved in partisan politics much less in a multiparty political system. And yet, the very same constitution makes the army part of the legislature.⁵¹ The presence of the army in a largely partisan parliament raises concerns on whether the army is indeed non-

50 Article 208 (2) of the Constitution of Uganda 1995.

51 See, Article 78 (1) (c) of the Constitution of Uganda 1995.

partisan. Most critical is that MPs representatives of UPDF are on record for always siding with the executive positions in parliament, which puts into question their independence and neutrality. Compared to past armies in Uganda, the UPDF is highly reputed to be a disciplined army.

However, since the return of political pluralism, its role in elections where some officers committed some electoral abuses raise the question of sustainability of their discipline and professionalism. Most crucially, the UPDF has continued to dominate the political life of Uganda and if not controlled could become a single most threat to democracy. While their presence in parliament was motivated by the desire to regulate and control them, their partisan nature dashes these expectations. Consequently, it is proposed that the UPDF should be phased out of parliament to protect them from partisan politics. Alternatively, the army representatives could be retained in parliament without voting powers or the right to debate any partisan issue to avoid being drawn into divisive politics.

5.5. Size of Parliament

The current 9th Parliament has 375 MPs representing various constituencies around the country. Going by the size alone, this Parliament is too large and an expensive burden to the taxpayers. Ironically, it continues to increase with the trend of creation of new districts which to a large measure serves political expedience rather than ensuring effective legislative representation. The creation of districts has been justified on the basis of striving to bring services nearer to the people. Yet in most cases, the creation of some districts has not been translated into improved service delivery but rather loss of revenue to the mother district, increased public administration expenditure and conflicts over district borders that always follow the ethnic divide which constrain service delivery. Most noteworthy is that the creation of a new district would mean an additional woman member of parliament.

Structurally, the parliamentary building was built to accommodate only 80 MPs but now has to accommodate 375 MPs leading to most of them never attending the sessions. But more importantly than the sitting capacity of the house, the quality of representations is impeded by the near crowd in the house. It makes it difficult for the speaker to conduct effective business and provide space for effective and meaningful deliberations by all MPs. The parliament is simply too big, an unnecessary burden of the taxpayers and does not provide effective representation of the people of Uganda. Consequently, it is recommended that the size of Parliament should be reduced and that constituencies of members directly elected should be based on a population quota of two hundred thousand (200,000) people per constituency as was originally proposed by the Constitutional Review Commission. A small, well-equipped and facilitated Parliament will be able to be effective and to exert its independence.

Also related to the size of Parliament is the remuneration of members of Parliament. The current status quo is that MPs should determine their emoluments. Experience has

shown that it is not easy for MPs to rationally determine their remuneration without provoking public anger and loss of trust among the citizens which also impacts on their performance. Consequently, it is proposed that MPs remuneration should be determined by an independent commission.

5.6. Establish a Two Chamber/Bi-Cameral Parliament

A two Chamber or Bi-Cameral Parliament is being proposed as one of the safe guards for the principle of separation of powers particularly, the independence of parliament. Most crucially for Uganda as a conflict prone country, a two chamber parliament is likely to act as a conflict management mechanism, stabilize and set the country on a path to durable peace. The ideas on which bicameralism which is the practice of having two legislative or parliamentary chambers is based can be traced to the theories developed in the Ancient Sumer and later Greece, ancient India and Rome.⁵² Recognizable bicameral institutions first arose in medieval Europe where they were associated with separate representation of different estates of the realm. For example, one house would represent the aristocracy and the other would represent the commoners. The framers of the Constitution of the United States of America also favored a bi-cameral legislature. The idea was to have the Senate that was wealthier and wiser. The Senate was created to be a stabilizing force, knowledgeable and more deliberate – a sort of republican nobility- and a counter to what Madison saw as the ‘flickleness and passion’ that could absorb the House.⁵³

Madison further noted that the use of the Senate is to consist in its proceedings with more coolness, with more system and more wisdom than the popular branch (lower house or congress). This argument led the framers of the US Constitution to grant the Senate prerogative in foreign policy, an area where steadiness, discretion, and caution were deemed very important.⁵⁴ Initially, the Senate was chosen by state legislators, and the Senators had to possess a significant amount of property in order to be deemed worthy and sensible enough for the position. In 1913 the 17th Amendment was passed which mandated that Senators would be elected by popular vote rather than chosen by the State legislatures. In the case of America, a rationale was invented for bicameralism in which the upper house (Senate) would have states represented equally, and the lower house would have them represented by population.

The relationship between the two houses varies from country to country. In some cases both houses have equal power, while in others one house is clearly superior in its powers. There are two schools of thought about bi-cameralism. Critics believe that bicameralism makes meaningful political reforms more difficult to achieve and increases the risk of gridlock especially in cases where both chambers have similar powers.⁵⁵ Proponents of

52 <http://en.wikipedia.org/wiki/Bicameralism>, [accessed on 13/10/2011].

53 Bicameralism; <http://www.absoluteastronomy.com/topics/Bicameralism> [accessed on 13 October 2011]

54 <http://en.wikipedia.org/wiki/Bicameralism>, [accessed on 13/10/2011].

55 <http://www.pogar.org/publications/other/undp/legis/chambers.pdf> [accessed on 14 October 2011].

bicameralism argue that the merits of the checks and balances provided by the bicameral model help to prevent the passage into law of ill-considered legislation. Kenya, Rwanda, South Africa and Burundi have both houses. Other countries with bicameral legislatures are USA, Canada, Argentina, Australia, Brazil, Germany, India, Switzerland etc.

In the United States, Australia, Mexico each state is given the same seats in the upper house. While the difference in population size is taken into account, deliberate effort is taken to ensure that smaller states are not overshadowed by larger states which have more representation in the lower house.

5.7. Election of Senators

In Uganda, the election of Senators could borrow from the Canadian model. In Canada, Senators are not elected by all the voters but are elected by the Governor General on the advice of the Prime Minister. The Senate does not originate most legislation although a small fraction of government bills are introduced in the Senate and Senators may introduce private members bills in the same way as MPs.⁵⁶ The Senate acts as a chamber of revision; almost passing legislation approved by the House of Commons made up of MPs who are elected. In bi-cameral systems, the Senate must pass legislation before it becomes law and can therefore act as a wise facilitator. Senate does not have to endure the accountability and scrutiny of parliamentary elections. In Germany and India, the upper houses are more closely linked with the federal system and are either appointed or elected directly by the governments or legislatures. The Indian upper house does not have the states represented equally, but on the basis of their population.⁵⁷

It should be noted that bicameralism exists in countries that are not federations where the upper houses representation is based on territorial basis. A good example of a country with a bi-cameral system is South Africa where the National Council of Provinces has its members chosen by each Province's legislature.⁵⁸ Many bicameral countries that have unitary systems such as Netherland, Philippines and Republic of Ireland, the upper house generally focuses on scrutinizing and vetoing the decisions of the lower house.

5.8. Why a Bicameral system for Uganda?

Uganda is a conflict prone country. For most of the 49 years of Uganda's independence, the country has experienced protracted violent conflicts with the LRA conflict as the longest and still going on. While, there are quite a number of underlying causes of the conflicts in Uganda, lack of constitutionalism and rule of law is central to the history of violent conflicts and political instability in Uganda. Secondly, right from independence

56 Bicameralism- Wikipedia, the free encyclopedia, available at: <http://en.wikipedia.org/wiki/Bicameralism>, Accessed on 13/10/2011.

57 Second Chambers Overseas, Available at: <http://www.ucl.ac.uk/spp/publications/unit-publications/40.pdf> Accessed on 13/10/2011.

58 Bicameralism- Wikipedia, the free encyclopedia, available at: <http://en.wikipedia.org/wiki/Bicameralism>, Accessed on 13/10/2011.

in 1962, almost all leaders have pursued the winners take it all model which has meant political exclusion of some people from power forcing some to pursue armed struggle to access political power. Thirdly, the first independence constitution provided a federal arrangement for the four kingdom areas, which were abolished in 1966 together with the constitution. The spirit of federalism especially in Buganda that had tasted its benefits continues to hover around and remains a challenge to national peace and stability.

More so, while the current constitution provides for the principle of separation of powers, in practice, government has greatly undermined and eroded the independence of both parliament and judiciary. The bicameral system is intended to strengthen the independence and protect the sanctity of parliament. Apart from the bicameral system offering checks and balances to the executive and judiciary, the system will act as a conflict management mechanism to prevent future conflicts that bedevil the country's stability. Most crucially, a bicameral system will help to utilize the country's eminent elder statesmen and women who are accomplished and wise enough to provide guidance to the country.

5.9. Denial of Bail to Rioters, Rapists and Treason Suspects

In May 2011, President Museveni indicated his intention to introduce amendments to the Constitution to deny bail to rioters, treason, rapists and economic saboteurs. This announcement followed a series of demonstrations that rocked Kampala city following the increase of food and fuel prices in the country. Most political observers think that government intends to use the legislation to harass political opponents and trample on peoples human rights. Other people have interpreted such a move as a desire to rule by law and not by rule of law. In any case, rule by law means that the government can pass a draconian legislation and use them to infringe on their fundamental human rights.

5.9.1. The Right to Bail

In Uganda, the right to bail stems from Article 23(6) of the Constitution of Uganda 1995. The constitution provides that every person accused of criminal offence has a right to apply for bail. In this case, bail is a fundamental right of any accused person. The right to bail is well stipulated in article 9(3) of the International Covenant on Civil and Political Rights which provides inter alia that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officers authorised by law to exercise judicial power and shall be entitled to a trial within reasonable time or to release.

The rationale for granting bail is based on the provisions of Article 28(3)(a) of the 1995 constitution and Article 7 (1)(b) of the African Charter on Human & People Rights that presume every person accused of a criminal offence is innocent until proven guilty or until he pleads so.

These provisions of international law provide a very strong safeguard to the right to bail whereby any variance in relation to the above provisions directly contravenes international law to which Uganda is a signatory. However while the accused has a right to apply for bail, he/she has no right to be granted bail. It is a contentious issue as to whether the courts are mandated to grant bail applications. In *Uganda v Dr. Kizza Besigye*⁵⁹ the court ruled that under article 23(6)(a) the accused is entitled to apply for bail. The word “entitled” creates a right to apply for bail and not a right to be granted bail. The word “may” creates discretion for the court to grant or not grant bail.

Similarly in *Florence Byabazaire v Uganda*, Justice Akiiki Kiiza reiterated that the accused person has no automatic right to bail but rather the accused has a right to apply for bail and article 23(6) confers discretion on court to decide whether to grant bail or not to grant it.

5.9.2. The net effect of the recent proposal by Government

The proposal would go against national and international laws on the established principles of bail. The proposal will create legislation directed to particular citizens and as such would encroach on their rights which is contrary to the principle of rule of law. The rule of law requires compliance by the state with its obligations under international law.

Commenting on the proposed constitutional reforms to deny bail to suspected economic saboteurs, rapists and treason suspects some constitutional experts have observed that,

*If the automatic right to bail is removed it will affect several other rights such as freedom of movement, right to life (broadest sense), freedom of speech and many others. It will also run against the spirit and letter of the constitution which reminds us to recall our history of tyranny and dictatorship in order not to repeat it.*⁶⁰

In the process of ensuring rule of law, it is important that government must ensure a balance between protecting the rights of the accused and ensuring that justice is done to uphold rule of law and equitable justice that builds public confidence in criminal justice system.

By and large, bail for suspects is a fundamental right of an accused person which should be exercised judiciously. The right to bail was firmly developed in the spirit of the 1995 constitution. In the event that government succeeds in amending the constitution to achieve its objective, the move would greatly undermine the independence of Judiciary but most importantly it may erode people’s confidence in the legal system and could result into increased criminality and violence.

59 *Uganda v Kizza Besigye* Constitutional Ref 20 of 2005.

60 <http://www.monitor.co.ug/OpEd/Commentary/-/689364/1167104/-/139mljdz/-/>

6. Locating Constitutional Reforms in the Context of East African Community

Uganda is a member of the East African Community. The East African Community treaty provides for the establishment of a political federation.⁶¹ In terms of constitutionalism, the treaty provides that 'in order to realize the objectives of the EAC, the Treaty directs partner states to observe fundamental principles such as good governance, which includes adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunity; gender equality, and the recognition, promotion and protection of human rights, in accordance with the provisions of the African Charter on Human and Peoples Rights.⁶²

The need to harmonize the legal framework within the community will be central to the achievement of a political federation. Further, the harmonization of the broader constitutional framework in each of the federating states is also crucial. To this end, any constitutional reform must as of necessity take into account the regional constitutional development in the partner states.

The developments in the region indicate a move towards a more independent electoral commission, presidential term limits and creation of a more independent judiciary. These developments cannot be ignored in the process of amending the constitutional order in Uganda if we are to move towards a political federation. After its traumatic and violent experience arising from election violence, Kenya has undergone a comprehensive constitutional reform with fundamental changes in its constitutional order. One of the key reforms is the establishment of an independent Electoral Commission.⁶³ Tanzania has had the most relatively stable electoral process over the years providing for free and fair elections and ensuring an orderly transition of governments.

The other important matter for the constitutional development in the region is the question of presidential term limits. The new Kenyan constitution provided for a two-term presidency of five years each.⁶⁴ Similar provisions are contained in the constitutions of Rwanda,⁶⁵ Tanzania and Burundi. While Rwanda will see a transition of power when the term of President Kagame ends, Tanzania has had many transitions in terms of presidents that have been peaceful. The challenge for Uganda, the country has never had

61 Article 5 of the Treaty for the Establishment of the East African Community (as amended on December 14, 2006 and August 20, 2007)

62 Article 6 (d) of the Treaty for the Establishment of the East African Community (as amended on December 14, 2006 and August 20, 2007).

63 See chapter seven of the Kenyan Constitution 2010.

64 See article 146 (2) and article 136 (2) (a) of the Kenyan Constitution 2010.

65 Article 101 of the Rwanda Constitution 2001. The Rwandan constitution is even more emphatic and provides that 'under no circumstances shall a person hold the office of President of Republic for more than two terms.'

any peaceful transition from one president to another and many people wish to see that happen under President Museveni. Currently, President Museveni is the longest serving head of state in the region and most observers predict that if the political transition is not well handled, it could plunge the country into political violence.⁶⁶

The other regional trend that is worth noting is the matter of separation of powers between the executive and the legislature in order to ensure checks and balances. The Kenyan constitution is very instructive. It has provided a clear delineation of roles and responsibilities between the executive and the judiciary. It should also be noted that among all the five member countries of the EAC, Uganda is the only country without presidential term limits.

The preamble to the EAC treaty recognizes the lack of participation by civil society and the private sector as one of the reasons for dissolution of the original East African Cooperation. The Treaty therefore provides for the creation of opportunity for civil society and private sector participation. In Chapter 25, the Treaty emphasizes the “creation of an enabling environment for the private sector and the civil society”, “strengthening the private sector”; and providing for “cooperation among business organizations and professional bodies”.

The desire to involve civil society in the affairs of the EAC is further given effect by Article 7, which describes civil society as one of the crucial actors in the EAC. Article 127 envisages the creation of an enabling environment for both civil society and the private sector to participate in the affairs of the Community and specifically demands the promotion of the roles of non-governmental organizations (NGOs).

Civil Society will therefore be crucial for the success or failure of the EAC to execute its mandate. The creation of linkages and development of common programs and strategies under the EAC framework in order to shape the political and democratic developments in the region will be essential. The proposed constitutional reform process driven by civil society to a large extent falls into the framework of the EAC. It is hoped that government of Uganda that has been at the forefront of fast-tracking the EAC integration will embrace this initiative and support it for it to succeed.

7. Conclusion

In this paper, we have stated the case for constitutional reforms in Uganda which is mainly intended to deepen the democratization process and consolidation of democracy. The paper has analysed the constitutional history of Uganda to demonstrate the need for democratization and steer the country away from a history of violence and political

66 Barkan, D. J. (2011) Uganda: Assessing Risks to Stability. A report of the CSIS Africa Program, June.

anarchy. The paper identified and analysed constitutional issues for reform and justified these reforms in the context of regional integration. It is proposed that while this initiative is driven by civil society, it must be owned by government since it has the constitutional mandate to review the constitution. We propose a participatory, inclusive and people centred process that will not only deliver an amended constitution but also issue based civic education to the citizens.

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