

**A CRITICAL ANALYSIS OF THE LEGAL CONSTRUCTION OF
THE PRESIDENCY IN POST-1995 UGANDA**

A thesis submitted for the degree of Doctor of Philosophy

by

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Declaration

I, Fredrick Derek Sekindi declare that this thesis is my work. Where I have quoted the work of other people in this thesis, they have been acknowledged. This thesis has not been submitted for the purpose of an award of a degree at any other university.

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ABSTRACT

Fundamental laws in Uganda have demonstrated that the presidency must be granted command of the armed forces, as well as immunity from legal proceedings among other presidential privileges and powers. However, very few attempts have been made to question the origins of presidential authority and to circumscribe its exercise, in order to avoid the possibility of its misuse. As a result, the control of presidential authority in Uganda and in many other countries in Africa remains one of the most challenging issues in constitutional frameworks.

This thesis argues that since its boundaries were drawn up by the British in 1894, up until 1995 when the Constitution of the Republic of Uganda 1995 was adopted, Uganda has been ruled under fundamental laws authored under the leadership or the influence of heads of state and governments. Such laws were designed to permanently grant state powers to the heads of state and governments under whose leadership or influence they were created, and it is from those laws that presidential authority as commonly conceived in Uganda has emerged. Therefore, because of the purpose for which those laws were designed, they have not provided sufficient constraints on heads of state and governments. This thesis seeks to answer the principal question as to whether the 1995 Constitution of Uganda which was written under the leadership of President Museveni and his NRM government is another such fundamental law.

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List of abbreviations

ANC	African National Congress
CP	Conservative Party
DP	Democratic Party
ECJ	East African Court of Justice
FDC	Forum for Democratic Change
KY	KabakaYeka
NCC	National Consultative Council
NEC	National Executive Council
NOCEM	National Organisation for Civic Education and Election Monitoring
NRA	National Resistance Movement
NRC	National Resistance Council
NRM	National Resistance Movement
RC	Resistance Council
UJCC	Uganda Joint Christian Council
UNLF	Uganda National Liberation Front
UPC	Uganda People's Congress
UPDF	Uganda People's Defence Force
UPM	Uganda Patriotic Movement

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Chapter One

General Introduction

1. Background to the study

Before 1995 when the Constitution of the Republic of Uganda 1995 was adopted, fundamental laws¹ commonly granted the presidency the command of the armed forces as well as immunity from legal proceedings, among other presidential privileges and powers. Some of their provisions stated as follows:

There shall be a Supreme Head and Commander in Chief of Uganda who shall be known as the President of Uganda and who is referred to in this Constitution as the President.²

The President shall take precedence over all persons in Uganda and shall not be liable to any legal proceedings whatsoever in any court.³

The President acting in accordance to the advice of the Cabinet may at any time dissolve Parliament.⁴

The President may remit any punishment imposed on any person for any offence or any penalty.⁵

¹ I use the term fundamental law to refer to either a constitution or a legal instrument that has been declared to have the status of supreme law. This is because in Uganda, it is not only Constitutions that have been the supreme law of the land. Decrees, Orders and other legal agreements have been declared as the supreme law of the land.

² Uganda (Independence) Order-in-Council 1962 (The Independence Constitution), art 34 (1).

³ *ibid* art 34(2).

⁴ Constitution of the Republic of Uganda 1967 (The Republic Constitution), art 73.

The exercise of power by the President under this Constitution shall not be inquired into by any court.⁶

By this Decree, the President of Uganda His Excellence Field Marshal Idi Amin Dada suspends Chapters I, IV and VI of the Constitution of the Republic of Uganda, 1967 and declares that the said Constitution shall be modified by ordinances issued by the President and all legislative and executive powers of Uganda shall be vested in the President.⁷

There are four main problems with this model of presidential designation with untrammelled powers, which this study will demonstrate is also common in many countries in Africa. First, it conflicts with the principles of constitutionalism which are founded on minimising opportunities for any public office-bearer who exercises state powers, such as a head of state;⁸ or a government to harm the citizens.⁹ In this context, constitutionalism demands that the functions of a constitution negotiated among the people should include limiting any exercise of state powers, determining which state powers should be vested in a head of state, and directing ahead of state on how to exercise such powers. Constitutionalism also permits the governed to recall the state powers when they have been misused or abused, or the public office-bearer. Therefore, constitutions serve to grant heads of state and governments, powers that should be exercised for

⁵ *ibid* art 86(1)(d).

⁶ *ibid* art 39(2).

⁷ Republic of Uganda, Legal Notice No. 1 of 1971, para1.2.

⁸ I use the term 'head of state' to refer to a natural person holding the highest-ranking official position in a country, who also acts as the chief public representative of a country. In Uganda, not every holder of the highest-ranking office has had the title of the president.

⁹ Stephen Elkin and Karol Soltan (eds), *A New Constitutionalism; Designing Political Institutions for a Good Society* (University of Chicago Press, 1993) 21.

the betterment of the people, and as envisioned by the people, but not as instruments for entrenching power and subjugating citizens.

However, the Report of the Commission of Inquiry into the Violations of Human Rights in Uganda from 1962 when the country had independence from the British, until 1986 when President Museveni's National Resistance Movement (NRM) seized power, estimates that two million extra-judicial killings of Ugandans occurred at the hands of the state, and between seven hundred and fifty and one million people were exiled by the successive oppressive governments.¹⁰ The Report notes that in an effort to hold on to power governments wantonly exercised unrestrained state powers which lead to human rights abuses and extrajudicial killings.¹¹ It may therefore be stated that vesting unrestrained state powers in public office-bearers not only departs from the accepted constitutional norms which impart 'legal legitimacy'¹² on a fundamental law, but also the absence of legal legitimacy in the fundamental laws has had a devastating impact on the Ugandan society.

Second, presidential authority as established by fundamental laws in post-colonial Uganda has not differed from that exercised by some of the rulers in the pre-independence period, whose authority did not emerge out of the citizenry and, therefore, it could not be questioned.¹³ In this

¹⁰ Republic of Uganda, *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (Ministry of Justice and Constitution Affairs 1994) (Oder's Report) 465.

¹¹ *ibid* 588.

¹² The concept of legal legitimacy is defined in chapter 3 of this study.

¹³ For example, the power of the kabaka of Buganda had its authority in a source higher than kabaka's subject therefore, it was absolute or never questioned, see Edward Wamala, 'The Social-Political Philosophy of Traditional Buganda Society in George Maclean (ed), *The Foundation of Social Life: Uganda Philosophical Studies* (Council for Research in Values and Philosophy 1992) 37, 37; Samwiri Karugire, '*Roots of Instability in Uganda*' (Fountain

context, the introduction of fundamental laws perceived as documents in which the citizenry determine how they are governed and control how public office-bearers exercise state power, has not been able to yield mechanisms for circumscribing presidential authority. It may therefore be stated that the authoritarian design of the head of state as established by post-colonial constitutional structures in Uganda, has its roots in some of the pre-independence governance systems.

Third, granting unlimited state powers to any person offends regional standards for democracy and good governance found in the African Charter on Democracy, Elections and Governance (ACDEG) 2007.¹⁴ ACDEG urges member states of the African Union to promote adherence to universal principles of democracy¹⁵ and to implement separation of powers in their Constitutions.¹⁶ Therefore, Member States of the African Union are encouraged to adopt norms of democracy and constitutionalism, which, for the protection of the citizenry, are aimed at limiting the exercise of state powers.

Fourth, the exercise and acquisition of state powers in Uganda have been fraught with controversy before 1995 when the new constitution was adopted. During the pre-independence period from 1900 to 1962, some traditional governance systems and colonial constitutional arrangements did not provide any constraints on the leaders and in many parts of the country the

Publishers 2003) 9. While the authority of the colonial governor was not subject to any legal scrutiny see *R v Besweri Kiwanuka High Court Criminal Appeal No.38 of 1937*.

¹⁴African Charter on Democracy, Elections and Governance (adopted 30 January 2007 Assembly/AU/Dec.147 (VIII)).

¹⁵ *ibid* art 2(1).

¹⁶ *ibid* art 3(5).

citizenry could not choose their leaders.¹⁷ During the period from 1962 when the country gained independence, up to 1995 when the new constitution was adopted, Uganda had seven heads of state of which six came to power by overthrowing the previous government. In the same period, it adopted three Constitutions¹⁸ which were either written under the influence or the leadership of a president and his government. The involvement of the majority of Ugandans in the adoption of these Constitutions was ignored. Also, nearly every head of state that came to power through violence and unconstitutional means took charge of creating a fundamental law that would validate their exercise of power. As this study will demonstrate, such laws were designed to entrench in power the leadership under which they were written. Moreover, all fundamental laws which were adopted before 1995 failed to allow for the direct involvement of Ugandans in the election of the president. Before 1995, with the exception of the general elections administered by the British colonial government in 1962 to usher in the first native government following the granting of independence, Uganda only held elections in 1980. These, however, have been widely discredited as fraudulent.¹⁹ All other transfers of state power were achieved through violent and unconstitutional means. Therefore, before 1995 Ugandans did not participate in electing their head of state and in the making of the fundamental laws that ruled over them and,

¹⁷ Seen (n 3); also see Prosser Gifford and Roger Louis (eds), *Decolonization and African Independence: The Transfers of Power, 1960-1980* (Yale University Press 1988) 36.

¹⁸ These are the Independence Constitution (n 2); the Interim Constitution of Uganda 1966, also known as the pigeonhole Constitution; the Republic Constitution (n 4).

¹⁹ It has been widely claimed that the 1980 general elections were rigged in favour of Milton Obote's Uganda People's Congress (UPC). See generally Dan Mudola, 'Political Transitions since Idi Amin: A Study in Political Pathology' in Holger Bernt Hansen and Michael Twaddle (eds), *Uganda Now: Between Decay and Development* (Oxford University Press 1988) 280-298; Francis Bwengye, *The Agony of Uganda: From Idi Amin to Obote* (Regency Press 1986); Holger Bernt and Michael Twaddle (eds), *Changing Uganda: The Dilemmas of Structural Adjustment and Revolutionary Change* (Oxford University Press 1991); Olive Kobusingye, *The Correct Line? Uganda Under Museveni* (Author House 2010); Sabiti Makara, *The Management of Elections in Uganda* (Chr. Michelsen Institute 2012); Yoweri Museveni, *Sowing the Mustard Seed; The Struggle for Freedom and Democracy In Uganda* (Macmillan Education 1997).

therefore, the position and the laws were not rooted in 'popular legitimacy',²⁰ The position was also not open to be contested for by all Ugandans because fundamental laws did not allow it.

It may therefore be stated that from 1894 to 1995, Uganda has been ruled through fundamental laws authored under the influence or the leadership of a head of state and his government. It is from such laws that the powers and privileges as commonly conceptualised in Uganda have emerged. Because of the purposes for which the laws were designed, they did not provide sufficient constraints on the head of state and government, and they did facilitate the smooth transfer of political power. For the same reasons, fundamental laws in Uganda before 1995 lacked the necessary legal legitimacy to conform to the basic principles of constitutionalism which recognise limits of presidential authority and governments. They have also lacked popular legitimacy²¹.

In 1986, the National Resistance Army (NRA) stormed the capital city of the country Kampala after a five-year armed conflict. By Legal Notice No.1 of 1986, President Museveni and his National Resistance Movement (NRM) installed themselves as interim President and government, and promised to adopt a new constitution that would oversee a new democratic transition. These events marked three significant factors that have become too familiar in post-independence Uganda. First, for the seventh time, state power was transferred through violence and unconstitutional means. Second, for the fourth time, a president and his government who come to power through violence and unconstitutional means suspended the fundamental law that was in force and issued a new one that validated their exercise of state powers. Third, seemingly

²⁰ The concept of popular legitimacy is defined in chapter 3 of this study.

²¹ The concept of legal legitimacy is defined in chapter 3 of this study.

unrelated at that time, for the third time, a president and his government took charge of the process of adopting a new fundamental law with the aim of imbedding themselves in power permanently. On 8 October 1995, the Constitution of the Republic of Uganda¹⁹⁹⁵ was promulgated.²² The Constitution is still in force.

2. Significance of the study

I have been motivated to carry out this research because of the constitutional history of Uganda which illustrates that the country has been ruled under fundamentals created under the influence or the leadership of heads of state and governments. The designs of these laws demonstrate that they were intended to entrench in power, heads of state and governments under whose leadership or influence they were written. Therefore, they did not provide sufficient mechanisms for limiting the exercise of state powers. The constitutional history of Uganda also indicates that the involvement of majority of Uganda was excluded from the making of the fundamental laws and, therefore, the authority of governments did not have its roots in the wishes of the people. During the deliberations on the new constitution adopted in 1995, one of Uganda's constitutional law experts Joe Oloka-Onyago counseled as follows:

As Ugandans debate the draft constitution, it is important to remember that it is not only the Executive that needs to be harnessed to democratic mechanisms of supervision and sanctions but also other organs of government which are under its directions (such as the Cabinet and the Inspectorate of Government) as well as those which interact, such as the Legislature, the Judiciary and the population at large.²³

²² Here after referred to as the 1995 Constitution.

²³ Joe Oloka-Onyago, 'Taming the President: Some Critical Reflections on the Executive and the Separation of Powers in Uganda' [1995] 2 East African Journal of Peace and Human Rights 189, 192.

In this context, what has been described as the first fully consultative and participatory constitution-making process in Uganda,²⁴ which yielded the 1995 Constitution, was actually intended among other aims, to reconstruct the institution of the presidency in order to ensure that its powers and privileges are effectively circumscribed in order to avoid their misuse and to ensure that future presidents enjoy the mandate of the people. This is because the problem in Uganda before 1995 has been that fundamental laws did not provide parameters of presidential authority.

However, the old practices of ignoring the views of the majority of Uganda in the making of the fundamental laws, adopting fundamental laws under the leadership or the influence of the head of state and government, and of not building sufficient constitutional constraints against the presidency re-emerged in the manner in which the 1995 Constitution was adopted and its provisions. Therefore, the pre-1995 problems of excessive presidential authority and incumbency perpetuation have continued unabated in what was hoped to be a new democratic era, founded on a Constitution that has been misrepresented as having been debated and adopted by the people.²⁵

I take these claims based on four main factors. First, the undemocratic nature of the laws that were established to adopt the 1995 Constitution and the manner in which it was adopted indicates an intention by NRM government to commandeer the constitution-making process in order to adopt a fundamental law which would grant them power permanently. Second, the

²⁴ According to George Kanyeihamba, the 1995 Constitution was effectively discussed throughout the length and breadth of the country and eventually adopted and promulgated by a largely directly and freely elected Constituent Assembly to a great credit to the leadership of President Museveni and the work of the NRM. See George Kanyeihamba, *Constitutional and Political History of Uganda; From 1894 to the Present* (Centenary Publishing House Limited 2002) 240.

²⁵ *ibid.*

design of the presidency as provided for by the 1995 Constitution demonstrates an intention by the framers of the Constitution to create an unlimited presidency. Third, the manner in which the 1995 Constitution has been amended to repeal the presidential term limits indicates disregard of the principles of constitutionalism and the wishes of Ugandans. Fourth, presidential electoral laws have been constructed and construed to favour the incumbent president and, consequently, they have failed to facilitate fair competition for the presidency. I aim to substantiate these claims in this study.

Given that the majority of Ugandans were participating in the first ever consultative and participatory constitution-making process, did they intend to design the presidency with similarly uncircumscribed powers and privileges that had been misused by former heads of state? Also, recent studies have indicated that the majority of Ugandans would like to see the end of President Museveni's twenty-nine year-long government,²⁶ which is longer than all Uganda's seven post-colonial heads of state put together have served. This notwithstanding, the President continues to emerge victorious in presidential elections despite popular discontent with the laws governing presidential elections.²⁷ Could it be that like the previous heads of state before him, although his methods differ, President Museveni has remained in power because of a legal framework which was designed to perpetuate his incumbency?

²⁶ See Research World International, *Ugandans Tired of Museveni* (Research World International Publications 2012) 3; Jeremy Liebowitz, Robert Sentamu and Francis Kibirige, *Citizen Perception of Democracy in Uganda: The Growing Gap between Expectations and Reality* (Afrobarometer, Briefing Paper No. 1115, 2013); Peter Girke and Mathias Kamp, *Museveni's Uganda: Eternal Subscription for Power?* (Kas International Report No. 7, 2010).

²⁷ Peter Girke and Mathias Kamp have argued that constitutional and domestic legal framework has been structured so as to hinder the transfer of political power from the incumbent. See Peter Girke and Mathias Kamp, *Museveni's Uganda: Eternal Subscription for Power?* (Kas International Report No.70, 2010).

This study critically analyses the legal construction of the presidency under the 1995 Constitution. The main aim is to investigate whether the design of the office of the president in the 1995 Constitution emerged out of another fundamental law, this time authored under the leadership of President Museveni, for the purposes of granting the President permanent ownership of power. The study also assesses Uganda's efforts towards building constitutional safeguards against the misuse or abuse of presidential authority. It also analyses the legal instrumentalities that were established for the purpose of adopting the 1995 Constitution and the manner in which the Constitution was adopted in order to determine the popular and legal legitimacy of the presidency therein. This study further investigates the purposes of granting the presidency the power and privileges as provided by the 1995 Constitution. It also analyses how presidential authority has been exercised by President Museveni. Furthermore, it proposes how the power and privileges of the presidency may be exercised in a constitutional manner. Another objective is to explore the efficacy of post-1995 constitutional and domestic legal framework for electing a president in promoting fair political contestation.

3. Thesis statement and research questions

The main research question in this thesis is:

Is the presidency as provided under the 1995 Constitution a result of another fundamental law, this time authored under the leadership and influence of President Museveni and his NRM government, for the purpose of entrenching their government in power?

In responding to the main research question, the following ancillary questions have been addressed for the purpose of greater clarity:

1. What are the origins of the presidential authority in Uganda?
2. Does the 1995 Constitution create an office of the president rooted in popular and legal legitimacy?
3. How does the 1995 Constitution ensure essential checks and balances against the exercise of the powers and privileges of the presidency to avoid their abuse and misuse?
4. How has presidential authority been exercised following the promulgation of the 1995 Constitution?
5. How should a president exercise the powers and privileges conferred by a constitution?
6. Do the post-1995 presidential electoral laws facilitate fair political competition?

4. Effectiveness and significance of post-conflict constitutional reforms

The two most important steps towards establishing a new democratic dispensation through constitutionalism in a country emerging from conflict and misrule are to meaningfully involve the citizenry in contributing to the constitutional reforms and to establish appropriate structures or institutions designed to remedy wrongs of the past. Some African countries have taken various steps towards realising these aims. For example, in South Africa, building a new democratic

dispensation required an inclusive and consultative constitution-making process and it necessitated replacing apartheid structures. Many of the old structures were transformed as a result of ideological and jurisprudential shifts. One of the ideological shifts was to implement affirmative action programs in order to repair the social fabric of a society damaged by racism and colonialism.²⁸ In Benin, after a long period of political instability in which the country witnessed constitution abrogation, unconstitutional seizures of power and absolute one-man regimes, the country agreed to an idea emerging out of the desire of the populace, to create a new constitution in order to eradicate the political instability.²⁹ The ‘never again’ approach to constitution-building sought to identify and address the causes of political instability. Constitutionalism and the protection of human rights were at the heart of this new era of democratic revival which the country went through.³⁰ With regards to eradicating the possibility of returning to one-man rule regimes, the new constitution-making process in Benin focused on addressing the problems of excess powers and privileges exercised by previous presidents. The Constitution of the Republic of Benin 1990 also emerged out of a meaningful consultative and participatory constitution-making exercise which aimed at eradicating the ills of the past. Thus, it emphasises a strong rejection of dictatorship, one-man leadership and disrespect for the Constitution, and disregard of the rule of law, which were the main features of the previous

²⁸ Constitution of the Republic of South Africa 1996, art 9 (2) allows for legislative and others measures designed to protect and advance persons or categories of persons disadvantaged by unfair discrimination.

²⁹ Charles Fombad and Nathaniel Inegbedion, ‘Presidential Term Limits and their Impact on Constitutionalism in Africa’ in Charles Fombad and Christian Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Publication 2010) 1, 7.

³⁰ Bruce Magnusson, ‘Testing Democracy in Benin’ in Richard Joseph(ed), *State, Conflict and Democracy in Africa* (LynneRienner Publishers 1999) 208.

regimes.³¹ Benin's and South Africa's experiences illustrate that post-conflict constitutional reforms are more likely to be meaningful if they emerge out of a genuine participatory and consultative process and they are only effective if they seek to remedy the ills of the past.

5. Methodology

The study reviewed the existing literature on which the discourse on presidentialism has been developed and the subject matter has been explored extensively. Particular focus was given to fundamental laws as the source of presidential authority and the manner in which presidential authority has been acquired and exercised. Information sources included case law, constitutions, legislations, academic literature, newspapers articles, databases and website blogs. The study surveyed designs of the head of state in Uganda as established under pre-colonial governance systems, constitutional arrangements during the colonial era and by fundamental laws in the post-colonial period. It also analysed how fundamental laws in Uganda were adopted. Comparable parameters of presidential authority as defined by constitutional frameworks in various countries and by the courts, with a particular focus on Benin were examined. The study also analysed the constitutional and domestic legal framework for conducting presidential elections in Uganda and the international standards for adjudicating electoral complaints. Furthermore, it examined African standards for democracy, elections and governance. Academic publications, newspaper articles and web blogs were also consulted to provide the foundation for the arguments advanced in this study. The research also benefited from engagement, discussion and dialogue with academics in Uganda, the United Kingdom and in South Africa. Opinions of

³¹ John Heilbrunn, 'Social Origins of National Conferences in Benin and Togo' [1993] 31 *Journal of Modern African Studies* 110, 112.

legal practitioners, politicians, civil society activists and judges whose evaluation and understanding of constitutionalism and politics in Uganda contributed to shaping some of the issues that are discussed in this study. Journalists and a host of other members of the Ugandan society also directed my attention towards the political realities in the country. I also attended conferences, workshops and training sessions in Uganda, the United Kingdom and in South Africa where I gathered sufficient knowledge from the views shared by research students and academic staff with expertise on the topics relating to the issues under discussion.

Through these interactions, the study gained considerable insights on the problems associated with excess presidential authority and the deficiencies in presidential models, constitutional frameworks and presidential electoral laws, from which suggestions for a suitable presidential model and fair presidential electoral laws have been developed.

Descriptive, analytical and historical approaches were applied to analyse and critique the presidential model as established by the Constitution of Republic of Uganda 1995, to answer the main research question of this study and its ancillary questions.

6. Limitations

One of the main obstacles that this study faced is the dearth of academic literature and sources of reliable information on governance and constitutionalism in Uganda. Most of the documentation relating to the colonial era and to the period before 1995, are not available in Uganda because they were destroyed during the various wars that the country has experienced. The common

source of the history of Uganda is fundamentally oral. This has been handed down over generations and it is often distorted with tribal and religious bias. However, there are a few Ugandan academics who have engaged with issues pertaining to this research and, therefore, their work has been frequently cited to support the arguments that I make and to question some common assumptions. It may also be stated that there is a fear among Ugandans of criticizing the ruling government because of the level of intolerance towards alternative views. This made it difficult for this study to elicit the free opinions of Ugandans which would have enhanced this study. For these reasons, the purview of this thesis has been limited to exploring a the few available local sources supplemented by newspaper articles, web blogs and the work of international and regional academics for the purposes of sketching and probing the conclusions made by this study.

Newspaper articles and website blogs have been used to the supplement academic literature. While these sources may not be found to be authoritative, they have been drawn on in an attempt to highlight both the realities in Uganda and the opinions formed on the issues concerning this research. In order to address the challenges posed by the dearth of a variety of sources, I relied extensively on informal interviews with judges, lawyers, journalists, members of civil society and with the academic community in order to challenge common perceptions and to supplement the available information.

7. Breakdown of chapters

This thesis consists of this introductory chapter, four substantive chapters and a concluding chapter. The contents of each chapter are discussed at the beginning of every chapter therefore, only an outline of the issues dealt in this study is provided under this section. Chapter two provides a background to this study. The main aim is to provide a comprehensive platform for a critical analysis of the legal construction of the institution of the presidency in post-1995 Uganda. Starting with pre-colonial governance systems, the chapter traces the origins of the powers and privilege of the head of state in Uganda. It provides a history of fundamental laws that Uganda adopted before 1995, and it analyses designs of presidencies found these laws. A discussion of the history of transfers of the office of the head of state and an analysis of how presidential authority was exercised before the 1995 Constitution was adopted are carried out. The chapter also illustrates how fundamental laws were adopted before 1995 in an effort to explain how heads of state acquired and exercised state powers.

In chapter three, the study investigate the constitution-making process which yielded the 1995 Constitution in an effort to engage with issues that motivated the design of the office of the executive president therein. The chapter also aims to gauge the efforts of the NRM towards adopting a truly first home-grown constitution that reflects the aspirations of the people of Uganda, and which is cast in the principles of constitutionalism. It also examines attempts to reconstruct the presidency in the 1995 Constitution. The chapter further defines two concepts namely, popular and legal legitimacy, which are commonly known as popular sovereignty and constitutionalism respectively. The two concepts are employed to measure the legitimacy of the

model of executive president as provided under the 1995 Constitution and the Constitutions as a whole.

Chapter four analyses some of the powers and privileges of the presidency established by the 1995 Constitution. It also questions the basis of granting these powers and privileges to the presidency. The chapter examines how the 1995 Constitution attempts to impose checks and balances in order to safeguard against abuse of presidential authority, and it explores how President Museveni has exercised the powers and enjoyed the privileges granted by the 1995 Constitution. It also proposes how presidential authority should be exercised in a constitutional manner. Furthermore, it explores how Constitution and Courts in various jurisdictions have defined the scope of presidential authority. Lastly, the chapter illustrates that the designation of the executive president as established by the 1995 Constitution is not particular to Uganda only, but it is a common phenomenon in African Constitutions. Thus, the chapter discusses the implications of such presidential models on constitutionalism and good governance across the continent. It further demonstrates that the Constitution of the Republic of Benin¹⁹⁹⁰ marks an exception in Africa in the way it conceptualises the office of the president and how it establishes organs for checking and balancing presidential authority.

Chapter five explores the post-1995 constitutional and domestic legal framework established for electing the president of Uganda. Focusing on the challenges in presidential elections, it explores the efficacy of the laws under which the president of Uganda is elected in facilitating fair political competition. The chapter also discusses how the Supreme Court has interpreted

presidential electoral laws and it examines the constitutionality of the 2005 constitutional amendment to repeal the presidential term limits from the 1995 Constitution.

The final chapter of this study provides concluding observations, findings and recommendations.

8. Mini-conclusion

The focus, objectives and structure of this study have been set out in this introduction in order to provide a preliminary understanding of the issues that are dealt with in the rest of the study. A comprehensive historical background to the office of the head of state in Uganda before 1995 is essential for launching a platform for this study. This follows in chapter two.

CHAPTER TWO

The head of state in Uganda (1300-1995)

1. Introduction

It would be impossible to critically analyse the post-1995 legal construction of the presidency in Uganda without understanding how the powers and privileges of the head of state were acquired and exercised in Uganda before 1995. This is because, as this study will demonstrate, no single institution of government in Uganda required more reconstructing than the head of state because of the way it dominated and acquired state power through undemocratic and unconstitutional processes before 1995. In this regard, the post-1995 constitutional reforms emerged out of efforts to circumscribe the presidency, among other things. To achieve this aim, Ugandans sought to develop rules in the new constitution for minimising the power excesses of leaders and for allowing smooth transfers of power in order to eradicate the plagues of unconstitutional change of power and its abuse which afflicted the country since independence. In this regard, this chapter focuses on the manner in which heads of state acquired, retained and exercised power from 1300 to 1995 in order to provide the foundation for this study.

This chapter is made up of eight sections, of which section 1 is this introduction. Section 2 provides a brief background to how the leaders of kingdoms and tribes acquired and exercised power in pre-colonial Uganda from 1300 up to 1894 when Uganda was declared a British Protectorate. Section 3 discusses the constitutional arrangements under which the colonial governor and native leaders exercised power during the colonial era from 1894 up to 1962. Section 4 provides a history of the transfer of the office of the head of state from 1962 when Uganda acquired independence up to 1995 when the new constitution was adopted. Section 5 analyses the designs of fundamental laws created under the leaderships of successive heads of state from the period since independence until 1995. Section 6 provides an account of how heads of state and governments have used state powers to abuse human rights, carry out extra-judicial killings and to undermine constitutionalism in the period under discussion. Section 7 discusses role of the army as a brutal instrument for unconstitutional change of power and a final arbiter of political disagreements. Section 8 is the conclusion to this chapter.

2. Pre-colonial governance systems and the exercise of power by the kings and the leaders of tribes (1300-1894)

Uganda¹ is a territorial unit consisting of ninety three thousand and nine hundred and eighty one square mile of land and water in the heart of Africa, commencing in a north-easterly point of Mount Sabyinyo, running in the easterly direction to the summit of Kyeshero Hill, its most

¹ It has been claimed that when the first Europeans and Asians came to Uganda, they misspelt and mispronounced Bugandahence earlier referring to it as Uganda when it was brought under the British colonial rule. See Timothy Amerit 'Contextualising a Jurisprudence Cliché that Buganda was nothing but a 'Protected State' in the Uganda Protectorate' (*Timothy Amerit Legal Wheels*, 5 September 2014) <http://timothyamerit.blogspot.co.uk/2014/09/contextualizing-jurisprudential-cliche.html> accessed 22 April 2015.

eastern point is at the Wagagai summit of Mount Elgon and its most southern boundary at Sumba Island, its south-western boundaries are along the Rwenzori Mountains, while its western boundaries are at Lake Albert and its most northern point is at Nimule National Park.² Before being declared as the Uganda Protectorate in 1894 by the British colonial government; the country now known as Uganda was made up of the five main Kingdoms of the Ankole, Buganda, Busoga, Bunyoro and Toro in the southern and western parts of the country; of which Buganda was the largest both in size and population; and other tribes including the Acholi, Langi, Lugbara, of the north and Iteso, Bagwere and Bagisu of the east; to mention some of the indigenous populations of Uganda that were placed under one territory- Uganda.³ According to Samwiri Karugire there were two main governance systems in pre-colonial Uganda, namely segmentary and non-segmentary.⁴ Under the non-segmentary governance system as was practiced in the southern and western Kingdoms such as Buganda, the Kingdom had a centralised system of governance with the king (kabaka) as its titular head with absolute powers.⁵ In contrast, Edward Wamala argues that kabaka was believed to be a semi-divine being, his power and authority though never absolute, was never questioned.⁶

John Mbiti makes the following observations of the source of the authority of the institution of the kabaka and how the rulers were conceived by their subjects:

² The Constitution of the Republic of Uganda 1995, (The 1995 Constitution), 2nd sch, art 5.

³ Timothy Amerit (n 1).

⁴ Samwiri Karugire, *Roots of Instability in Uganda* (Fountain Publishers 2003) 9.

⁵ *ibid* 26.

⁶ Edward Wamala, 'The Social-Political Philosophy of Traditional Buganda Society' in George Maclean (ed), *The Foundation of Social Life: Uganda Philosophical Studies* (Council for Research in Values and Philosophy 1992) 37.

Where these rulers are found, they are not simply political heads: they are the mystical and religious heads, the divine symbol of their people's health and welfare. The individual as such may not have outstanding talents or abilities but their office is the link between human rule and spiritual government. They are therefore, divine or sacral rulers, the shadow or reflection of God's rule in the universe. People regard them as God's earthly viceroys.⁷

It may therefore be stated that the authority of the institution of the kakaba was not subject to earthly constraint or scrutiny because the rulers derived the right to rule from a greater source than their subjects.

A kabaka did not perform his duties solely but was assisted by a committee of senior people (Lukiiko) who were responsible for collecting revenues and enforcing the kings' orders and as such, they took positions of both political and social significance. These included a prime minister (katikiro), a royal sister (nalya), a queen mother (namasole), a naval commander (gabunga) and a commander of the armed ground forces (mujasi).⁸ In modern political terms, we may refer to lukiko as the cabinet of a kabaka.

The Kingdom of Buganda was partitioned into administrative units headed by chiefs, the biggest of which were the Counties (Amasaza). Counties were sub-divided into Sub-Counties (Amagombolola) which were also sub-divided into Parishes (Emiruka). Parishes were also sub-divided into Sub-Parishes (Bakungu) which were the smallest village unit.⁹

⁷ John Mbiti, *African Religions and Philosophy* (Heinemann 1969) 182.

⁸ Buganda Kingdom <http://www.buganda.or.ug/index.php/ekitiibwa-kya-buganda-bugandas-glorry/cultural-administration> accessed 20 April 2015.

⁹ *ibid.*

Apart from the queen mother and the royal sister who owed their positions to their family relationship with the kabaka, members of the Lukiiko and the chiefs were appointed by a kabaka and were directly responsible to him.¹⁰ A kabaka could assign or dismiss any chief at any time.¹¹ However, by the end of 1750, chieftainship was taken to be open for anyone to qualify.¹² It was awarded by the kabaka on a clan basis but only to men of merit with notable services.¹³ The manner in which the institution of the kabaka of Buganda exercised authority over its subjects illustrates their absolutism. The kingdom of Buganda was founded by Kabaka Kato Kintu in 1300.¹⁴ Abdu Kasozi notes that by 1404, Kabaka Tembo had acquired the right to kill his subjects.¹⁵ Subsequently, rulers of the Kingdom of Buganda used dehumanising violence towards their subjects. Kabaka Namugala (1734-1764) massacred a group of his subjects and buried two hundred of them in a mass grave.¹⁶ Kabaka Kyambade executed hundreds of his subjects on the Ssese islands because they complained that they were not given meat during a ceremony.¹⁷ Kabaka Suuna II (1824-1854) executed three hundred subjects because he suspected one of them of stealing from him.¹⁸ Kabaka Walugembe Mutesa I (1854-1884) was nicknamed

¹⁰Abdu Kasozi, *The Social Origins of Violence in Uganda 1962-1985* (McGill Queens University Press 1994) 12; also see Karugire (n 4) 11.

¹¹ *ibid.*

¹² Buganda Kingdom (n 8).

¹³ *ibid.*

¹⁴ The Royal Ark, 'Buganda Brief History' <http://www.royalark.net/Uganda/buganda.htm> accessed 28 April 2015.

¹⁵ Kasozi (n 10) 13.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.* 14.

Mukabya (he who makes people cry) because of how easily he took life.¹⁹ Buganda was littered with the kings' execution sites in Busanji, Nakinziro, Kubamitwe, Kitinda, Kijabi and many others.²⁰ No other leaders in what was to become the Uganda Protectorate and later Uganda had absolute power over their subjects and misused their powers as the rulers of Buganda. The people of Buganda (Baganda) also seemed to accept the right of rulers to use violence against them and many of their proverbs seems to show their acceptance or at least resignation. These include, kabaka nyondo ekusabuzito (The king is a heavy hammer that kills by its weight) kabakanyanja eta natavuba (The king is an ocean that not only kills fishermen but also anyone else he wishes).

In sum, the power of the institution of the kabaka of Buganda had its source in an authority higher than the kabaka's subjects. Therefore, the actions of a kabaka were not questionable by the subjects. Consequently, the rulers exercised absolute power. This allowed them to kill their subjects needlessly. The Baganda also accepted that their rulers had the right to kill and that their authority was unquestionable.

In contrast, under the segmentary governance system as was practised by the northern tribes of Uganda such the Acholi, a chief governed according to wishes of the people.²¹ Each family was independent. For example, every Acholi man was held to be a king of his own house (arwot ki

¹⁹ John Speke, *The Journal; of Discovery of the Source of River Nile* (J. M. Dent and Sons, Limited 1906) 21.

²⁰ *ibid.*

²¹ Dennis Pain, *The Bending of Spears'' Producing Consensus for Peace and Development in Northern Uganda* (International Alert.1997)18.

oda).²² Such independence limited the powers of the traditional chiefs (rwot) to that of ruling by consent and decisions of the chief tended to be final summaries of the consensus view of the elders and advisers to which any man may contribute openly. ²³

Rwots were selected by the elders of the village from royal families on the basis of their ability to listen to people and to resolve disputes peacefully.²⁴ Clan leaders (ladit kaka) who formed the body of advisers for the rwot were appointed by elders of the clan.²⁵ To qualify as a ladit kaka, a person was expected to know a lot about the clans, to assist in dispute settlement and they were often asked to act as a messenger (lakwena) for the rwot in conflict resolution.²⁶ It has been claimed that the strong anti-violence values in traditional Acholi society are reflected in the fact that a person who kills cannot be respected as a leader.²⁷ He or she must go through cleaning of the body (yubo kum) to purify them before being allowed into the society.²⁸ The principle of conflict resolution (mato oput) was used to bring together the two sides in a disagreement in order to investigate the conflict, with the aims of establishing responsibility for the wrong, and to allow the wrongdoer to seek repentance.²⁹ A rwot had no means of coercion, although all adult

²² *ibid.*

²³ *ibid.*

²⁴ *ibid* 19.

²⁵ *ibid.*

²⁶ *ibid* 20.

²⁷ John Russell, *Men Without God? A study of the impact of Christian message in the north of Uganda* (Highway Press 1966) 21.

²⁸ *ibid.*

²⁹ Pain (n 21)18.

male habitats were required to lender tributes to the rwots, there were always villages that refused to pay and moved away to set up chiefdoms of their own.³⁰

The segmentary governance system constituted a social form of governance that shared power and decision-making among members of the community thereby leading to a social order and a non-violent political culture. Unlike a non-segmentary system, leaders owed their authority to the citizenry who elected them. The governance structures in segmentary societies provided sufficient constraints on powers of the leaders in order to avoid their misuse by ensuring that decisions of the leaders are reached by consensus and they cannot be imposed on the people that objected to them. There was also an acceptance by the leaders to operate within the governance constraints. This led to a better system of governance under which the populace were ruled by consent and the authority of the leaders could not be used to subjugate them.

In conclusion, pre-colonial governance systems in Uganda were diverse allowing for both democratic governance and autocracy. Segmentary systems allowed for sufficient checks and balances on the powers of the leaders in order to avoid the abuse or misuse of power. This was possible because the authority of the leaders was granted by the populace who would select their leaders and who also developed mechanisms for checking and balancing their powers. For example, the selection process which provided that advisers to the rwots, the *ladit kakas*, were not elected by the rwots but by the elders of the clan appears to be designed to ensure that in making decisions, the rwots consults the *ladit kakas* who are the representatives of the people.

³⁰ F K Girling, *The Acholi of Uganda*, (Her Majesty's Stationery Office 1960) 94.

While in non-segmentary such as the Kingdom of Buganda, the institution of the kabaka derived its power from an authority higher than the subjects. Therefore, the ruler's power could not be questioned or constrained by subjects who were not the source of the power. This system of governance moored autocracy.

3. Legal foundations of the powers and the privileges of the head of state (1894-1962)

In 1894, the kingdom of Buganda was declared a British Protectorate on the basis of the Buganda Treaty 1894 that was negotiated between the British and Kabaka Mawanga II of Buganda which was negotiated the year before it came into force, and which was confirmed by a notification in the London Gazette.³¹ It should be noted that the Buganda Treaty 1894 was first constitutional document in Uganda that put the powers that were previously exercised by the native leaders through traditional practices, into what we may refer to as a legal document. In this regard, it represents the first constitutional framework that defined how the powers of the state would be exercised. It is not known if Kabaka Mwanga and his successors fully understood how the Treaties that they negotiated with British were to impact on the exercise of the power by the institution of the kabaka. Events that were to unfold before independence suggest that they did not. The main effect of Buganda Treaty 1894 was that the Protectorate came under the ambit of the African Order- in-Council 1889, which authorised the British government to establish local jurisdiction and under which it was to exercise executive, judicial and administrative powers.³²

³¹*London Gazette* (London, 19 June 1894) 92-103.

The Buganda Protectorate was gradually expanded to incorporate other territories however, apart from the Treaties negotiated between the rulers of Tororo and Ankole in 1900 and 1901 respectively, which were important in their own ways but they did not achieve prominence because the British carried out their main political and economic activities within the Kingdom of Buganda,³³ there were no arrangements with any of the other kingdoms and tribes accepting Britain's protection.³⁴ It should be noted the expansion of the Protectorate of Uganda began on 4th December 1893 with the military campaign launched against the Kingdom of Bunyoro by the British, which was led by Colonel Coleville and supported by the army of the Kingdom of Buganda.³⁵ After suffering a series of defeats, King Kabalega of Bunyoro was driven from his Kingdom and forced to take refuge in Lango in the northern part of Uganda in 1894.³⁶ As a reward for his assistance in the war against the Kingdom of Bunyoro, Colonel Colville promised the Kabaka of Buganda that the Kingdom of Bunyoro would be incorporated into Buganda.³⁷ This roughly was the area comprised of Buyaga and Bugangazi, northern Singo, Buruli, and the formerly semi-independent area of northern Bugerere, which were part of the Bunyoro territory.³⁸ The areas are commonly referred to as the 'Lost Counties'.

³² African Order-in-Council 1889, art 3.

³³ The Kingdom of Buganda was the nucleus around which the Uganda Protectorate was built, and it became the centre of British colonisation. It later came to be known as the Pearl of Africa. Buganda was the staging post for colonial expansion. See (Amerit n 1) 4.

³⁴ John Mugambwa, 'The legal aspects of the 1900 Buganda Agreement' [1987] 11 (25) *Journal of Legal Pluralism* 243, 243.

³⁵ Amerit (n 1) 6.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

On 10 March 1900, Kabaka Daudi Chawa II of Buganda who at the time was three years old, was assisted by his Lukiiko in negotiating with British government, the Buganda Agreement 1900 which was signed by Governor Harry Johnson who represented the British.³⁹ William Johnston writes that when the Buganda Agreement was made, the legal advisers for the British Foreign Office, which was responsible for the administration of the Buganda Protectorate, were convinced that by a new the Treaty, the British colonial governments' authority would be extended to cover all the aspects of government in the Uganda Protectorate.⁴⁰ It may therefore be stated that it was following the advice from the Foreign Office that the New Uganda Order-in-Council 1902 was made with the Kabaka Daudi Chwa II of Buganda and the aim was to ensure that British government controls all aspects of governance in the Protectorate.

As John Mugambwa aptly notes, the Buganda Agreement 1900 and the New Uganda Order-in – Council 1902 gave the Crown extensive powers for the purposes of administration, raising revenue and granting land titles.⁴¹ This may be deduced from some of their provisions. For example in relation to the aspect of administration namely, legislation, the Buganda Agreement provided that the laws, customs and regulations that were in place before its adoption were to apply to the Protectorate except in so far as they were inconsistent with the Agreement and in which case the Agreement will prevail.⁴² Thus, pre-colonial systems of governance became subordinate to the Buganda Agreement and to a greater extent were replaced by it. It should be

³⁹ *ibid* 4.

⁴⁰ William Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the late Nineteenth Century* (Duke University Press 1973) 98.

⁴¹ Mugambwa (n 34) 247.

⁴² Buganda Agreement 1900, arts 5; 6; 8; 10.

noted that the kakaba remained the head of the state of the native population of Buganda. He and his Lukiiko retained the constitutional right to pass laws for the natives provided that such laws were consistent with the Treaties. This position was confirmed by Court of Appeal of Eastern Africa in the case of *Nasanairi Kibuka v Bertie Smith*.⁴³ The Buganda Agreement defined the Kingdom of Uganda as a territory within the Uganda Protectorate which comprised of twenty administrative units or Counties (Amagombolola).⁴⁴ It provided for the appointment of three native officers; that is a prime minister (katikiro), a chief justice (omulamuzi) and a treasurer (omuwanika) or controller of the kabaka's revenue; to assist the kabaka in the governance of his people.⁴⁵ It further created a Native Legislature (Lukiiko) whose members were to be appointed by the kabaka from the Magombolola, and it provide that the legislative functions of the Lukiiko were to make resolutions in matters concerning the administration of Buganda subject to the consent of the kabaka and the colonial governor.⁴⁶

The New Uganda Order-in-Council gave the colonial governor the power to make ordinances for the administration of justice, raising of revenues and generally for the peace, order and good governance for all persons in Uganda.⁴⁷ Such legal construction of the colonial governor was intended to create the supreme authority vested with all powers for the sole administration over the Protectorate –the head of state. The effect of these provisions was that there was nothing that could not be done in the Protectorate by the colonial governor issuing legislation. The other

⁴³ Original Civil of 11 December 1908.

⁴⁴ The Buganda Agreement 1900 (n 42), art 9.

⁴⁵ *ibid* art 10.

⁴⁶ *ibid* art11

⁴⁷ New Uganda Order-in-Council 1902 (The New Oder-in Council), art 16.

notable constitutional introduction by the colonial government included the establishment of the High Court of Uganda,⁴⁸ which was vested with original and unlimited jurisdiction on both civil and criminal matters over all persons and matters;⁴⁹ and the creation of the Legislative Council for the Protectorate, consisting of the governor and such persons as His Majesty would direct by any instructions under His sign;⁵⁰ and which was bound to observe royal instructions in the discharge of its functions.⁵¹ In 1919, the Native Authority Ordinance Uganda was enacted. It established native courts with powers to hear all criminal and civil matters relating to the Africans in the Protectorate.⁵² Appeals from the native courts lay before the High Court,⁵³ which was established under the New Uganda Order-in-Council.⁵⁴ Also, the Eastern African Court of Appeal Order-in-Council 1921 established the Eastern Africa Court of Appeal for the Protectorates of Kenya, Uganda, Nyasaland and Zanzibar.⁵⁵ The Court of Appeal had jurisdiction to hear and determine appeals including reserved questions of law from the four Protectorates.⁵⁶ Appeals from it were heard by the Privy Council of the House of Lords in the United Kingdom.⁵⁷ Judgements, decrees or orders of the Court of Appeal had the full force and

⁴⁸ *ibid* art 15 (1).

⁴⁹ *ibid* art 15 (2).

⁵⁰ *ibid* art 8.

⁵¹ *ibid* art 13.

⁵² Native Authority Ordinance 1919 (The Native Authority Ordinance), s 3.

⁵³ *ibid* s 7.

⁵⁴ See (n 48).

⁵⁵ Eastern African Court of Appeal Order-in Council 1921 (The Court of Appeal Order-in Council) *London Gazette* (London, 21 September 1921) 872-879.

⁵⁶ *ibid* 872.

⁵⁷ *ibid* 873.

effect in every Protectorate.⁵⁸ It should be noted under section 7 of the Foreign Jurisdiction Act 1890, His Majesty's government had the power to legislate for foreign territories and, therefore, the Eastern African Court of Appeal Order-in-Council was passed under this provision.

In relation to the position of the kabaka of Buganda before the colonial era, Buganda was an autonomous kingdom socially, economically and politically with a kabaka who was vested with absolute power. However, upon the signing of the Buganda Agreement, the institution of the kabaka lost some of its absoluteness. For example, revenues were to be collected by the General Revenue of the Protectorate.⁵⁹ Also, under article 11 of the Buganda Agreement, the kabaka had to share his powers of decision making with his chiefs pursuant to the Native Authority Ordinance.⁶⁰ Therefore, the exercise of power by the institution of kabaka was now supervised by constitutional arrangements negotiated by the rulers of Buganda and the British government. In the case of *Rex v Crewe Ex. P. Sekgome*,⁶¹ the British Court of Appeal held that by virtue of the Foreign Jurisdiction Act, the Crown's powers in any of its Protectorates could not be legally challenged because it was an Act of the state. This decision served to confirm that the superior authority vested with the administration of the Protectorate was no longer in the hands of the native rulers but the colonial governor. In their entirety, the constitutional arrangements introduced at the beginning of colonialism weakened the powers that were exercised under the position of the kabaka and by other native rulers, not only because they were no longer the direct rulers of their people, but also because they could no longer exercise unconstrained powers. The

⁵⁸ *ibid.*

⁵⁹ The Buganda Agreement 1900 (n 42), art 4.

⁶⁰ The Native Authority Ordinance (n 52), art 11 allowed chiefs to make administrative decisions relating to the governance of their areas without consulting the kabaka.

⁶¹ [1910] 2 QB.576.

absoluteness enjoyed by the institution of kabaka before the colonial era was effectively transferred by the constitutional arrangements to the new head of state of the Protectorate- the colonial governor. It may well be that the weakened position of the kabaka and the exploitation of the natural resources by the British colonial government, among others things aroused political conscious among the natives.

The quest for political inclusion in Uganda started in earnest in the 1940s. According to David Apter, demands for the native population's participation in formulating and implementing government policy increased around 1944.⁶² Native political parties were formed; between 1946 and 1951, the Bataka (Indigenous) Party was formed, followed by the African Farmers Union Party and the Baganda Abakopi (Peasant) Party.⁶³ James Miti and Ignatius Musazi, the founders of the Indigenous party and the Peasant Part respectively, called for an end to colonial dominance and for the involvement of the natives in political and economic affairs of their country.⁶⁴ In 1949, protests in Buganda against colonial rule cumulated into full-on confrontation between the natives and the colonialists.⁶⁵ As the native population struggled for political involvement in their country, the British answered their pursuit of political inclusion with violence, albeit more tempered than that they had seen under the institution of the kabaka⁶⁶ and that which was to

⁶² David Apter, *The Political Kingdom in Uganda: A Study in Bureaucratic Nationalism* (2nd edition, Routledge 1977) 34.

⁶³ *ibid* 35.

⁶⁴ *ibid*.

⁶⁵ Roger Louis, *Ends of British Imperialism: The Scramble for the Empire, Suez Canal and Decolonization* (IB Tauris and Co Ltd 2006) 123.

⁶⁶ Kasozi (n 10) 47.

follow under post- independence leaders. The British also embarked on enacting oppressive laws as a method of suppressing the native calls for independence. The colonial governor declared a state of emergency in March 1950⁶⁷ and enacted the Penal Code Act of 1950 Chapter 120 which established offences intended to criminalise any opposition to colonial rule.⁶⁸ These offences were used to silence calls for political change. In the early 1950s, political activities among the native population reached a new level.⁶⁹ Leaders of the native parties called for an end to colonial dominance and for the involvement of the native population in the governance of Uganda.⁷⁰ The native political parties were proscribed as unlawful societies,⁷¹ and the Deportation Ordinance of 1908 was used to avert demands of the political rights for the natives.⁷² Many Baganda Chiefs⁷³ including the Kabaka, Sir Edward Mutesa I were deported because they demanded more involvement in the governance of their country.⁷⁴ All of this was possible because the colonial governor was vested with unlimited authority to pass laws and to clamp down on all those who

⁶⁷ C .A. G. Wallis, Report of an Inquiry into African Local Government in the Protectorate of Uganda (Government Printer Uganda 1953) 23.

⁶⁸ Penal Code Act 1950 Chapter 120 (The Penal Code Act), art 24 created an offence of committing acts intended to alarm, annoy or ridicule the governor. Art 50 created an offence of publishing false news against the governor. The offence would be committed by any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace.

⁶⁹ Kasozi (n 10) 53.

⁷⁰ See (n 64).

⁷¹ The Penal Code Act (n 68), art 58 prohibited membership of an unlawful society. Under art 56, an unlawful society would be declared by an order of the governor to be any society dangerous to the good government of Uganda.

⁷² Wallis (n 67) 24.

⁷³ Samwiri Wamara; Eridadi Mulira; David Mukubira; Ruben Musoke; Spire Mukasa; Ignatius Musazi were deported from Buganda because of their demands for political and economic inclusion of the natives in the affairs of Buganda. See Monica Twesiime-Kiryia, 'The Independence and Accountability of the Judiciary in Uganda: opportunities and challenges' (East African Centre for Constitutional Development 2008) 17.

⁷⁴ Cranford Pratt, 'The Politics of Indirect Rule: Uganda 1900-1955' in Anthony Low and Cranford Pratt (eds), *Buganda and British Overrule, 1900-1955*(Oxford University Press 1960) 161, 334.

challenged the colonial government.⁷⁵ The native population had no right to participate in the governance of their country.

The British also created a police force for the purpose of sustaining its colonial power. Joe Oloka-Onyango describes the role of the police during the colonial period as follows:

Rather than playing the role of the neutral arbiter over actions of a criminal nature, the Police under colonialism was a central element in the struggle over resources, power and authority. Its primary responsibility was the suppression of political opposition while the prevention of crime was regarded only as a supplementary function.⁷⁶

Prosser Gifford and Roger Louis posit that:

European colonial regimes could continue to exist only so long as three requirements were fulfilled. First, that their colonial subjects acquiesced to their authority; second, that the politicians and electorates of the metropolitan countries accepted colonial commitments as not entirely unethical and, on the whole, worthwhile; and third, that these empires received international recognition.⁷⁷

Despite efforts by the British to stifle the demands for political involvement by the native population, Samwiri Karugire notes that in the last decade before independence, pressure continued to mount for self-governance in the Protectorate mainly from Buganda and owing to this pressure, by 1945, membership of the Legislative Council had risen to twenty-eight including seven Africans, seven Asians and fourteen British.⁷⁸

⁷⁵ See (n 47); (n 68); (n 71).

⁷⁶ Joe Oloka-Onyango, 'Taking Orders From Above: Police Powers, Politics and Democratic Governance in Post-Movement Uganda' (HURIPEC Working Paper No 31/2011, 2011) para 2.2.

⁷⁷ Prosser Gifford and Roger Louis (eds), *Decolonization and African Independence: The Transfers of Power, 1960-1980* (Yale University Press 1988) 34.

⁷⁸ Karugire (n 4) 33.

In 1944, the Democratic Party (DP) was created while the Uganda Peoples' Congress (UPC) and the Kabaka Yeka (KY) parties were both formed much later in 1961.⁷⁹ By the early 1950s, native political parties were no longer proscribed as the British government began to prepare the country for independence. Abdu Kasozi notes that political parties in Uganda were founded on religious and tribal roots. He writes that the DP's leadership and supporters were mainly Baganda, who were against the leadership style of the institution of kabaka and were catholic; while the UPC's support base was the Acholi and Langi and the other tribes of northern Uganda, and were also protestants; and the KY supporters were Baganda who wished for the reinstatement of the institution of the kabaka as the head of state, and they were protestants.⁸⁰

In 1952, following the appointment of Sir Andrew Cohen as the Governor, the pace of the demands from the native population altered the British colonial government policy. Its emphasis was first placed upon the rapid expansion of the social services (especially education) and then on constitutional reforms with the prospect of independence in the foreseeable future.⁸¹ In 1955, as the moment towards independence gained momentum among the Protectorates of Kenya, Uganda and Nyasaland that were under the protections of His Majesty's government, Kabaka Mutesa II in an effort to secure the autonomy of his Kingdom of Buganda, signed the Buganda Agreement 1955 with Sir Andrew Cohen. Under this agreement, the British government made an undertaking that the Kingdom of Buganda will not become part of a unitary East African Federation State following independence.⁸² The Buganda Agreement 1955 represents one of the

⁷⁹ *ibid* 36.

⁸⁰ Kasozi (n 10) 59.

⁸¹ Neville Rubin, *Government Publications Relating to Africa in Microform* (EP Microform Limited 1973) 28.

⁸² Buganda Agreement 1955, Preamble.

constitutional arrangements negotiated between the British government and the rulers of Buganda that favoured the rulers of Buganda over other native leaders that Protectorate of Uganda comprised. No other tribes or kingdoms were given such assurances by the British. It is important to note that the Buganda Agreement 1955 did not repeal the agreements between Buganda and British government of 1894 and 1900 or the New Uganda Order-in-Council 1902.⁸³ Thus, the powers of the colonial governor under these constitutional arrangements remained the same. Appended to the Buganda agreement 1955 was the Constitution of the Kingdom of Buganda which provided a new design of the office of the kabaka. It provided that the governor of the Uganda Protectorate shall be the representative of Her Majesty in Buganda.⁸⁴ The kabaka enjoyed all the titles, dignities and pre-eminence that attach to the office of the kabaka under the law and custom of Buganda.⁸⁵ Before assuming the functions of his office; the kabaka was required to enter into a solemn undertaking in the presence of the governor; to be loyal to Her Majesty Queen Elizabeth II whose protection Buganda enjoys, Her Heirs and successors; to well and truly govern Buganda according to the law; and to abide by the terms of the Agreements made with Her Majesty and by the Constitution of Buganda.⁸⁶ If at the time of taking the position, a kabaka was a minor, then until he attains majority, he, except where customs require, was not to perform the duties of the position of the kabaka and was not be required to enter into the solemn undertaking.⁸⁷ If the kabaka was a minor or was unable to

⁸³ *ibid* art 2(3).

⁸⁴ *ibid* art 2(2).

⁸⁵ *ibid* art 7(4).

⁸⁶ *ibid* art 5(2).

⁸⁷ *ibid* art 5(3).

perform his constitutional duties, the Buganda Agreement 1955 provided that the Lukiiko would elect three persons to be regents.⁸⁸ It also created the kabaka's council of minister appointed by the kabaka and headed by the prime minister (katikiro) and approved by the governor.⁸⁹ The council of ministers was charged with the administration of kabaka's government.⁹⁰ The kabaka in consultation with the governor would terminate the appointment of a minister, if the minister was convicted of a crime and sentenced to imprisonment without the option of a fine.⁹¹ If in the opinion of the kabaka, a minister become incapable of performing his functions by reason of physical or mental infirmity, the kabaka was authorised to appoint a committee consisting of such persons he considered suitable to enquire into the matter; and the committee, if satisfied that a minister has become incapable of performing his functions by reason of physical or mental infirmity, would inform the kabaka accordingly and thereupon the kabaka in consultation with the governor would terminate the appointment of the minister.⁹²

The kabaka was empowered to pass laws for the Africans in Buganda with the advice of the Lukiiko and the approval of the governor.⁹³ Laws made for the general governance of the Uganda Protectorate were equally applicable to Buganda except in so far as they did not conflict with the terms of the Buganda Agreements in which case, terms of the Buganda Agreements

⁸⁸ *ibid* art 6 (1).

⁸⁹ *ibid* art 7(2).

⁹⁰ *ibid* art 8(1).

⁹¹ *ibid* art 18(1).

⁹² *ibid* art 18(3).

⁹³ *ibid* art 26(1).

constituted a special exception in regard to Buganda.⁹⁴ The revenues and expenditure of the kabaka's government were approved by the governor.⁹⁵

The Buganda Agreement 1955 represents an attempt to circumscribe the powers of the institution of the kabaka and build into them mechanisms that ensure that the powers are not misused. For example, the kabaka's powers to appoint and dismiss a minister were supervised by the colonial governor.⁹⁶ Also, the reasons for dismissing a minister were provided by the Buganda Agreement.⁹⁷ However, the powers of the colonial governor who wielded 'actual power' and who had the overall authority of over the Protectorate and was therefore the head of state, were not subject on any constitutional constraints.

In 1959, a committee commissioned by the colonial government recommended for elections to be organised in preparation for independence.⁹⁸ Apart from the Uganda (Independence) Order-in-Council 1962,⁹⁹ the Buganda Agreement 1955 marked the end of treaty negotiations between the British and the native rulers within the Protectorate of Uganda.

With regards to the acquisition and exercise of the powers of the colonial governor who became the first head of state of the Protectorate of Uganda, it may be stated that the authority of the colonial governor had no legal constraints, neither was it rooted in the wishes of the native

⁹⁴ *ibid* art 26(4).

⁹⁵ *ibid* art 27(1).

⁹⁶ See (n 90).

⁹⁷ See (n 93).

⁹⁸ Wild Committee, *Report of the Constitutional Committee* (Government Printers 1945) (The Wild Report) 45.

⁹⁹ Uganda (Independence) Order-in-Council 1962 (The Independence Constitution).

population. The main constitutional arrangements namely, the Buganda Agreement 1900 and the New Order-in-Council 1902 which created the basis for the colonial rule over the Uganda Protectorate and thereby established the legal authority of the colonial governor were negotiated by the rulers of Buganda and the colonial government and imposed on Ugandans.¹⁰⁰ The New Uganda Order-in-Council also gave the colonial governor extensive powers to pass laws for the administration of the Protectorate,¹⁰¹ thereby vesting all legislative powers in one person. Although the governor shared his legislative role with the Legislative Council, he was a member of this Council, and he had powers to suspend its members and to revoke the appointments to it.¹⁰² Thus, members of the Legislative Council owed their positions to the governor. Also, pursuant to article 7(4) of the Uganda New Order-in-Council 1902 all mineral resources in the Protectorate were placed under the sole custody and jurisdiction of the governor.

It therefore suffices to conclude that the governor's powers were not sufficiently constrained by the constitutional arrangements that were in place during the colonial era. In addition, the arrangements posed a challenge to the notion of separation of powers, which I will discuss in chapter three, in as so far as they allowed the governor to encroach on the role of the Legislative Council and also because the Council was not constitutionally empowered to provide checks and balances on the governor. This domineering legal construction of the office of the governor created a passage to a dictatorial rule and a benchmark for the design of the office of the head of

¹⁰⁰ Joe Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda: A Historical Perspective' in Mahmood Mamudani and Joe Oloka-Onyago (eds), *Studies in Living Conditions, Popular Movement and Constitutionalism* (JEP Books 1996) 463, 464.

¹⁰¹ See (n 47).

¹⁰² The New Oder-in Council (n 47) arts 6 and 7.

state, which was to be reproduced in fundamental laws that Uganda would adopt after independence.

The British government also confirmed the legally uncontainable nature of the power of the colonial governor. In the case of *R v Besweri Kiwanuka*,¹⁰³ the High Court of Buganda sought directions from the British Secretary of State for Colonies¹⁰⁴ on the jurisdiction of His Majesty over the Kingdom of Buganda. In response, the Secretary of State for Colonies asserted that:

By the Uganda Ordinance-in-Council, His Majesty had made manifest the extent of His jurisdiction in Uganda. Such may be referred to as an act of state unchallengeable in any Court or may be attributed to state power given under the Foreign Jurisdiction Act.¹⁰⁵

All doubts over which institution of state was the supreme authority with unlimited powers were erased. As Joe Oloka-Onyango notes, such interpretation of the law was deliberate and necessary to preserve the authority of the British for the domination of the colonised.¹⁰⁶ The courts also served to emphasise that the authority of the colonial governor was supreme and that the native population would not enjoy any political rights. In the case of *Nyali Ltd v Attorney General*,¹⁰⁷ which originated from the Protectorate of Kenya, the most liberal of British judges, Lord Denning, made it clear that the British government and its power exercised through the colonial governor was unchallengeable and could not be subjected to review by the courts.

¹⁰³ High Court Criminal Appeal No. 38 1937.

¹⁰⁴ Under the Foreign Jurisdiction Act 1890, s 4, the High Court was mandated to seek directions from the Foreign Secretary of Colonies on matters relating to the extent of the jurisdiction of His Majesty.

¹⁰⁵ See (n 104) para 9.

¹⁰⁶ Joe Oloka-Onyango (n 101) 468.

¹⁰⁷ (1957) 1 All E.R. 646.

Colonial laws also augmented the legally unfettered nature of the powers of the governor. A clear example of this can be found in the Deportation Ordinance Act 1908. The Act permitted the colonial governor to deport any person, who conducted himself so as to be dangerous to peace and good order, or any person who endeavoured to excite enmity between the people of the Protectorate and His Majesty, or any person who plotted against His Majesty's power and authority.¹⁰⁸ It also provided that the decision of the colonial governor was not subject to appeal in any court of law.¹⁰⁹ The Penal Code Act 1950, Chapter 120 also served to insulate the colonial governor¹¹⁰ and his chiefs¹¹¹ from any criticism. It prohibited political mobilisation against the colonial government¹¹² and it created an offence of treason which could be committed by an attempt to cause the death of the governor.¹¹³ These draconian laws helped to secure the existence of an illegitimate and repressive colonial government.

The designations of the head of state as provide for under the colonial constitutional arrangements represented a negation of the basic principles of constitutionalism which I will discuss in the next chapter. It was through these agreements that the parameters for the exercising and acquiring the powers of the state were defined in Uganda, although the absoluteness of the kabaka of Buganda before colonialism did not differ from that of the colonial governor.

¹⁰⁸ Deportation Ordinance Act 1908, s 2.

¹⁰⁹ *ibid* s 3.

¹¹⁰ See (n 68).

¹¹¹ The Penal Code Act (n 68), art 27 created an offence of promoting war on chiefs. The offence would be committed through utterance.

¹¹² See (n 71).

¹¹³ The Penal Code Act (n 68), art 23(1).

In the remaining sections of this chapter, I focus on the period after independence in 1962 and before 1995 when the new constitution was adopted.

4. Transfers of the office of head of state (1962-1995)

On 9 October 1962, Uganda acquired independence from the British. Three preliminary points that I briefly made in chapter one section 2, about the manner in which heads of state acquired and exercised state powers after independence and before 1995, need to be expounded further in order to set a comprehensive background to this study. First, in the period under discussion, six out of the seven heads of state came to power by overthrowing the previous government. Therefore, for the first thirty-three years after independence, state power in Uganda was mainly transferred through violence and unconstitutional means. As a result, Uganda has not witnessed a single smooth and democratic transfer of power from one government to another, save for the handover of government from the Military Commission headed by Paulo Muwanga to President Obote's, following the highly disputed elections of 1980. Second, Uganda has promulgated three Constitutions in 1962, 1966 and 1967 which were all sponsored by the ruling governments without the involvement of the majority of Ugandans.¹¹⁴ Thus, similar to the powers and privileges exercised and enjoyed by the institutions of the kabaka and the colonial governors, the authority of the heads of state under the three Constitutions following independence was not founded on the popular authority of Ugandans. Third, on acquiring power through violent and

¹¹⁴ These are: Constitution of the Republic of Uganda 1967 (The Republic Constitution); Interim Constitution of Uganda 1966 also known as the Pigeonhole Constitution (The Interim Constitution); Uganda (Independence) Order-in-Council 1962 (The Independence Constitution).

unconstitutional means, nearly every head of state suspended the existing fundamental law and replaced it with that sponsored by his government which allowed them to legitimise their rule. Therefore, governmental powers and by implication those of the head of state, have been emerged out of fundamental laws sponsored and designed under the influence of the government in power.

The Independence Constitution was adopted for the purpose of defining the manner in which independent Uganda was to be governed. It was supplemented by the National Assembly Elections Act 1957 for the purposes of conducting the first general elections in 1962 to prepare the country for self-rule. The elections were contested by the DP, KY and the UPC. Although the DP got the majority in the National Assembly, KY and the UPC merged to become KY-UPC, and became the majority that formed the government under President Edward Mutesa II, the leader of KY, while Milton Obote of the UPC became the Prime Minister.¹¹⁵ It is important to note that the transfer of power from the Colonial Governor, Sir Walter Coutts, to President Mutesa II and Prime Minister Milton Obote, following the 1962 general elections was the only non-violent and undisputed transfer of political power in the country's history before 1995.

The Independence Constitution was negotiated between the native agitators for independence and the British Government at Lancaster House in London.¹¹⁶ It was therefore based on the principles and philosophy of the United Kingdom.¹¹⁷ It is important to recall that under section 7

¹¹⁵ Kasozi (n 10) 58.

¹¹⁶ Karugire (n 4) 39; also see Kasozi (n 10) 59.

¹¹⁷ When making a recommendation on the form of legislature that should be adopted, the Wild Report noted '[in] dealing with the question of the composition of Government and the composition of the Legislative Council following the next elections, it seems to us essential to be clear about the ultimate aim. Our view about this is quite

of the Foreign Jurisdiction Act 1890, His Majesty's government had the powers to legislate for foreign territories and, therefore; the Independence Constitution was adopted under these powers. In this context, the process of constitutional promulgation resembled in many ways the 'amiable farce' of treaty-negotiation that took place between the rulers of Buganda and the British during colonialism. The British government sought to negotiate political settlements that were favourable to them in order to maintain their influence in Uganda, while Kabaka Mutesa II was posturing for political dominance in the new independent Uganda in order to restore the powers that the position of the kabaka had lost during the colonial period. No consideration was given to the wishes of the indigenous population.

Similar to the colonial constitutional arrangements, the Independence Constitution represented a vague attempt at constraining the powers of the head of state and at demarcating the parameters of state power between the executive, judiciary and legislature. Evidence of this may be detected from the powers it bestowed on the presidency. It created the first president of Uganda – President Mutesa II¹¹⁸ and, therefore, the role of the colonial governor as the head of state was transferred to the presidency. The Independence Constitution provided that the president was to take precedence over all persons in Uganda and was not liable to any legal proceedings whatsoever in any court.¹¹⁹ A president was the commander-in-chief of the armed forces¹²⁰ and

clear, namely the aim should be the development of a national assembly modelled on the House of Commons in the United Kingdom....'The Wild Report (n 98) 68.

¹¹⁸ The Independence Constitution (n 99) chapter 1 and chapter IX.

¹¹⁹ *ibid* art 34(2).

¹²⁰ *ibid* art 34(1).

was not to pay taxes.¹²¹ The president was to appoint the head of the judiciary in consultation with the prime minister.¹²² She or he was vested with the sole powers of clemency.¹²³ The High Court of Buganda administered justice in the name of a president.¹²⁴ The Independence Constitution also recognised the supremacy of the Constitution¹²⁵ and it repealed the constitutional arrangements negotiated between the native rulers and the British government, and those that were issued under Crowns' powers to legislate for the Protectorate.¹²⁶ A president was eligible for re-election for as many terms of office¹²⁷ provided she or he met the eligibility conditions.¹²⁸ In relation to the exercise of legislative powers, the Independence Constitution empowered the National Parliament to make laws for the peace, order and good government of Uganda.¹²⁹ At the same time, the legislature of the Kingdom of Buganda (Lukiiko), at the exclusion of the National Parliament had the powers to make laws for Buganda and Uganda. The Lukiiko was constitutionally empowered to make laws for the peace, order and good government of Buganda; in relation to the institution of the kabaka: for the powers, obligations and duties of the institution of the kabaka, the status of Buganda's ministers and their powers, obligations and duties (other than those conferred by or under a law enacted by the National Parliament); for the

¹²¹ *ibid* art 34(3).

¹²² *ibid* art 91(1).

¹²³ *ibid* art 84.

¹²⁴ *ibid* art 94(4).

¹²⁵ *ibid* art.8 (1).

¹²⁶ *ibid* arts 111-113. The only exception was the Eastern Africa Court of Appeal which remained operational.

¹²⁷ *ibid* art 36(6).

¹²⁸ *ibid* art 36(1) provided that the president and the vice president shall be elected in accordance with such procedure as may be prescribed by the National Assembly from among the rulers of the federal states and the constitutional heads of districts by the members of the National Assembly for a term of five years.

¹²⁹ *ibid* art 73.

public service of Buganda; for matters incidental to the Lukiiko and other authorities in Buganda, taxation and matters relating thereto as may be agreed between the kabaka's government and the government of Uganda, and the public debt of Buganda.¹³⁰ Bills originating from the Lukiiko and from the National Parliament required the approval of the president to become law.¹³¹ The executive authority of the Kingdom of Buganda was entrusted to the institution of the kabaka¹³² while the executive authority over Uganda was vested in the National Parliament¹³³ and the presidency.¹³⁴ Cabinet ministers were appointed by the president in consultation with the prime minister,¹³⁵ and could be dismissed by the president on either the recommendation of the prime minister, or after consultation with the prime minister,¹³⁶ while ministers for the Kingdom of Buganda were appointed by the kabaka after consultation with the Lukiko.¹³⁷

Apart from the provisions vesting shared executive powers between presidency and the National Assembly, and those that relate to the appointment and dismissal of cabinet ministers, the other significant changes in the Independence Constitution from the design of the head of state in

¹³⁰ *ibid* art 74(2).

¹³¹ *ibid* art 75.

¹³² *ibid* art 77(2).

¹³³ *ibid* art 77(1).

¹³⁴ See (n 119).

¹³⁵ The Independence Constitution (n 100), art 54.

¹³⁶ *ibid* art 57.

¹³⁷ *ibid* art 74(1).

the pre-independence Uganda was that the president was to be elected by the National Assembly for a term of five years,¹³⁸ and could be removed from office by a resolution originating from either the prime minister or the National Assembly, and supported by not less than two-thirds of all members of the Assembly.¹³⁹ The group from which a president could be elected was restricted to the native rulers of the Kingdoms of Buganda, Bunyoro and Butoro and heads of Districts.¹⁴⁰ In this regard, the majority of Ugandans were excluded from contesting for the presidency and they were not allowed to participate in the election of their president. The president was also a member of the National Assembly.¹⁴¹ He or she could resign at any time from office by writing to the prime minister.¹⁴² The Independence Constitution also created the Electoral Commission whose members were to be appointed by the president on the advice of the prime minister.¹⁴³ Such was the constitutional design of the first presidency in independent Uganda.

The Independence Constitution reflected the bargaining powers and the wishes of the Kabaka Mutesa II of Buganda, the darling of the colonialist, who was to become the first president of Uganda. As discussed above in this chapter, throughout the colonial era, the British established constitutional arrangements that favoured the rulers of Buganda and the Baganda over other

¹³⁸ *ibid.*

¹³⁹ *ibid* art 36(3).

¹⁴⁰ See (n 129).

¹⁴¹ The Independence Constitution (n 100), art 37.

¹⁴² *ibid* art 36(5).

¹⁴³ *ibid* art 45(1).

rulers, tribes and kingdoms in the Protectorate.¹⁴⁴ In a similar manner, many of the complex provisions of the Independence Constitution favoured Kabaka Mutesa II and his tribe the Baganda, over other rulers and tribes which comprised independent Uganda.¹⁴⁵ It has also been claimed that during the negotiations on the Independence Constitution, Kabaka Mutesa II and his tribe the Baganda were against joining a unitary state as they would forfeit their autonomy and *de facto* end their monarchy and, therefore, they demanded that unless they were granted a degree of autonomy, they would not join a free Uganda.¹⁴⁶ Joe Oloka-Onyango traces the historical role of Buganda and its implication within the broader context of Uganda. He notes that the imperialist policy of indirect rule guaranteed that the Kingdom of Buganda remained dominant virtually throughout the colonial epoch and after it.¹⁴⁷ Anthony Low also provides an insight into the root of the cordial relations between the Kingdom of Buganda and the British. He writes that although Buganda is one of the many Kingdoms of the south of Uganda, it owes its present size and preponderance to the fairly permanent abode which, it alone of the Kingdoms, provided for the Europeans who began to move into the area from 1875.¹⁴⁸ He contends that the rulers of Buganda seem to have been impressed by the assistance given by Sir

¹⁴⁴ For example, under the Buganda Agreement 1955, the British government made an undertaking that the Kingdom of Buganda will not become part of the unitary East African Federation State following after the grant of independence. No such assurance were given to the other tribes and kingdoms in Uganda. See (n 83).

¹⁴⁵ The Independence Constitution (n 100), art 4 created federal status for the Kingdom of Buganda and a semi federal status for the Kingdoms of Busoga, Ankole and Toro while, creating unitary relations between the districts and the central government. Arts 43, 74-76, 90-95, 107-108, 118-120 granted Buganda significant powers allowing it to pass laws on specified issues such as creating its own courts, controlling and raising its own taxes, enjoying protection for land tenure and its representatives to the National Assembly continued to be directly elected by its local legislature (Lukiko). Art 5 stipulated that the central government had no powers over federal states and could not alter their constitutions or forms of governments.

¹⁴⁶ Alan Forward, *You Have Been Allocated Uganda* (Poyntington Publishing Company 1999) 17.

¹⁴⁷ Joe Oloka-Onyango, 'The Question of Buganda in Contemporary Ugandan Politics' [1997] 15(2) *Journal of Contemporary African Studies* 173, 181.

¹⁴⁸ Anthony Low, 'The British and the Baganda' [1956] 32(3) *Journal of International Affairs* 308, 308.

Samuel Baker and Colonel Gordon to the Egyptian in their quest to acquire more territories and they believed that they could call on the assistance of the British to acquire neighbouring kingdoms.¹⁴⁹ Unlike the Kingdoms of Bunyoro and Butoro who kept the Europeans out, the rulers of Buganda welcomed their assistance in providing them with arms that were used to conquer the other kingdoms and tribes and take over their territories.¹⁵⁰ Further evidence of the genial relations between the Kabakas of Buganda and the British which also indicates that the British were grooming Kabaka Mutesa II to take over power after they departed is provided by Alan Forward. He writes that among all the native leaders in the Protectorate of Uganda, only Kabaka Mutesa II was chosen to attend Magdalene College, Cambridge in England where he was commissioned as a Captain in the Grenadier Guards.¹⁵¹ Also, leading up to independence, Mutesa II was knighted as Commander of the British Empire on the New Year's honour list in 1962 by the Queen Elizabeth II of the United Kingdom.¹⁵² The relationship between the British government and the rulers of Buganda is important for understating the powers and privileges granted to presidency which were exercised and enjoyed by Kabaka Mutesa II of Buganda, who became the first president of Uganda under the Independence Constitution. It may therefore be stated that the design of the presidency found in the Independence Constitution and many of its provisions, were written under the overriding influence of the Kabaka of Buganda Mutesa II. The presidency was the compromise Mutesa II enjoyed in exchange for agreeing to allow his Kingdom of Buganda to join the unitary state of Uganda. It may well be that during the negotiations on the Independence Constitution, Mutesa II could not accept for the presidency to

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ Forward (n 147) 9.

¹⁵² Rene Lemarchand, '*African Kingships in Perspective: Political Change and Modernization in Monarchical Settings*' (Cass 1977) 21.

be bestowed with less power than that which was exercised by the rulers of Buganda or the colonial governor. In sum, the outcome of the independence constitutional reforms in relation to the presidency is that it did not differ much from the structures of the institution of the kabaka or the colonial governor whose authority was unlimited. The presidential authority bestowed by the Independence Constitution indicated an intention to create a supreme authority whose power over the administration of Uganda would be close to unquestionable. It should be noted that the majority of Ugandans were ignored in the making of the Independence Constitution. Therefore, they were unable to formulate ideas on how state powers should be exercised.

The domineering nature of the presidency and the provisions that favoured the Baganda sowed the seeds of division which were to form the root for abrogating the Independence Constitution. Having brought together many tribes and kingdoms that had nothing in common by defining the boundaries of Uganda; the British had the moral, if not legal responsibility to ensure that the constitution which would provide how they were to be governed would not be the basis for tribal conflicts. James Paul observes that:

Independence Constitutions were like negotiated treaties. They were often more the product of ad hoc bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. They were also often extraordinarily complex. But by accepting a constitutional document worked out in London on the eve of independence, regimes in Africa could hasten the attainment of national sovereignty and the entrenchment of their own power. Once independent, the regime could change the constitution to suit local needs, and not surprisingly, to tighten its own control over the political system.¹⁵³

It may well be that the native political actors of that time felt undermined by British and the Kabaka of Buganda during the ‘constitution-bargaining process’, accepted the Independence

¹⁵³ James Paul, ‘Some Observations on Constitutionalism, Judicial Review and the Rule of Law in Africa’ [1974] 35 Ohio State Law Journal 851, 855.

Constitution as part of an opportunity for self-rule but knew it had to be changed to reflect the new independent Uganda.

On 22 February 1966, a year before the general elections were meant to be held as provided for under the Independence Constitution,¹⁵⁴ a struggle for political power between President Mutesa II, local leaders and Prime Minister Obote came to a breaking point over the controversy of the so-called 'Lost Counties'.¹⁵⁵ It is important to record here that Hansard notes that during the negotiations on the Independence Constitution, Kabaka Mutesa II rejected the proposal to return the Lost Counties to the Kingdom of Bunyoro claiming that they had become part of Buganda after sixty years.¹⁵⁶ Thus, the Independence Constitution provided that a referendum would be held in the areas to allow residents to make a decision as to whether the Counties should remain as part of Buganda or return to Bunyoro.¹⁵⁷ The residents voted for the return of the Lost Counties to Bunyoro.¹⁵⁸ The Kabaka of Buganda and the President of Uganda refused.¹⁵⁹ Prime Minister Milton Obote decided to stage a *coup d'état*. He sent the army which was headed by Idi Amin to depose President Mutesa II.¹⁶⁰ Although the Independence Constitution put the armed forces at the command of the presidency,¹⁶¹ as will be discussed in the last section of this

¹⁵⁴ See (n 139).

¹⁵⁵ See (n 36) - (n 38).

¹⁵⁶ HL Deb 26 July 1962, vol.242 cc1145-72.

¹⁵⁷ The Independence Constitution (n 100), art 26.

¹⁵⁸ Karugire (n 4) 41.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid* 43.

¹⁶¹ See (n 121).

chapter, the colonial foundations on which the armed forces in Uganda were built meant that it was mainly made up of soldiers from northern Uganda who were loyal to Obote who was also from northern Uganda. Obote abrogated portions of the Independence Constitution, abolished the federal states, and imposed on the country the Interim Constitution 1966¹⁶² while the parliament building was surrounded by armed soldiers in commanded by Idi Amin.¹⁶³ The Report of the Commission of Inquiry into Violations of Human Rights since Independence and before 1986 notes that:

The abrogation of the Independence Constitution was a unilateral action taken without consulting either Parliament or the people of Uganda. For a couple of months, Uganda was literally governed without a constitution. Then the 1966 Constitution was put in the pigeonholes of the members of Parliament and they were asked to approve it even before reading it, and they did. In other words, Parliament suddenly, and without consulting anybody, constituted themselves into a Constituent Assembly. They enacted and promulgated a Constitution whose contents they did not even know.¹⁶⁴

The legitimacy of Obote's government, his unconstitutional and violent seizure of power, and the validity of his imposed Interim Constitution were subjected to legal scrutiny in the case of *Uganda v Commissioner of Prisons Ex-parte Matovu*.¹⁶⁵ The petitioner was served with a detention order under provisions of the Interim Constitution.¹⁶⁶ He filed a *habeas corpus* application, arguing that the detention order violated article 28 of the Independence Constitution,¹⁶⁷ which remained the supreme law of the land. The case presented the High Court

¹⁶² Interim Constitution 1966. (The interim Constitution).

¹⁶³ Phares Mukasa, *The Buganda Factor in Uganda Politics* (Fountain Publishers 2008) 77.

¹⁶⁴ Republic of Uganda, *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (Ministry of Justice and Constitution Affairs 1994) (Oder's Report) 87.

¹⁶⁵ [1966] EALR 514.

¹⁶⁶ The Interim Constitution (n 163), art 31(1) gave power to the president to issue a proclamation for the detention of any person.

of Uganda with the opportunity to examine the validity of the Interim Constitution and the legitimacy of Obote's government.

In a unanimous decision, the Court rejected the government's plea that the new oath of allegiance to the Interim Constitution that had been taken by Parliament precluded the Court from inquiring into the validity of the Constitution. It also dismissed the argument that the Court had no jurisdiction to enquire into the validity of the Constitution because the making of a constitution is a political act and outside the scope of the functions of the Court. This landmark decision marked the first attempt to limit the actions of the head of state by a Ugandan court and a departure from the colonial jurisprudence which indicated that the exercise and acquisition of the powers of the head of state were not amenable to judicial scrutiny.¹⁶⁸ Obote's government appealed to the Eastern Africa Court of Appeal. Justice Odoma quoted extensively from the case of *State v Dosso*,¹⁶⁹ which he found 'irresistible and unassailable.' He declared as follows:

The events from 22 February to 14 April 1966 "are a law creating facts" appropriately described in law as a "revolution" because there was an abrupt political change, not contemplated by the existing Constitution that destroyed the entire legal order and was superseded by a new Constitution. The revolution is victorious in the sense that the person assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, and then the revolution itself becomes a law-creating fact. The Constitution of 1966 is a legally valid constitution and the supreme law of Uganda. The Independence Constitution of 1962 was abolished as a result of a victorious revolution in law, it no longer exists nor does it form part of the laws of Uganda, having been deprived of its de facto and de jure validity. The 1966 Constitution is the new legal order and which has been effective since 15 April 1966, when it first came into force.¹⁷⁰

¹⁶⁷ The provision provided for the protection of freedom of movement.

¹⁶⁸ See (n 104) and (n 108).

¹⁶⁹ [1958] 2 PSCR 180.

¹⁷⁰ *ibid* [36] (Odoma C J).

According to Joe Oloka-Onyango, the Court clothed the patently illegal actions of Obote in a shroud of legitimacy and thus aided the erosion of its own power and authority.¹⁷¹ Indeed, having endorsed the violent and unconstitutional seizure of political power, the Court accepted that it is possible to undermine the authority of competent institutions such as the courts and Parliament to create and amend legal order and to resolve political conflicts. The Court's decision aided the abrogation of the Independence Constitution. It also set two precedents that were to dominate the political and constitutional histories of post-independence Uganda. First, that political power can be transferred through violent and unconstitutional means. Second, that a head of state and a government can impose a fundamental law on the country.

It should be noted that despite the multifaceted provisions of Independence Constitution, it provided a procedure for impeaching a president.¹⁷² It is not known if Obote explored this option before he opted to remove President Mutesa II through a method not authorised by the Independence Constitution.

Obote's government later introduced the Constitution of Republic Uganda of 1967¹⁷³ in June 1966.¹⁷⁴ Following the seizure of power by Obote, a significant number of the members of KY and DP in the then National Assembly joined the UPC which allowed the UPC to have a

¹⁷¹Oloka-Onyango (n 101) 471.

¹⁷² See (n 140).

¹⁷³ Constitution of the Republic of Uganda 1967 (The Republic Constitution).

¹⁷⁴ Karugire (n 4) 40.

majority in the legislature.¹⁷⁵ This act highlights the willingness of Uganda's politicians to change allegiances swiftly in order to acquire or retain power. It also transformed the reputation of the institution of Parliament from its envisaged role as a regulator of the powers of the presidency and the bastion of constitutional rights, to one that is subservient to the presidency. The UPC's majority in the National Assembly was to become significant in the process of debating and adopting the Republic Constitution.

It should be recalled the Independence Constitution prohibited amendments to any of its provisions relating to its supremacy, the federal states and the districts,¹⁷⁶ and many of its provisions nurtured inequalities among the various tribes and kingdoms in independent Uganda.¹⁷⁷ Therefore, having ousted President Mutesa II and assumed power in a manner not authorised by it, and having also abolished the federal states, Obote had to introduce a new fundamental law that would not only legitimise his powers but that would also normalise the inequalities in the Independence Constitution.

The Republic Constitution can be conceived as Uganda's first attempt at developing a home-grown constitution. Although it came as a result of the 'constitutional crisis of 1966', it was debated and passed by a Ugandan Parliament. However, its popular legitimacy is shrouded in controversy for several reasons.

¹⁷⁵ Oder's Report (n 165) 87.

¹⁷⁶ The Independence Constitution (n 100), art 5.

¹⁷⁷ See (n 146).

First, the term of the Parliament which transformed itself into a Constitution Assembly and adopted the Republic Constitution had expired.¹⁷⁸ Therefore, it had no mandate to adopt the Republic Constitution. It was an illegitimate forum both for governing Uganda and for adopting a new constitution. Obote's government had the option of calling for new elections. The National Assembly emerging out of the new elections would have been dressed in some level of popular legitimacy to adopt a new constitution. Second, the popular legitimacy of the Republic Constitution would have benefited from a consultative and participatory constitution-making process, marking a departure from the exclusive method of constitution-making through which the Independence Constitution was adopted. Obote could have pointed at the inequalities in the Independence Constitution which allowed the other tribes of Uganda to be dominated by Kingdom of Buganda as forming the basis for its abrogation and for adopting a more inclusive constitution. He could also have argued that the Independence Constitution was imposed on the country by the erstwhile colonial authorities and the Kabaka of Buganda. These issues would have given him sound grounds for proposing a new constitution. However, the mode of adoption of the Republic Constitution employed by Obote suggests that his intentions were to make use of an easily manipulable, illegitimate and limited forum that had exhibited its acquiescence to him by adopting the Interim Constitution; to adopt a constitution that would fortify his power and government.

¹⁷⁸ The Independence Constitution (n 100), art 61 provided that the term of the first National Assembly of Uganda is five years. The five years commenced on 9 October 1962 when the Constitution came into force and ended on 8 October 1967. The Republic Constitution was however adopted 11 months after the tenure of the first Parliament of independent Uganda had expired on 8 September 1968.

Although the Republic Constitution was actually adopted on 8 September 1968, it had come into force on 15 April 1966¹⁷⁹ the day after Obote deposed President Mutesa II. It declared the Constitution as the supreme law of the land.¹⁸⁰ The Republic Constitution mirrored the provisions in the Independence Constitution relating to the election of a president in that presidential election was to continue in the previous indirect manner.¹⁸¹ It also continued to sanction multiparty political competition.¹⁸² It provided four possible routes to the presidency. First, the leader in the National Assembly of the party having a numerical strength which consists of a majority of all members of the Assembly returned to the Assembly after a general election would become the president.¹⁸³ Second, where no party acquired a majority in the Assembly, the leader of the party with the greatest numerical strength following a general election would become president.¹⁸⁴ Third, in the event that the leader of the party which acquires the greatest numerical strength following a general election fails to form a government which commands the support of the Assembly, the leader of the party having the next numerical strength in the Assembly would become president.¹⁸⁵ Last, where a person who has become president under the immediately preceding provision¹⁸⁶ fails to form a government which

¹⁷⁹ The Republic Constitution (n 174), art 115(6).

¹⁸⁰ *ibid* art 5.

¹⁸¹ *ibid* art36.

¹⁸² *ibid* art 56.

¹⁸³ *ibid* art 36(1).

¹⁸⁴ *ibid* art 36(2).

¹⁸⁵ *ibid* art 36(3).

¹⁸⁶ *ibid*.

commands the support of the Assembly, then the Assembly would proceed to elect one of its members as president.¹⁸⁷

The National Assembly was empowered to prescribe a procedure for electing a president.¹⁸⁸ A motion of no confidence in the government passed by a majority of not less than two-thirds of the total membership of the National Assembly could force the resignation of the president.¹⁸⁹ With regards to the immediate occupancy of the office of the president, the Republic Constitution provided that the person holding office as the prime minister before the commencement of the Constitution was deemed to have been elected as president.¹⁹⁰ Therefore, Milton Obote, the instigator of the *coup d'état* against President Mutesa II, the sponsor and arguably the architect of the Republic Constitution became the second president of Uganda.

The Republic Constitution also abolished the position of prime minister and created the first full executive president¹⁹¹ who was also a member the National Assembly.¹⁹² In relation to holding elections and the tenures of the then serving leaders, it provided that general elections would be held after five years.¹⁹³ Like President Obote, members of the serving National Assembly were

¹⁸⁷ *ibid* art 36(4).

¹⁸⁸ *ibid* art 34(5).

¹⁸⁹ *ibid* art 40.

¹⁹⁰ *ibid* art 36(6).

¹⁹¹ *ibid* art 35(1).

¹⁹² *ibid* art 50.

¹⁹³ *ibid* art 61.

deemed elected until the next elections.¹⁹⁴ With regard to the presidency, it had powers to appoint and dismiss top civil servant officials.¹⁹⁵ A president was the commander-in-chief of the armed forces.¹⁹⁶ The president had powers to dissolve Parliament.¹⁹⁷ The presidency had the sole power of clemency.¹⁹⁸ A president was not liable to any legal proceedings¹⁹⁹ and would not pay taxes.²⁰⁰ The Republic Constitution also prohibited the courts from inquiring into actions carried about a president in the exercise of constitution powers.²⁰¹

John Wapakhabulo argues that apart from the election of the president, the provisions for the presidency in the Republic Constitution had some democratic semblance.²⁰² The facts are that the significance of these provisions includes the increment of powers to the presidency. Courts were barred from scrutinising the exercise of the presidency's constitutional authority. Also, Ugandans who expected to hold elections in 1967, as was envisioned by the Independence Constitution had to wait for another four years. Moreover, Prime Minister Obote was to serve as the president for a term without being elected. Members of the National Assembly would also serve another term without being subjected to the ballot. The manner of adoption of the Republic Constitution and

¹⁹⁴ *ibid* art 116(1).

¹⁹⁵ *ibid* arts 43; 45; 46; 110.

¹⁹⁶ *ibid* art 34.

¹⁹⁷ *ibid* art 73.

¹⁹⁸ *ibid* arts 86; 87.

¹⁹⁹ *ibid* art 24(3).

²⁰⁰ *ibid* art 43(3).

²⁰¹ *ibid* art 39(2)

²⁰² John Wapakhabulo, 'Uganda's experience in Constitutional Making' (*Constitution of Kenya Review Commission* 2009) www.commonlii.org/ke/other/KECKRC/2001/33.html accessed 13 May 2015.

the design of the institution of the presidency therein suggests that Obote's government took charge of creating a fundamental law with the aims of granting more powers to the presidency and to legitimise its powers acquired through violent and unconstitutional means. There was no democratic tone to the Republic Constitution.

Christopher Mbazira observes that the militaristic way in which Obote ousted President Mutesa II, imposed on the country the Interim Constitution and later adopted the Republic Constitution meant that he would depend on the military for his stay in power.²⁰³ Indeed, it was the army that ousted Obote. On 25 January 1971, the year in which elections were to be held as provided for under the Republic Constitution,²⁰⁴ Idi Amin took power by *coup d'état* in continuation of the method of acquiring power through violence and unconstitutional means set by Obote, and which was endorsed by the Eastern Africa Court of Appeal.²⁰⁵ Amin's assault on Mutesa, as Obote's Chief of Staff of the armed forces had given him an invaluable lesson on how to acquire political power through the barrel of a gun.²⁰⁶ For the second time since independence, state power was transferred through violence and by unconstitutional means. Amin declared himself president-for-life.²⁰⁷ He also suspended; by decree, parts of the Republic Constitution including those that relate to its supremacy, provisions for elections, the presidency and for the legislative powers of Parliament; and he declared the Republic Constitution subordinate to the decrees he

²⁰³ Christopher Mbazira, 'Dream Deferred? Democracy and Good Governance: An Assessment of the Findings of Uganda's Country Self-Assessment Report under the African Peer Review Mechanism' (HURIPPEC Working Paper No19/, 2008) 7.

²⁰⁴ See (n 194).

²⁰⁵ See (n 171).

²⁰⁶ Henry Kyemba, *State of Blood: The Inside Story of Idi Amin* (Ace Books 1977) 56.

²⁰⁷ *ibid* 57.

issued.²⁰⁸ In this regard, like Obote before him, President Amin's government established its fundamental law that validated its exercise of power. By declaring himself president-for-life and by repealing the constitutional right to vote, Amin also excluded any other Ugandan from contesting for the presidency. The presidency was not to change hands. Amin was president for eight years.

When Amin's forces invaded Tanzania, Tanzania mobilised her army under the umbrella of Ugandan dissidents- the Uganda National Liberation Front (UNLF), which overthrew Amin on 11 April 1979. For the third time after independence, state power was transferred through the use of force. By Decree, the UNLF transferred the powers that were vested in Amin to the new President Yusefu Lule, its leader.²⁰⁹ The UNLF also set up the National Consultative Council (NCC) as an interim legislature and suspended Chapters IV and V of the Republic Constitution which provisions dealt with elections and legislative powers of Parliament.²¹⁰ This fundamental law served to validate the exercise of state power by the UNLF government and the new-President Lule. Lule was to serve for a nineteen-month interim period to prepare the country for the first general election since 1962. However, he did not have the backing of the army and the NCC removed him after two months accusing him of attempting to centralise power.²¹¹

²⁰⁸ Republic of Uganda, Legal Notice No. 1 1971 (Legal Notice No.1 1971) para 1.2.

²⁰⁹ Republic of Uganda, Legal Notice No. 1 1979 (Legal Notice No.1 1979).

²¹⁰ *ibid* para1.4.

²¹¹ Oder's Report (n 165) 146.

In the case of *Andrew Lutakome Kayira v Edward Rugumayo & 2 Ors*,²¹² a constitutional petition was brought to challenge the removal of Lule. Justice Odoki who delivered the Court's judgment declared that the matter was not justiciable, being 'a political question' and that the Court would not issue a declaration to reinstate the head of state.²¹³

On the issue of whether the NCC had powers to remove Lule from office, the Court issued a modified declaration that the NCC acting in its capacity as the legislature had no powers to remove the President from office.²¹⁴ It is important to recall that the constitutional provisions providing for the impeachment of a president under the Republic Constitution were suspended by Amin,²¹⁵ and subsequent to that by Lule's UNLF.²¹⁶ Under the fundamental law created by the UNLF,²¹⁷ the NCC as a legislative council had no powers to remove President Lule. On the question of whether the Court had powers to issue a declaration to reinstate President Lule, it appears the Court did not stray from the confines set by Justice Odoma in the case of *Uganda v Commissioner of Prisons Ex-parte Matovu*²¹⁸ as discussed above.

The NCC installed Godfrey Binaisa as President. Lule's successor-Binaisa, was removed in May 1980 by the Military Commission led by Paulo Muwanga.²¹⁹ In December 1980, the

²¹² Constitutional Case No. 1 1979.

²¹³ *ibid* [19] (Odoki J).

²¹⁴ *ibid* [21] (Odoki J).

²¹⁵ See (n 209).

²¹⁶ See (n 210).

²¹⁷ *ibid*.

²¹⁸ See (n 171).

Military Commission organised the first general elections since independence. The elections were contested between the Conservative Party (CP), the Democratic Party (DP), the Uganda Patriotic Movement (UPM) and the Uganda Peoples' Congress (UPC).²²⁰ It was a common occurrence during the 1980 election campaigns for the army to harass, torture and to kill Obote's political opponents, and also to disperse political rallies organised by Obote's political opponents.²²¹ By this time, Obote's henchmen led by Army Commander General Ojok had swelled the army with soldiers from Obote's tribe.²²² Events before, during and after the elections suggest that the elections were neither free nor fair. Also, during the elections, the Chairman of the Military Commission-Paulo Muwanga, usurped the powers of the Electoral Commission by a Proclamation²²³ and he took over the responsibility of announcing the results when it became apparent that the DP, was on the verge of winning the majority of seats in the National Assembly to form a government.²²⁴ The DP's victory was reversed by the Military Commission. The Proclamation also ousted the powers of the courts to adjudicate any disputes arising out the elections.²²⁵ These factors form some of the reasons why the credibility of the

²¹⁹ Kasozi (n 10) 177.

²²⁰ *ibid.*

²²¹ The media reported that a UPC motorist drove through a crowd of DP supporters at a political party injuring 210 people. See Mike Mukasa 'Mayhem at DP Rally' *Weekly Topic* (Kampala, 18 July 1980) 2; The Secretary General of DP Charles Bwengye was arrested by the UPC militia, the Vice President of DP Tiberio Okeny was intimidated by armed soldiers, DP supporter Haji Wamala lost his arm after he was shot during a political rally in Nakiswera Sub-County. See James Tamale 'Violence Mars Political Campaigns' *The Citizen* (Kampala, 25 August 1980) 4.

²²² Dan Mudoola, 'Communal Conflict in the Military and Its Political Consequences' in Kumar Rupesinghe (ed), *Conflict Resolution in Uganda* (Ohio University Press 1980) 116, 138.

²²³ Republic of Uganda, Legal Notice No. 10 1980 (Legal Notice No. 10 1980).

²²⁴ Dan Mudola, 'Political Transitions since Idi Amin: A Study in Political Pathology' in Holger Hansen and Michael Twaddle (eds), *Uganda Now: Between Decay and Development* (Oxford University Press 1988) 280, 291.

²²⁵ Legal Notice No. 10 1980 (n 224) para 4.6.

1980 elections has been widely contested.²²⁶ The UPC under Obote took power and the DP that commanded the most support but lacked the military might, formed the opposition. Yoweri Museveni, then the UPM party leader, declared that the elections were fraudulent and unacceptable.²²⁷ Museveni formed apolitical organisation- the National Resistance Movement (NRM), which embarked on contesting the elections through a popular and bloody armed conflict.²²⁸

While Museveni's NRM was engaged in an armed struggle with Obote's government, on 27 July 1985, heightened tensions between soldiers led to another military *coup d'état*.²²⁹ Soldiers stormed the capital city- Kampala, and Obote was overthrown. Lieutenant General Tito Okello was sworn in two days later as president. Okello's government was toppled by a war led by Museveni in January 1986. Museveni and his NRM were installed as interim president and government respectively, while the country embarked on the process of adopting a new constitution.

²²⁶ See generally Dan Mudola, 'Political Transitions since Idi Amin: A Study in Political Pathology' in Holger Bernt Hansen and Michael Twaddle (eds), *Uganda Now: Between Decay and Development* (Oxford University Press 1988) 280-298; Francis Bwengye, *The Agony of Uganda: From Idi Amin to Obote* (Regency Press 1986); Holger Bernt and Michael Twaddle (eds), *Changing Uganda: The Dilemmas of Structural Adjustment and Revolutionary Change* (Oxford University Press 1991); Olive Kobusingye, *The Correct Line? Uganda under Museveni* (Author House 2010); Sabiti Makara, *The Management of Elections in Uganda* (Chr. Michelsen Institute 2012); Yoweri Museveni, *Sowing the Mustard Seed; The Struggle for Freedom and Democracy In Uganda* (Macmillan Education 1997).

²²⁷ Yoweri Museveni, *Sowing the Mustard Seed: The Struggle for Freedom and Democracy In Uganda* (Macmillan Education 1977) 45.

²²⁸ *ibid* 49.

²²⁹ *ibid* 89.

5. Fundamental laws created under leaderships of heads of state (1962-1995)

It is important to outline the designs of fundamental laws from which presidential authority has emerged and which anchored authoritarian governments, since independence and before the 1995 Constitution was adopted. This provides an understanding of how heads of state and governments, by taking charge of processes of creating fundamental laws, have bestowed on themselves excessive powers which allowed them to entrench their rule without the possibility of change through constitutional processes, ravage Uganda and to abuse human rights.

Starting with the Independence Constitution, fundamental laws in Uganda have moulded a president in the images of the kabaka and a colonial governor who exercised unrestricted powers and who did not require the mandate of the people to hold power. George Kanyeihamba observes as follows:

The Independence Constitution created a president who required no mandate from Uganda as a whole; all he needed was to be a ruler of a Kingdom or District, and also only one Kingdom or District could determine the qualification of this high office.²³⁰

It should be recalled that before the adoption of the Independence Constitution, the authority of the institution of the kabaka was based on the divine-right theory of kingship which asserts that it is not subject to earthly authority because the kabaka derives its right to rule from a greater

²³⁰ George Kanyeihamba, *Constitutional and Political History of Uganda; From 1894 to the Present* (Centenary Publishing House Limited 2002) 146.

source than their subjects; while that of the colonial governor was founded on constitutional arrangements designed with the aims of granting the governor unlimited powers in order for the British to exploit Ugandans. With the introduction of the Independence Constitution, there was a shift in the basis for acquiring power and in the authority to exercise state power. State power was no longer based on the divine-right theory or the colonial mode of governance, but on a constitution negotiated on behalf of the populace, through which they granted state powers to the governments. Therefore, the basis and authority of the government were now vested in the people who would elect their leaders, decide which state powers to grant them and regulate the way this power is exercised through the Independence Constitution. Under the 'post-independence constitutionalism dispensation', presidents and governments owed their powers to the citizenry who were the new source of state power. However, the framers of the Independence Constitution did not allow the majority of Ugandans to participate in the making of the Independence Constitution. Therefore, most Ugandans were unable to formulate their views on which powers should be exercised by governments and on the limits of those powers.

The failure to recognise the shift in the basis for acquiring and the authority to exercise state powers and Kabaka Mutessa II's quest to exercised unlimited power, led to the aggregation of all most all state powers in the presidency under the Independence Constitution. It may well be that had the Independence Constitution emerged out of a more consultative and participatory constitution-making process, Ugandans could have sought a different design for the office of the president. In this context, the Independence Constitution may be viewed as a fundamental law negotiated and authored with the primary aim of providing for the wishes of Kabaka Mutesa II.

The Independence Constitution was the supreme law of Uganda until the developments regarding the ‘Lost Counties’ which led to the ‘constitutional crisis of 1966’. On adoption, the Republic Constitution declared Prime Minister Obote as the president.²³¹ The designation of president enshrined in the Republic Constitution yielded incremental powers to President Obote in several ways that further laid the foundations of an untrammelled president. First, it abolished the position of prime minister,²³² thereby ending the constitutional role of the prime minister in scrutinising the presidential authority.²³³ Second, it permitted the president to promulgate such ordinances as he required.²³⁴ In this regard, the powers of the presidency were expanded at the expense of the legislative role of the National Parliament and the Lukiiko.²³⁵ The Republic Constitution also provided that the exercise of the powers of the presidency would not be subject to legal scrutiny.²³⁶ The creation of a presidency to which all instruments of power are beholden, which enjoyed all state privileges and that exercised almost all state powers without limits was complete.

When the Republic Constitution was debated in Parliament, several political figures criticised the proposals on which the design of the presidency therein was based. Abu Mayanja decried that:

The keynote of the proposals is the concentration of all powers of government – legislative, executive, administrative, and judiciary – into central Government institutions and the subjection of those institutions to

²³¹ See (n 191).

²³² See (n 192).

²³³ Under the Independence Constitution (n 100), the prime minister could initiate a motion to impeach the president for violation of the Constitution. See (n 140).

²³⁴ The Republic Constitution (n 174), art 38.

²³⁵ See (n 130); (n 131).

²³⁶ The Republic Constitution (n 174), art 39(2).

the control of one man – the President. The result is the creation – not of a republic, but of a one-man dictatorship.²³⁷

Adoko Nekyon argued that the powers accorded to the office of the president provided for an autocracy or an African type of democracy which prevailed and would depend on the person who held the presidency.²³⁸ Luyimbazi Zake also criticised that:

This was the biggest indication of autocracy. Members have given the president powers to appoint everybody and dismiss everybody, nominate one-third of Parliament and detain them in the bargain.....²³⁹

Although Obote designed the presidency under the Republic Constitution with the intention to serve him, presidential authority therein has been acquired by successive heads of state in Uganda before 1995. At the same time, provisions of the Republic Constitution that attempted to limit the powers and tenure of the presidency, such as those that allowed for elections and that provided for legislative powers of Parliament, were suspended in order to foster incumbency perpetuity, dictatorship, and also to provide incremental powers to the presidency.

For example, when Amin seized power in 1971; he issued by decree Legal Notice No. 1 1971 which suspended provisions of the Republic Constitution including those relating to the supremacy of the Republic Constitution, which ceased to be the supreme law, and also suspended the constitutional right to vote and the legislative powers of Parliament. The Republic Constitution was, therefore subordinated to the decreeing authority of the sole supreme law-maker- President Amin.

²³⁷Abu Mayanja, 'The Government's Proposals for a new Constitution of Uganda' [1967] 7 (2) Transitional Journal 20, 22.

²³⁸ Nelson Kasfir, 'The 1967 Uganda Constituent Assembly Debate' [1967] 7 (2) Transitional Journal 52, 54.

²³⁹ *ibid.*

President Amin also issued the Constitution Modification Decree No. 5 1971 which had the effect of vesting all privileges, prerogatives, powers and functions enjoyed by all arms of government in the Chairman of the Defence Council, a position that was also occupied by Amin. Decrees No.1 and No. 5 effectively became part of and superior to the Republic Constitution for as long as the issuing authority- President Amin was in power. Christopher Mbazira notes that the suspension of parts of the Republic Constitution including the supremacy clause meant that the Constitution could be overridden by decrees passed by President Amin. This led the country to quickly degenerate into a dictatorship.²⁴⁰

In the case of *Andrew Lutakome Kayira v Edward Rugumayo & 2 Ors*,²⁴¹ Justice Odoki described the fundamental laws that existed when Amin was dethroned in 1979 by Yusufu Lule's Uganda National Liberation Front (UNLF), up to 1986 when Museveni's National Resistance Movement (NRM) seized power as follows:

Yusufu Lule made a Proclamation under Legal Notice No. 1 of 1979 published on 8th May 1979 but deemed to have come into force on the 11th April 1979. The proclamation suspended Chapters IV and V of the Constitution which provisions dealt with the executive and the legislature. All titles, privileges, prerogatives, powers and functions and exemptions formerly enjoyed or exercised by the former President of the Republic of Uganda under the Constitution were vested in the new President. There was to be a cabinet of Ministers appointed by the President to advise him in the exercise of his executive functions. All legislative powers referred to in the Constitution were vested in the National Consultative Council (NCC) until such a time as a Legislative Assembly was elected. The Legislative powers were to be exercised by the NCC through the passing of Statutes assented to by the President and published in the Gazette. Subject to the above provisions of the Proclamation, the operation of the Constitution and the existing laws were not to be affected by the Proclamation except that such laws were to be construed with such modifications, qualifications and adaptations as are necessary to bring them into conformity with the Proclamation. This Proclamation revoked

²⁴⁰ Mbazira (n 204) 15.

²⁴¹ Constitutional Case No. 1 1979.

Decree No. 1 of 1971 by Idi Amin on his assumption of power. The overthrow of Idi Amin's regime by the UNLF and forces of its allies amounted in law to a revolution. A revolution in law is the nullification of the legal order and its replacement by a new order in an illegitimate way.²⁴²

The UNLF also issued Legal Notice No.5 on Constitution Modification 1980. It provided that:

Where any conflict arises between the provisions of this Proclamation and the provisions of the Constitution of Uganda or any other written law, the provisions of this Proclamation shall prevail.²⁴³

Hence, the Republic Constitution was again subordinated to another fundamental issued by a government that acquired power through violence and unconstitutional means.

From April 1979 when Yusufu Lule's UNLF seized power, up to January 1986 when President Yoweri Museveni's NRM took power, the supreme law of Uganda was the Republic Constitution as modified by Legal Notice No.5 on Constitutional Modification 1980, and Legal Notice No. 1979.

On seizing power, the NRM issued Legal Notice No.1 1986. Legal Notice No.1 1986 repealed Legal Notice No.1 1979 and transferred all powers enjoyed by Yusufu Lule to Yoweri Museveni- the new President.

In the case of *Rwanyarare & 2 Others v. Attorney General*,²⁴⁴ a constitution petition challenged the provisions of Legal Notice No. 1 1986, arguing that they adversely affected the right to free

²⁴² *ibid* [34] (Odoki J).

²⁴³ Republic of Uganda, Legal Notice No. 5 1980, para 16.3.

²⁴⁴ Miscellaneous Application No. 85 1993.

expression as protected under the Republic Constitution²⁴⁵ because, campaigns on the basis of political parties or on sectarian grounds were outlawed and criminalised.²⁴⁶ The Constitutional Court ruled that Legal Notice No.1 1986, which was issued by NRM after it seized power was superior to the Republic Constitution and that rules made by the NRM government to adopt a new constitution were valid. This decision further reinforced the superiority of fundamental laws created following acquisitions of power by unconstitutional means over the existing constitutional order in line with Justice Odoma's judgement.²⁴⁷

Although the Republic Constitution was the main superior legal document in post-colonial Uganda before 1995, successive leaders of Uganda have transferred and monopolised power by creating fundamental laws that modified, amended and were superior to it. Such laws were created for the purposes of legitimising power acquired through means not authorised by the Independence Constitution, and to allow governments fasten their grip on power. Nearly every head of state and his government created their fundamental law which allowed them to exercise state powers and to entrench themselves in it. Therefore, no fundamental law, not even those referred to as Constitutions, survived following the end of the government that created it. Acquiring power through violence and unconstitutional means allowed heads of state and their governments to abrogate the prevailing fundamental law and impose on the country laws which were designed to grant unlimited powers to the presidency and the government. The issuance of presidential decrees as a method of passing fundamental laws coupled with the ousting of judicial

²⁴⁵ The Republic Constitution (n 174), art 22.

²⁴⁶ Republic of Uganda, Legal Notice No.1 1986, para 4.3.

²⁴⁷ See (n 171).

competence in inquiring into acts of the heads of state moored authoritarian rule. By the fundamental laws authored under their leadership, heads of state bestowed on themselves all the power of the state. Their powers were unlimited and their authority was unquestionable. Also, this mode of creating fundamental laws was endorsed by the courts.²⁴⁸

6. Implications of the fundamental laws on the Ugandan society

As discussed in section 3 of this chapter, the Independence Constitution was negotiated under the overwhelming influence of the Kabaka of Buganda and the British Government. The implications of such a ‘constitution-bargaining process’ include the establishment of a presidency that did not require the mandate of the majority to hold power²⁴⁹ and the majority of the Ugandans did not participate in process of determining how state power should be exercised. It may therefore be stated that similar to the power exercised by the institutions of kabaka and the colonial governor before independence, the presidential authority under the Independence Constitution did not have its source in the people

Phares Mukasa notes that the powers conferred to the presidency by the Republic Constitution were used by President Obote against those he considered to be political opponents and civilians.²⁵⁰ He points to the state of emergency that was declared by the President in Buganda in 1966 and later extended to other regions in 1969 following an assassination attempt on President

²⁴⁸ *ibid*; also see (n 242).

²⁴⁹ See (n 171): (n 245).

²⁵⁰ Mukasa (n 164) 79.

Obote, and the banning of all political parties except the UPC by the President, as evidence of excessive grants of power to the presidency by the Republic Constitution.²⁵¹

An early indication of how the excessive powers of the presidency were to be used to suppress political opponents in post-independence Uganda and to frustrate the rule of law, is portrayed by the events that unfolded in the aftermath of Obote's *coup d'état*. On 22 February 1966, five Ministers who served under the first government following independence were arrested.²⁵² They wielded great political influence and commanded a lot of respect from Ugandans.²⁵³ No charges were proffered against them. However, warrants were executed for their arrest under the Deportation Act of 1962 Chapter 308 with a view of deporting them. The law required for an intended deportee to be brought before a court to contend why the order of deportation should not be issued.²⁵⁴ None of these procedures seems to have been followed by the government, necessitating an application for a writ of *habeas corpus*. Thus, in the case of *Grace Stuart Ibingira and others v Uganda*,²⁵⁵ the Ministers challenged their arrest and detention on the grounds that their arrest was unlawful and the Deportation Act 1962 Chapter 308 was inconsistent with articles 1,²⁵⁶ 9²⁵⁷ and 28²⁵⁸ of the Interim Constitution. The Ministers were moved to the

²⁵¹ *ibid.*

²⁵² The five Ministers were: Balaki Kirya; Emmanuel Lumu; George Magezi; Grace Ibingira; Mathias Ngobi.

²⁵³ Karugire (n 4) 73.

²⁵⁴ Deportation Act 1962 Chapter 308, s 3.

²⁵⁵ (1966) EALR 306.

²⁵⁶ The Interim Constitution (n 163), art 1 declared the supremacy of the Constitution over other laws.

²⁵⁷ *ibid* art 9 provided that everyone born in Uganda before 9 October 1962. This is the date Uganda acquired independence, was entitled to Ugandan citizenship.

capital city-Kampala, in order for the government to continue their detention without trial.²⁵⁹ Kampala was under a state of emergency that had been declared by President Obote.²⁶⁰ The contention was that the government did not have the power to detain a citizen of Uganda without a court order. This could only be done by an executive order in a state of public emergency.²⁶¹

The Eastern Africa Court of Appeal declared the Deportation void, held that a deportation order could not be made against a citizen of Uganda and it ordered the release of the Ministers. Following the decision of the Court, the Ministers were served with detention orders made under Emergency Powers (Detention) Regulations 1966 as provided under Emergency Powers Act 1963. President Obote, by decree,²⁶² passed the Public Order Act and Security 1967. The effect of the legislation was to give the government the powers that it did not have in the terms of the Courts' decision. Section 2 of the Public Order Act and Security 1967, allowed the presidency to order for detainees to be held without charging them with any offence or when the public state of emergency elapsed. Thus, by exercising the presidential power to decree under the Republic Constitution, President Obote was able to override the prevailing laws in order to detain the Ministers without trial. It is estimated that between one hundred thousand Ugandans were victims of extrajudicial killings at the hands of the state during Obote's first four years as

²⁵⁸ *ibid* art 28 guaranteed freedom of movement.

²⁵⁹ Karugire (n 4) 75.

²⁶⁰ The Interim Constitution (n 163) art 30(1) (2) allowed the president to declare a state of emergency.

²⁶¹ *ibid* art 19 (1) (j) allowed for the detention of a person in a specified area where a state of emergency has been declared.

²⁶² *ibid* art 38 authorised a president to pass law by decree.

president,²⁶³ while approximately fifty thousand political prisoners were held without trial²⁶⁴ and at least another one hundred thousand people were forced into exile.²⁶⁵

During Amin's regime between 1971 and 1979, Uganda moved from civilian authoritarian rule to military rule by decree.²⁶⁶ President Amin issued a decree banning all political parties.²⁶⁷ His regime was characterised by violence inflicted by his army on suspected political opponents.²⁶⁸ It has been estimated that up to five hundred thousand Ugandans were exiled and between seven hundred and fifty and one million people lost their lives at the hands of the state without the sanctions of judicial proceedings.²⁶⁹ On 25 June 1973, President Amin enacted the Trial by Military Decree No.12 1973. In September 1977, sixteen people were tried before the Military Tribunal for treason under the Trial by Military Decree.²⁷⁰ Twelve were sentenced to death and executed by firing squad.²⁷¹ It has been claimed that the evidence used to convict the suspects

²⁶³ Kasozi (n 10) 99.

²⁶⁴ Karugire (n 4) 57.

²⁶⁵ Holger Hansen and Michael Twaddle (eds), *Uganda Now: Between Decay and Development* (Ohio University Press 1988) 66.

²⁶⁶ Amnesty International, *Human Rights in Uganda* (Amnesty International Secretariat, 1978) 6.

²⁶⁷ Republic of Uganda, Political Activities Decree No. 14 1971.

²⁶⁸ Jan Jorgensen, *Uganda: A Modern History* (Saint Martin's Press 1981) 314-315.

²⁶⁹ Oder's Report (n 165) 455-465; also see Amnesty International (n 266) 8; Centre for Systemic Peace, 'Major Episodes of Political Violence 1964-2004' (Centre for Systemic Peace, December 2009) www.systemicpeace.org/africa/pluga.html accessed 30 March 2015.

²⁷⁰ Under the Trial by Military Decree No.12 1973, para 1.2, any person charged with treason and related offences could be tried by the military tribunal; while para 4 gave powers to the president to order trials of civilians by military where he was satisfied that their acts were intended to alarm or intimidate members of the public or to bring the military government under contempt or disrepute.

²⁷¹ WodOkelo Lawoko, *The Dungeons of Nakasero* (Författares Bokmaskin 2005) 89.

was acquired through torture and that the Military Tribunal did not observe the rules of natural justice.²⁷²

Abdu Kasozi describes the use of decrees during Amin's regime to oppress political opponents and to strengthen his grip on power. He writes that:

Amin passed a Decree that allowed soldiers and prison officers to arrest, detain and search civilians without an order from a court or a warrant, and another which provided immunity from litigation to state security agencies in exercise of state duties. After the expiry of the Soldiers and Prison Officers Power of Arrest Decree, it was replaced by another Decree which was a verbatim reproduction of the previous Decree except that no restriction on the time for its life span was prescribed. The powers of arrest were later restricted to military police officers only in uniform without affecting the police powers under the Police Act Cap 303. The exercise and abuse of these powers resulted into mass disappearances of those that were believed to oppose Amin's government and it silenced political opposition to Amin.²⁷³

It should be noted that despite the grant of these powers to the security agencies, the law required that a person arrested for offences that could not be tried by the Military Tribunal be brought before a court of law within 24 hours of arrest.²⁷⁴ However, because many of the people were arrested for alleged politically motivated charges, they were either dumped in prisons where they were tortured and killed or put before the Military Tribunal.²⁷⁵ Thus by suspending the legislative powers of Parliament under the Republic Constitution and by bestowing on himself all the powers of the state through Legal Notice No.1 1971, President Amin was able to pass decrees without any legal constraints. The powers vested in the presidency were used by the

²⁷² *ibid* 112.

²⁷³ Kasozi (n 10) 111.

²⁷⁴ Criminal Procedure Code Act of 1950 s 13.

²⁷⁵ Lawoko (n 272) 95.

Amin's government and security forces to carry out extrajudicial killings and human rights abuses.

Following another transfer of power through violence and unconstitutional means in 1979, the presidency's monopoly of state power was effectively transferred to President Yusufu Lule.²⁷⁶ State organs such as Parliament and the courts which are competent to create and amend the legal order were ignored. The use of the Public Order and Security Act 1967 to detain political opponents and persons associated with the previous regime also re-occurred after the fall of Amin.

Many people connected to Amin's regime were held in Luzira and other prisons.²⁷⁷ In the case of *Professor Yoweri Kyesimira v Attorney General*,²⁷⁸ the petitioner challenged his detention under the Public and Security Order Act 1967. The High Court held that a detention order must provide information on oath regarding the matters alleged against the detainee and ordered that the detainee be set free. The government refused to release Professor Kyesimira.²⁷⁹

During his second government from December 1980 to July 1985, President Obote held on to power by force and patronage. His army and persons connected to his government committed extensive human rights abuses.²⁸⁰ Ugandans from the southern part of the country and members

²⁷⁶ See (n 210).

²⁷⁷ Oder's Report (n 165) 46.

²⁷⁸ General Civil Appeal No. 1 1981.

²⁷⁹ Karugire (n 4) 78.

²⁸⁰ Oder's Report (n 165) 51.

of the opposition and of other political parties were linked to Museveni's NRA which was embroiled in armed conflict with Obote's government. Government security agents carried out mass murder, arrests and rape.²⁸¹ The contempt for the rule of law, the torture of civilians and the suppression of alternative political views was not dissimilar to that which the country witnessed under Amin's regime.²⁸²

In sum, since independence in 1962 up to 1995, the uncircumscribed nature of state powers has led to undermining the rule of law and constitutional order, allowed for extrajudicial killings and obstructed transfer of state power through democratic and constitutional processes. In this context, although following the attainment of independence the powers of the state were meant to emerge out fundamental laws negotiated among the citizenry and they were meant to be used as directed by the citizenry for their benefit, there was no actual change in their authoritarian use from what was witnessed under the kabaka and the colonial governor, whose powers emerged from sources other than the citizenry.

7. The armed forces and the heads of state

A study about presidentialism in Uganda would be incomplete without the consideration of the role the institution of the armed forces has played as the main tool for unconstitutional and violent transfer of political power. This is because heads of state have used the armed forces as an

²⁸¹Amii Omara-Otunnu, 'The Struggle for Democracy in Uganda' [1992] 112 *Journal of Modern African Studies* 443, 445.

²⁸² Oder's Report (n 165) 149.

instrument for political change and a final arbiter of political disputes. In this regard, the head of state's command and ownership of the armed forces, among other powers and privileges, has posed a major challenge to the smooth transfer of power and the enjoyment of fundamental rights. Amii Omara-Otunu aptly describes the role of the armed forces in Uganda's politics as follows:

The usurpation of state power by the army dealt a series of devastating blows to the democratic process in the country. The distinctive features of the system of government and administration which became established were the devaluation of human lives, the use of force in social interactions, the presentation by the power élite of political problems as being essentially military in nature, and the domination of civilian institutions by the armed forces.²⁸³

On its creation at the advent of colonialism, the army in Uganda was meant to assist the colonial government to maintain its rule and thus was suitably named the 'Kings African Rifles'. The British dismantled the formidable armies of the southern kingdoms of Buganda, Bunyoro and Ankole. Southerners would grow cash crops or acquire education, and would become minor civil servants, while the northerners would be recruited into the army, police and prisons services, and also provide labour in factories and plantations located in the south.²⁸⁴ Grace Ibingira describes the Kings African Rifles as an army that did not reflect the ethnic diversity of the country.²⁸⁵ He depicts the armed forces as an occupation for illiterate, prospect-less northerners, formed on the principle of divide-and-rule that sustained the colonial policy.²⁸⁶ Its role was the protection of the colonial enterprise power.²⁸⁷

²⁸³ Omara-Otunnu (n 281) 448.

²⁸⁴ Kasozi (n 10) 13.

²⁸⁵ Grace Ibingira, *The Forging of an African Nation: The Political and Constitutional Evolution of Uganda from Colonial rule to Independence 1894-1962* (Viking Press 1973) 201.

²⁸⁶ *ibid.*

The Independence Constitution also subjected the armed forces to the supreme commandship of the presidency ²⁸⁸ in a continuation of its envisioned colonial role as the protector of the head of state and government in power and as a tool for political repression. These structural problems at the heart of the armed forces would eventually be inherited by Uganda's leaders after independence. Nearly all Uganda's heads of state before 1995 from northern Uganda were either army officers with no basic education, had the support of the army and came to power through the barrel of the gun,²⁸⁹ while the southerners were highly educated, had no association with the army and were therefore removed from power by it.²⁹⁰ It is important to record here that President Amin is a product of the colonial recruitment policy which aimed staffing the army with personnel from northern Uganda. He served in King's African Rifle in which he rose to the rank of a sergeant, and he progressed to major general and army commander in 1964.²⁹¹

James Tumusime observes that early in their careers, Obote and Amin who were both from northern Uganda, realised the importance of the army as the final arbiter of political disagreements.²⁹² It is therefore not surprising that the Republic Constitution also attached the armed forces to the command of the presidency.²⁹³ Its architect knew the value of the army. When he seized power, Obote continued with the colonial policy that favoured northern tribes for

²⁸⁷ *ibid* 202.

²⁸⁸ See (n 121).

²⁸⁹ These include Milton Obote; Idi Amin; Tito Okello.

²⁹⁰ These include Mutesa II; Yusuf Lule; Godfrey Binaisa.

²⁹¹ Kasozi (n 10) 15.

²⁹² James Tumusime, *Uganda's History 1857-2007* (Fountain Publishers 2009) 23.

²⁹³ See (n 197).

army recruitment. He created an ethnic imbalance in the army by recruiting predominantly from his tribe. On 1 April 1966, Obote passed out eight hundred new recruits at Moroto, of whom seventy percent were from the northern region.²⁹⁴

Amin also continued with Obote's policy of bloating the armed forces with soldiers from his home area. By 1977, the composition of the army was radically changed; three-quarters of the military leadership were either Moslems or spoke Sudanic languages from Amin's home area, and many owed their appointments to Amin.²⁹⁵ Also, cabinet ministers that spoke Sudanic languages increased from one in six in 1971 to over a half in 1978.²⁹⁶

When the UNLF stormed Kampala and Professor Yusuf Lule was installed as President, his tenure of office was short-lived because he lacked strong ties with the army. His tribe- the Baganda, did not view the armed forces as an occupation for southerners, a belief established by the colonialists. He, therefore, had no tribal allies in the armed forces to call on when his presidency was challenged. President Godfrey Binaisa, another southerner and a British-trained lawyer who replaced Lule, was deposed by the Military Commission headed by Paulo Muwanga. Binaisa's mistake was to appoint General Oyite Ojok, then the Army Commander and a northerner, as a diplomat.²⁹⁷ In doing so, he removed General Ojok from the lucrative northern occupation and a vehicle to power namely, the armed forces. This resulted in the end of Binaisa's tenure. Soon after Binaisa was removed, the Vice-Chairman of the Military Commission, Yoweri

²⁹⁴ Kasozi (n 10) 83.

²⁹⁵ Ami Omara-Otunnu, *Politics and the Military in Uganda 1890-1985*(Macmillan Press 1987)133.

²⁹⁶ *ibid* 135.

²⁹⁷ Karugire (n 4) 81.

Museveni, complained that there was a deliberate strategy of bloating the armed forces with northerners.²⁹⁸ Museveni's fears were vindicated when during the 1980 elections organised by the Military Commission, one of the presidential candidates-Milton Obote, questioned whether his competitors had the instrument of power namely, the army, to allow them to take and control state power.²⁹⁹ As discussed in section 4 of this chapter, during the 1980 elections campaigns the army harassed, tortured and killed Obote's political opponents and it dispersed political rallies organised by his political opponents. These factors may well have galvanised the support for the armed conflict waged by Museveni's NRM that toppled Obote's successor.

8. Mini-conclusion

There were two main governance systems in pre-colonial Uganda, namely segmentary and non-segmentary that allowed for democratic governance and autocracy respectively. It however may be stated that foundations for what we may describe as presidentialism were laid on the non-segmentary mode of governance as was practiced in the Kingdom of Buganda. The constitutional arrangements negotiated between the rulers of Buganda and the British government may be conceived as providing the first legally notable framework in Uganda for exercising state power. These pre-independence systems of governance were not rooted in the wishes of the citizenry and they did not provide effective restraints against a head of state. This mode of constructing a head of state has been reproduced by fundamental laws adopted in Uganda after independence. The head of state acquired and exercised inordinate powers to the disadvantage of constitutionalism

²⁹⁸ *ibid* 86.

²⁹⁹ Tumusime (n 293) 66.

and the populace. This establishment of a head of state did not allow for questioning the purposes for allocating powers and privileges to the head of state and for defining how they should be exercised. The colonial ideology of exclusively adopting fundamental laws which in principle served only them, to the exclusion of Ugandans has also continued into post-colonial Uganda. Fundamental laws which Uganda has adopted after independence were adopted for the purpose of legitimising power that was often acquired through violence and unconstitutional means and to entrenching in power the governments under whose influence or leadership they were written. They also created all-powerful heads of state that subjugated rather than served citizens.

Although the Republic Constitution remained the supreme law of the land and the main legal reference point, its suspensions, disregard and amendments to it by successive governments allowed them to hold on to power and to erode any possibility of transferring it through constitutional processes. The issuance of decrees as fundamental laws and the excessive grants and use of powers emerging from such laws conflicts the principles of constitutionalism which seeks to minimise abuse or misuse of state powers. It is from these fundamental laws that presidential authority has emerged in Uganda and, therefore, heads of state have had no limits to their powers. The army has been employed by heads of state as a brutal tool for accessing and controlling political power and for suppressing political dissent. Because of its historical role, the army has constitutionally been attached to a head of state. Therefore, Uganda failed to develop armed forces into an institution of the state and which is purposed to serve all the people of Uganda. The ethnic structures of the armed forces were purposely distorted and deliberately designed by Uganda's heads of state to allow them access and control state power. The use of

violence, alterations and deferments of fundamental laws prevailed over the ballot box as a way of transferring political power. Courts also endorsed this mode of transferring power.

Arguably, the two most contentious issues in Uganda before 1995 have been the way heads of state and governments acquired and exercised state powers. In the following chapter, I interrogate efforts to reconstruct the institution of the head state through the constitution-making process that yielded the 1995 Constitution.

Chapter Three

Taming the Presidency? Interrogating Efforts to Crafting a Limited Presidency through the 1995 Constitution-Making Process

1. Introduction

On 8 October 1995, the Constitution of the Republic of Uganda 1995 came into force. The day marked the beginning of what has been described as a ‘new democratic dispensation’ for Ugandans, following a participatory and consultative constitution-making process.¹ In this regard, the process through which the Constitution was adopted marked a departure from the exclusive constitution-making processes which blighted the defunct Constitutions² which were imposed on Ugandans. For the purposes of this study, the coming into force of the 1995 Constitution also represented three significant factors. First, a new belief was sown that future leaders would be elected through free and fair elections to replace past authoritarian leaders most of whom came to power through violence and unconstitutional means. Second, Ugandans made a concerted effort to create a new constitution to which all leaders would be subordinated, thus departing from previous fundamental laws that engendered the excesses of presidentialism and governments. Third, the day marked the formal transition of the National Resistance Movement

¹ George Kanyeihamba, *Constitutional and Political History of Uganda; From 1894 to the Present* (Centenary Publishing House Limited 2002) 240.

² Constitution of Republic of Uganda 1967 (The Republic Constitution); Interim Constitution of Uganda 1966, also known as the pigeonhole Constitution (The Interim Constitution); Uganda (Independence) Order-in-Council 1962(The Independence Constitution).

(NRM) from an interim government to the permanent wielder of political power with its leader President Museveni at the apex.

This chapter investigates through the lenses of the constitution-making process, the creation of the institution of presidency found in the 1995 Constitution of Uganda. The main aims are to investigate the factors that inspired the design of the presidency, and to evaluate efforts to reconstruct the presidency. It will be argued that the design of the presidency established by the 1995 Constitution is not rooted in the wishes of the people of Uganda and it is not founded on the tenets of constitutionalism. This study will also contend that by taking charge of the constitution-making process, President Museveni and his government manipulated the process. In this context, like previous fundamental laws, the 1995 Constitution is another fundamental law authored under the leadership of a head of state and government with the aims of granting them unlimited powers in order to perpetuate their incumbency. To prove this, this study will delve into the constitution-making process to illustrate that the process cannot be described as participatory or consultative; on the contrary it was bent in favour of President Museveni's NRM government. In this regard, the 1995 Constitution has erroneously been hailed as the first truly home grown Constitution.³ Therefore, the design of the presidency in the Constitution can be explained through understanding the constitution-making process which did not acquire popular and legal legitimacy.

This chapter is divided into six sections. Section 2 that follows makes the case for the need to reconstruct a limited president in post-1995 Uganda. Section 3 sets out the background to the

³ See Kanyeihamba (n 1).

making of the 1995 Constitution. Section 4 interrogates the legal instrumentalities that were designated to propagate the 1995 Constitution. It also examines occurrences during the constitution-making process which favoured President Museveni's NRM. Section 5 defines the concepts of popular and legal legitimacy. Section 6 is the conclusion to this chapter.

2. Necessity for constructing a limited presidency for Uganda

The executive powers of the state are vested in the executive organ which is comprised of the head of state and the ministers or, in common parlance, the government. Generally, there are two main forms in which executive powers are exercised. In some countries, such as the United Kingdom,⁴ the head of state may be a monarch or a president who is entrusted with selected ceremonial functions, while the substantive executive powers of running the day to day business of government is vested in a prime minister and a cabinet of ministers. In such a system, the head of state is a symbol of the state and his or her powers vary from constitution to constitution. The common feature is that the non-executive head of state carries out his functions on the advice of the holder of executive powers such as the prime minister and a cabinet. In the second system, such as the one introduced in Uganda under the Republic Constitution, all the executive powers of the state are vested in a head of state who is the executive president. This system is more prevalent in African countries as this study will discuss in chapter four. The executive president can exercise powers directly or through his or her cabinet ministers and other organs of the state which are subordinate to and often appointed by the presidency.

⁴ It should be noted that the United Kingdom does not have a written constitution.

On acquiring independence, Uganda was governed under the Independence Constitution by the first and only semi-executive head of state in the country's history, in the person of President Fredrick Edward Mutesa II, with Prime Minister Milton Obote. Following Milton Obote's *coup d'état* in 1966 which deposed President Mutesa II, the semi-executive presidential system was abandoned in favour of a full executive presidential system introduced by the Republic Constitution. Since then, executive power has been the basis upon which heads of state in Uganda have asserted their hegemonic and illegitimate control over the country. However, the acquisition of executive powers by Uganda's heads of state has principally been through extra-legal and unconstitutional means, and was later validated through fundamental laws designed to maintain the incumbents in power as discussed in the previous chapter.

The Republic Constitution which created the first full executive presidential system with untrammelled powers was adopted by an illegitimate government that had no mandate to rule, and to adopt the Constitution. Starting with Amin, whose *coup d'état* overthrew Obote's government, successive heads of state acquired executive powers by over-throwing previous governments. This was followed by the issuances of decrees published as legal notices which purported to amend and suspend the Republic Constitution, allowing the leaders to seize power and to legitimise their exercise of state power through means not provided for under the Republic Constitution. The decrees allowed heads of state to exercise executive powers almost without limits.⁵ Thus, the exercise of executive powers by successive heads of state has been illegitimate because of their mode of acquiring power through unconstitutional means.

⁵ The exception is Obote's second government which came to power in 1980 following a highly disputed general election.

Executive powers have also been founded on fundamental laws created at the initiative of heads of state and governments for their own benefit without the involvement of populace. Nearly every head of state and their government established their legal order which overrode or replaced that which was created by the government before them. This has meant that no fundamental law survived alteration with each change of government. The decrees also became part of the Republic Constitution for as long as the issuing authority remained in power. They legitimised unlawful and unconstrained exercise of executive powers by successive heads of state. The creation of fundamental laws at the initiative of the president and their government in post-independence Uganda began with the model of the semi-executive presidential system in the Independence Constitution, followed by the domineering full executive presidential system in the Republic Constitution, trailed by Amin's Rule by Military Decree Legal Notice No.1 of 1971 and ended with Legal Notice No. 1 of 1986 following the seizure of power by President Museveni's NRM. Executive and state power has derived from the 1995 Constitution since its promulgation.

Executive powers as tailored for and often by previous heads of state have been employed as a tool for abusing human rights and for impeding the smooth transfer of political power. This was achieved through creating fundamental laws which bestowed on heads of state unlimited state powers, who also did not require the mandate of the people to rule. Almost every head of state and his government could unmake the fundamental law that was created under his leadership and those created by the governments before him. They also could abrogate or usurp any fundamental laws at will. Thus from 1966 when Obote seized power, up to 1995 when the present constitution was promulgated, Uganda's heads of state validated their exercise of power by

commandeering constitutional orders through military might, rather than subjecting themselves to the pre-existing constitutional order. Executive power in Uganda has also been exercised by leaders who do not surrender to constitutional limitations. A paradox in Uganda has been that instead of building into fundamental laws mechanism aimed at minimising the misuse and abuse of state powers, and at facilitating smooth transfer of state power, laws were designed to grant heads of state and governments unlimited powers and to entrench power.

To this end successive heads of state have been unwilling to subject themselves to laws that advance conditions of plural political competition and democratic institutions which are insulated from executive tampering and thus promote and protect constitutionalism, democracy and human rights. As a result, post-independence Uganda has never had a peaceful and democratic transfer of power from one government to another. Only violent political competition, rigged elections and fundamental laws created to serve leaders have determined who governs the country and the manner in which it is governed. For the same reasons, heads of state have exercised presidential authority without restraint.

Uganda's post-colonial heads of state have also exhibited a culture of disregarding constitutional and other legal orders which limit their tenures.⁶ The unbounded exercise of executive authority explains the institutionalisation of political violence as an instrument for the sustenance of political power and the disdain of constitutional order by leaders. Institutions of power such the armed forces were personalised, while institutions of governments such as Parliament were subordinated to the presidency by fundamental laws. Also, fundamentals laws did not provide

⁶ During Obote's first tenure, he extended the term of his government for 5 years; Amin abolished provisions relating to elections in the Republic Constitution and declared himself President-for-life; Museveni extended the tenure of his interim government for 5 years.

sufficient mechanisms that allow the citizenry and other constitutional organs to restrain actions of heads of state. Such misallocation and personalisation of state power was aimed at retain power at all cost. As a result, the over-arching need to acquire and retain power whatever the cost took precedence and made the populace victims of military coups, armed conflicts, human rights abuses and bad governance which was unleashed in 1966 and beyond.

It is against this backdrop that Ugandans made a concerted effort through the constitution-making process that yielded the 1995 Constitution, to transform to a first fully-fledged democratic system of government since the attainment of independence. To achieve this aim, the country had to reconstruct the institution of the head of state, amongst others constitutional institutions, in order to overcome its beleaguered history. Therefore, the constitution-making process became a focal turning point through which the country had to consider the challenges presented by the illegitimate conduct of past leaders in order to produce a constitution that would embody values and mechanisms which are conducive to political stability and which would ensure the durability of a viable constitutional order which were important for the political stability of the country.

The much needed post-1995 constitutional reforms were an important forum in the country's democratic transition. The 1995 Constitution had to be adopted through a more inclusive and participatory constitution-making process that would yield both legal and popular consensus in order to provide a platform for a stable and plural political life. The violent struggles for political power of the first twenty-four years after independence had to be remedied by introducing constitutional principles which promote peaceful political transition and which minimise the

risks of abusing state power. The past excessive self-grants of powers by previous leaders through fundamental laws and the subsequent misuse of those powers, were to guide the country in its quest for crafting a limited presidency in the new Constitution.

3. Background to the making of the 1995 Constitution

After the NRM seized power in January 1986, its leadership felt the need to break from the methods used by past governments of adopting exclusive fundamental laws, by adopting a popular constitution as the basis for the future exercise of state power. However, the manner in which the NRM government legitimised itself as an interim government was not dissimilar from that of its predecessors. By decree, it enacted Legal Notice No.1 of 1986 which formed the basis of legitimising its exercise of state power during ‘the interim period’.⁷ This decree suspended article 3,⁸ part of chapter IV,⁹ chapter V¹⁰ and article 63¹¹ of the Republic Constitution. Section 3.1 of Legal Notice No.1 of 1986 vested executive powers of the state in President Museveni, while under section 3.3 legislative powers were vested in the President and National Resistance Council (NRC), which was made up of members of the NRM and its armed wing the National Resistance Army (NRA). Also, under section 4.1 of Legal Notice No.1 of 1986 political activities were outlawed and criminalised.

⁷ The ‘interim period’ is from 25 January 1986 when Museveni’s NRM seized power to the 8 October 1995 when the new Constitution came into force.

⁸ The provision dealt with amendments to the Constitution.

⁹ The chapter dealt with the role and the powers of the executive.

¹⁰ The chapter provided for the powers of the legislature.

¹¹ The provision dealt with the executive’s and legislature’s role in making law.

The parameters of the 1995 Constitution were drawn before the NRM came to power. This is evidenced by the NRM's political programme which was written before it seized power in which its leadership set out its policies for rehabilitating the country, which included adopting a new constitution.¹² Writing at the time when the 1995 Constitution was being debated, interim President Museveni declared that:

The NRM believes that it is the inalienable right of all peoples to freely choose their government, and determine the manner of that government. Constitutions imposed on the people by guile or force cannot be a basis of stable and peaceful governance of men.¹³

President Museveni promised a new constitution for Uganda which would emerge out of consultative and participatory constitution-making processes, in line with the promise the NRM had made while it was still engaged in armed struggle for power. It promised as follows:

As part of laying the groundwork for returning Uganda to democratic government, the Interim Administration shall see to it that a new constitution based on the popular will, is drafted and promulgated by a Constituent Assembly elected by the people themselves. The present Constitution (1967) was drafted by Obote to answer the needs of establishing a despotic state. It contains many provisions that are anti-democracy, and returning the country to democratic rule under such constitution would lead to a quick demise of democracy once more.¹⁴

It may be stated that President Museveni and his NRM's aspirations to democracy and desire for a first truly home-grown constitution were also shared by the majority of Ugandans, who wished to prevent a return of one-man regimes, armed struggles for political power and craved to usher in democracy after long periods of dictatorship and unelected but powerful leaders. The

¹² National Resistance Movement, *Towards a Free and Democratic Uganda: The Basic Principles and Policies of the National Resistance Movement* (National Resistance Movement Publications 1984) 4.

¹³ Yoweri Kaguta Museveni, *What is Africa's Problem?* (National Resistance Movement Publications 1992) 21.

¹⁴ National Resistance Movement Secretariat, *Mission to Freedom Uganda Resistance News 1981-1985* (NRM Publications 1990) 20-21.

problems of *coup d'états*, rigged elections, extrajudicial killings and one-man regimes, originated as a result of two main reasons. First, the Independence Constitution was imposed on the majority of Ugandans and its provisions created imbalances of power among tribes of the newly founded Uganda. Its unfair provisions triggered the confrontation between Prime Minister Obote and President Mutesa II which led to the first *coup d'état* and its abrogation. Second, the manner in which President Obote seized power in 1966 and issued the Interim Constitution and later his government adopted the Republic Constitution set several precedents. These include that the powers of the state can be acquired through violence and unconstitutional means; a head of state and a government can dictate the contents of a fundamental law and grant themselves unlimited state powers; and they can abrogate any constitutional order and suspend its provisions that limit their exercise of state power.

The disdain with which the Republic Constitution was treated through the suspensions of its provisions made it lose its sanctity, rendering it unworthy of being the supreme law of the land. At the same time, the powerful presidency provided for by the Republic Constitution and subsequent amendments to it by the various legal notices had to be replaced by a limited presidency, which is also subordinate to the populace under the provisions of the new constitution. James Wapakhabulo posits that to the NRM, the country's political problems were traceable to the unilateral abrogation by Obote of the Independence Constitution and his imposition of the Republic Constitution that were not acceptable to a large section of the population.¹⁵ Also, as I have argued in section 4 of the last chapter, Obote's government and the

¹⁵ John Wapakhabulo, 'Uganda's experience in Constitutional Making' (*Constitution of Kenya Review Commission*, 2009) www.commonlii.org/ke/other/KECKRC/2001/33.html accessed 13 May 2015.

National Assembly had no mandate to adopt the Republic Constitution since their tenures had expired.

These factors justified the country's desire to promulgate a new popular constitution that would represent a new democratic dispensation. Moreover, since the creation of Uganda, the populace had not contributed to the making of a fundamental law. For these reasons, Uganda needed a new constitution. The hope was that the new constitution would guarantee a free society; subject the leaders to credible elections, constitutionalism and democratic processes; and that it would be accepted and revered by all Ugandans. It was equally important that the need to replace the Republic Constitution, did not give President Museveni and the NRM an opportunity to manipulate the constitution-making process with a view of adopting a new constitution that would serve to maintain their hold on power. This being the lesson learnt from the manner in which previous fundamental laws were adopted and how they allocated state powers to heads of state and governments under whose leadership or influence they were written.

To adopt a constitution that would allow for the stable and peaceful governance of Uganda as envisioned by Museveni then¹⁶ and as desired by Ugandans, called for the meaningful popular participation of Ugandans during the constitution-making exercise and a constitution which is cast in constitutionalism.¹⁷ It is on the basis of these two indispensable elements that this study appraises the design of presidency as established by the 1995 Constitution and the Constitution as a whole.

¹⁶ See (n 12).

¹⁷This study will argue that popular participation and constitutionalism are essential for the legitimacy of any constitution and must be built into a constitution during the constitution-making stage.

The constitution-making process was to be achieved through three main stages.¹⁸ At the first stage, the people were to be consulted on contents of the new constitution by the Constitution Commission, which would after draw up a draft Constitution based on the views of the people. The second stage was to be national debates on the draft Constitution and the adoption of the final version draft Constitution. At the last stage, the draft Constitution was to be debated, modified, finalised and then adopted by the interim legislature- the National Resistance Council (NRC), working together with the armed forces-the National Resistance Army (NRA), which were arms of the ruling interim NRM government.¹⁹ It is important to note that this mode of adopting the new constitution was contrary to promises made before the NRM seized power.²⁰

When the process of making the new constitution started taking shape, the method of its adoption planned by the NRM aroused suspicion that the NRM had drafted a constitution during the armed conflict and they were simply going through the necessary, but meaningless ritual, to dress it with legitimacy. One of the old political parties, the Ugandan People's Congress (UPC), argued that it did not recognise or accept the legitimacy of the NRA and the NRC, as impartial organs capable of adopting a new constitution for the people of Uganda. It stated that it would only recognise a constitution deliberated, adopted and promulgated by a Constituent Assembly, composed of representatives who had been freely elected from all parts of Uganda, under elections conducted in accordance with the universally accepted principles of universal adult

¹⁸ Republic of Uganda, *The Report of the Uganda Constitution Commission: Analysis and Recommendations* (Ministry of Justice and Constitutional Affairs 1992) (Odoki's Report and the draft Constitution) 731.

¹⁹ Constitutional Committee Statute No.5 1988 (The Constitutional Committee Statute), art 6.

²⁰ See (n 14).

suffrage, involving all political parties.²¹ The press also reported a public onslaught against the unrepresentative nature of the NRM's proposals for promulgating a new constitution and the lingering association of this process with military coercion and domination.²² The contention was that only the mandate of the people could bestow popular legitimacy on the new constitution.

On 21 December 1988, the NRC enacted the Uganda Constitutional Committee Statute No.5 1988 which established the Constitution Commission and gave it the responsibility to start the process of developing a new constitution. The NRM also extended its tenure as an interim government, citing the need to oversee the adoption of a new constitution. General elections were to be held following the adoption of the new constitution. The Constitution Commission was headed by Benjamin Odoki, reportedly a former schoolmate of the then Interim President Museveni.²³

From the outset, the constitution-making process was beset by discontent with the NRM's proposals for making a new constitution. The history of past governments commandeering constitution-making process with the aim of creating fundamental laws to maintain their exercise of state power had not escaped the minds some of Ugandans.

²¹ Letter dated 5 June 1991 from UPC to the Minister of Constitutional Affairs. Reproduced by Kagenda Atwoki, 'The Composition and Election of the Constituent Assembly' (Centre for Basic Research 1991), app 1.

²² Peter Serumaga, 'Constitutional Assembly Bill Blasted' *New Vision* (Kampala, 23 November 1992) 2.

²³ It has been claimed that Benjamin Odoki is a former schoolmate of President Museveni. See Africa Confidential, 'Museveni on the Defensive' (Africa Confidential Publication Issue 54 Volume 19, 2013) 3.

I will now investigate the context in which the 1995 Constitution was formulated, debated, drafted and promulgated in an effort to investigate the issues that influenced the design of the presidency therein.

4. An enquiry into the constitution-making process

The constitution-making process which yielded the 1995 Constitution may be divided into three main stages:

1. Establishment and operations of the Constitution Commission.
2. Constitution-making environment.
3. From the establishment and operation of the Constituent Assembly up to the point of promulgation of the 1995 Constitution.

4.1 Establishment and operations of the Constitution Commission

4.1.1 Appointment of members of the Constitutional Commission

The Uganda Constitution Commission Statute No.5 1988, which established the Constitution Commission provided that the Chairman, Vice-Chairman, Secretary and the eleven members of the Commission other than the *ex-officio* members were to be appointed by President Museveni in consultation with the Minister of Constitutional Affairs.²⁴ It also provided that the Director of

²⁴ The Constitutional Committee Statute (n 19), art 2(2).

Legal Affairs of the NRM²⁵ and the Chief Political Commissioner of the NRM shall be *ex-officio* members of the Commission.²⁶ Statute No.5 did not provide for the nominations process to allow anyone else to suggest a name for the membership of the Commission. Only two out of the twenty-one members of the Commission appointed by the President were not known sympathisers of the NRM,²⁷ while eleven members of the Commission have served in the NRM government or have been appointed by President Museveni to various lucrative positions following the adoption of the Constitution.²⁸ Therefore, the manner in which the Statute provided for the appointments of members of the Commission allowed the NRM to stake its pledge from the outset. As Joe Oloka-Onyago observes, although the Commission was regionally balanced, only one of its members was a known supporter of another party and it was made up of strong NRM supporters.²⁹ In their memorandum to the Minister of Constitutional Affairs, the UPC protested that:

²⁵ *ibid* art 2(1)(d).

²⁶ *ibid* art 2(1).

²⁷ These are Professors Fredrick Sempebwa and Phares Mukasa.

²⁸ The Constitution Commission was composed of Benjamin Odoki who was appointed as Chief Justice by President Museveni; Medi Kagwa served as Minister of State in the Office of the President from 1996 to 1998, and was later appointed as Chairman of the Uganda Human Rights Commission by President Museveni in 2008; Hajji Azizi Kasujja an active member of the NRM served as an ambassador to Saudi Arabia during President Museveni's government; Lieutenant Colonel Kale Kayihura is currently serving as Inspector General of Police, a presidential appointment; Khidu Makubuya served as an NRM member of Parliament for Katikamu South Constituency and he has held various post in the NRM government including State Minister in the office of the President, State Minister for Foreign Affairs, Minister of Education and Sports, Justice Minister, Attorney General and Minister for General Duties in the Prime Minister's Office; Mrs. Mary Maitum was appointed by President Museveni as a member of the Uganda Electoral Commission; Mrs Maria Matembe served under the NRM government as a Minister for Ethics and Integrity from 1998 to 2003 and NRM member of Parliament for Mbabara District; Lieutenant Colonel Sserwanga Lwanga was an NRA war veteran who served as a Principle Private Secretary to the President Museveni; Mr. Jotham Tumwesigye was appointed by President Museveni as a Supreme Court judge, and formerly he was the Chairman of the Directorate of Citizenship and Immigration and he also served as an Inspector General of Government in the NRM government; General Mugisha-Muntu was an NRM war veteran and he served as the army commander in President Museveni's government from 1989 until 1998. He however fell out with the NRM and he is now the leader of the opposition party- Forum for Democratic Movement (FDC); Dr. John Mary Waligo was appointed a Commissioner of the Uganda Human Rights Commission by President Museveni.

The current process of constitution-making has been shrouded in political bad faith. The selection of the members of the Constitution Committee was done without any regard to alternative political views of the people of Uganda. Most of the Commissioners are avid sympathisers of the NRM and have made the process of making a national constitution look like ideas are being gathered for making an NRM constitution.³⁰

The selection of the members of the Commission was not carried out in an open and democratic fashion. The NRM government, however, vigorously claimed the Commission's independence and integrity arguing that it mirrored the national characteristics of Uganda in that its membership included religious affiliations and special interest groups such as women, the armed forces and academics.³¹ The truth is that the interest group diversity was not insulated from political partisanship. There was no consultation process leading to the establishment of the Constitution Commission. The selection of its members was provided for by a Statute that was designed to give the NRM advantages during the constitution-making process. It may therefore be stated that Statute No.5 allowed President Museveni to appoint persons to the Commission that would safeguard and advance the NRM's interest during the consultation stage. This fuels the contention that the motive was to silence the expression of alternative political opinions.

4.1.2 Mandate and activities of the Constitution Commission

The functions of the Constitution Commission were set out in article 4 of the Uganda Constitutional Commission Statute No.51988. The Commission was to consult with the people of Uganda; solicit their proposals, study and review them; with a view to making

²⁹ Joe Oloka-Onyago, 'New Wine or New Bottles? Movement Politics and One Partyism in Uganda' in Justus Mugaju and Joe Oloka-Onyago (eds), *No-Party Democracy in Uganda Myths and Realities* (Fountain Publishers 2000) 40, 45.

³⁰Atwoki (n 21) 21.

³¹ Olive Furley, 'Democratisation in Uganda' (African Studies Conference, London, March 1999).

recommendations for the enactment of the national constitution which would *inter alia*³² guarantee the national independence, territorial integrity and sovereignty of Uganda.³³ The new constitution was to establish a free democratic system of government that would guarantee the fundamental rights and freedoms of the people of Uganda,³⁴ create viable political institutions that would ensure maximum consensus and orderly succession of government,³⁵ and recognise and demarcate divisions of responsibility among the state organs of the executive, legislature and the judiciary, by creating viable checks and balances between them.³⁶ In addition, the Commission was to endeavour to develop a system of government that would ensure people's participation in the governance of their country³⁷ and to develop a democratic free and fair electoral system that would ensure their proper representation in the legislature and other organs of the state.³⁸ It was also to establish and formulate a constitutional system that would uphold the principle of public accountability by the holders of public offices and political posts,³⁹ and guarantee the independence of the judiciary.⁴⁰ Also, the Commission was to formulate and structure a draft Constitution that would form the basis of the country's new constitution.⁴¹ The task of the Commission may therefore be summed up as to draw a draft Constitution founded on

³² The Constitutional Committee Statute (n 19), s 4(a).

³³ *ibid* 4(a)(i).

³⁴ *ibid* 4 (a)(ii).

³⁵ *ibid* 4(a)(iii).

³⁶ *ibid* 4(a)(iv).

³⁷ *ibid* 4(a)(v).

³⁸ *ibid* 4(a)(vi).

³⁹ *ibid* 4(a)(vii).

⁴⁰ *ibid* 4(a)(viii).

⁴¹ *ibid* 4(b).

popular consensus, following a consultative and participatory process and that was built on the pillars of constitutionalism.

The Commission's Report does not state when the Commission began its work. It however notes that the Commission invited submission on the draft Constitution in June 1999 and it received twenty-five thousand four hundred and fifty-seven submissions during the consultation and participatory stage.⁴² One of the Commission's members claims that about three hundred thousand communities were engaged in the seminars regarding the new constitution.⁴³ He writes that seminars were held in eight hundred and seventy Sub-Counties around the country, in which members of the Commission introduced and explained the constitution-making process, allowed people to contribute and memoranda were solicited at the end of each seminar.⁴⁴ However, it has also been claimed that during the meetings and seminars, the agenda was fixed and the direction of the discussions were controlled by the Commissioners, especially in relation to the guidelines they issued;⁴⁵ occasioning suspicions that a new constitution had already been drafted and the process was a sham. A total of twelve thousand four hundred and fifty-nine of the submissions, are reported to having been received by the Commission from Resistance Councils (RCs).⁴⁶ RC's constitute elected bodies of the local government institutions from the village to district levels.

⁴² Odoki's Report (n 18) 7.

⁴³ John Waligo, 'Constitution-Making and the Politics of Democratisation in Uganda' in Holger Hansen and Michael Twaddle (eds), *From Chaos to Order: The Politics of Constitution-Making in Uganda* (Fountain Publishers 1995) 21, 21.

⁴⁴ *ibid* 28.

⁴⁵ Olive Furley and James Kitalikawe, 'Constitutional Reform in Uganda: The New Approach' [1997] 96 *African Affairs* 243, 249.

⁴⁶ Joe Oloka-Onyago, 'Reflections on the Process of Constitutional Development in Uganda' (East Africa Law Society Conference, Mombasa, 15-16 August 1996).

They were initially established as rebel support structures in the areas controlled by the NRM during the armed conflict, and they proved effective in funnelling food and supplies to the NRA.⁴⁷ Therefore, they were affiliated to the NRM government. This created a serious problem of relying on submissions that toed the NRM political line.

On 31 December 1992, the Commission produced its final Report⁴⁸ and a draft Constitution.⁴⁹ The Commission noted that the majority of Ugandans preferred a Constituent Assembly directly elected by the people in order to be as fully representative as possible and to provide greater legitimacy for the new constitution.⁵⁰ The government accepted to establish a Constituent Assembly consisting of delegates elected by universal suffrage.⁵¹ Although the NRM's concession to constitute a directly elected Constituent Assembly is laudable, it is clear that it was persuaded into embarking on a popular promulgation exercise for the new constitution.

The Constitution Commission's Report states that the Commission sought the views of Ugandans, it visited other countries to seek views and learn from constitutional innovations outside Uganda, and it also consulted legal experts within and outside Uganda.⁵² Thus it claimed that the draft Constitution it produced was based on the people's views and legally accepted

⁴⁷ Per Tideman, 'The Resistance Council in Uganda: A Study of Rural Politics and Popular Democracy in Uganda' (PhD thesis, Roskilde University 1994) 89.

⁴⁸ Odoki's Report (n 18).

⁴⁹ The draft Constitution (n 18).

⁵⁰ Odoki's Report (n 18) 732.

⁵¹ Constitutionnet, 'Constitutional history of Uganda' (*Constitutionnet*, May 2013) www.constitutionnet.org/country/constitutional-history-uganda accessed 20 April 2015.

⁵² Odoki's Report (n 18) 23.

principles.⁵³ However, it was accused of ducking contentious constitutional issues in particular, on the federal question, the restoration of political parties which were banned when the NRM seized power, and the system of government most suited to Uganda.⁵⁴ It is also claimed that the memoranda submitted at the sub-county level were vetted by NRM leaders before submitting them to the Commission.⁵⁵ Critics also argue that the Commission was part of NRM's designs to persuade the public to support its agenda.⁵⁶ Martin Doornobs and Fredrick Mwesigye stated as follows about the popularity of the draft Constitution:

Of course, it cannot be claimed that the results necessary reflected the views of the people with complete accuracy. Apart from anything else, because of the high level of illiteracy in Uganda (probably about 50 percent or more). It can be assumed that there were some preponderances of elite participation. The Commission made use of its own analysis of Uganda's problems, an analysis which was however influenced by people's views..... in its approach, it also exercised its judgement in determining the best way to give form and, effect to the consensus of the majority view. Hence, it cannot claim to have based its draft on popular views.⁵⁷

In relation to the presidency, the work of the Constitution Commission is best measured by evaluating its draft Constitution against its task of producing a draft Constitution that provides efficient mechanisms that would minimise the abuse and misuse of presidential authority and

⁵³ *ibid* 7.

⁵⁴ L Katoboro, E Brett and J Munene, *Uganda: Landmarks in Rebuilding a Nation* (Fountain Publishers 1997) 76.

⁵⁵ Furley (n 31)5.

⁵⁶ John-Jean Barya, 'The Making of Uganda's 1995 Constitution: Achieving Consensus by Law' (Centre for Basic Research 2000) 46; see also Aili Mali Tripp, 'The Politics of Constitution-Making in Uganda' in Laurel Miller (ed), *Framing State in the Times of Transition: Case Studies in Constitution Making* (United States Institute for Peace 2010) 158, 159.

⁵⁷ Martin Doornobs and Fredrick Mwesigye, 'The New Politics of King-making' in Holger Hansen and Michael Twaddle (eds), *From Chaos to Order: The Politics of Constitution-Making in Uganda* (Fountain Publishers 1995) 68, 73.

which is based on the popular liberal view of Ugandans.⁵⁸ It is the absence of constitutionalism and the failure to adopt the popular liberal views of Ugandans in the draft Constitution which serves as a basis for condemning the Commission's work and renders it susceptible to the accusation of indulging in a bogus constitution-consultation process with a view of aiding in the adoption of a constitution under which the NRM would exercise unlimited and permanent power. It is on this basis that this study assesses provisions of the draft Constitution relating to the presidency.

4.1.3 The Constitutional Committee's contribution towards creating a popular and constitutionally restrained presidency

The constitution-making exercise occurred against a background of improper allocation and abuse of state power that the country suffered since its borders were defined. The presidency had too much power concentrated within the executive branch of government *vis-à-vis* the other branches of government such as the legislature and judiciary. It may therefore be stated that the task for the Commission in relation to the office of the president, was to rethink its powers and privileges, given that the previous designs had emerged out of fundamental laws designed to serve governments under whose leadership or influence they were created. It also required shackling presidential authority in such a way as to minimise possibilities of its abuse.

The Commission's Report states that the majority of Ugandans that commented on the issue of the presidency wished to see the continuation of an executive presidency with more distinctive

⁵⁸ See (n 32) - (n 40).

separation of powers than was provided by the Republic Constitution provided.⁵⁹ Thus, it recommended that executive powers of the state should be vested in a president.⁶⁰ It noted that Ugandans emphatically wished for a democratically elected president.⁶¹ There was also a majority view that emphasised that the president should be subject to the law.⁶² There was a general consensus that the exercise of executive powers in the areas of constitutional appointments, prerogative mercy and command of armed forces should be subject to checks and balances.⁶³ Accordingly, the Commission recommended the establishment of a National Council of State whose functions would include providing advice to a president on the exercise of executive powers, acting as the link between the presidency and Parliament and approving presidential appointments.⁶⁴ Similarly, there was a general consensus that Parliament should be strong and efficient so that it could provide checks and balances on the presidency, and efficiently represent and safeguard the people's interests.⁶⁵

The Commission's Report states that the majority of Ugandans were against providing a president with immunity from prosecution⁶⁶ as was provided under the Independence and

⁵⁹ Odoki's Report (n 18) 321.

⁶⁰ *ibid.*

⁶¹ *ibid* 319.

⁶² *ibid* 320.

⁶³ *ibid* 326.

⁶⁴ *ibid* 355.

⁶⁵ *ibid* 10.

⁶⁶ *ibid* 330.

Republic Constitutions.⁶⁷ The Commission members however resolved that to preserve ‘the dignity of the office of the president’ a president should not be subject to any court proceedings whatsoever during his tenure.⁶⁸ They reasoned that:

It would be absurd if the President who takes precedence over other all people in the country is liable to court proceedings. However, the President who has committed serious mistakes could be removed from office by either a vote of no confidence or impeachment by Parliament. He could be taken to court when he is no longer President.⁶⁹

Subsequently, the draft Constitution provided that a president may be impeached on the grounds of abuse of office, or the wilful violation of the presidential oath or oath of allegiance, or any other provisions of the Constitution;⁷⁰ misconduct or misbehaviour which brings or is likely to bring the office of the president into ridicule or contempt or disrepute;⁷¹ or which is prejudicial or inimical to the economy or inimical to the security of the state.⁷²

The Commission observed that opinions differed as to the length of the term of office for the presidency and that a substantial number of Ugandans suggested that it should be four years.⁷³

The overwhelming majority view was to limit the term of office to prevent a president from

⁶⁷ The Independence Constitution, art 24(3); the Republic Constitution, art 34(2) provided a president with immunity against legal proceedings.

⁶⁸ Odoki’s Report (n 18) 330.

⁶⁹ *ibid.*

⁷⁰ The draft Constitution (n 18), art 121(a).

⁷¹ *ibid* art 121(b)(i).

⁷² *ibid* art 121(b)(ii).

⁷³ Odoki’s Report (n 18) 332.

being re-elected indefinitely.⁷⁴ Thus, the Commission's draft Constitution provided that a president should hold office for five years and should be restricted to serving two terms only.⁷⁵

Regarding the judiciary, it was proposed that the independence of the judiciary should be guaranteed by the new constitution against the other two arms of the government, namely the executive and the legislature, and most importantly against the executive.⁷⁶ The judiciary should be the guardian of basic human rights and constitutionalism and it should have powers of judicial review over the new constitution and administrative actions.⁷⁷ The Commission's draft Constitution provides that the chief justice and the deputy chief justice should be appointed by the president subject to the approval of the National Council of State, while justices of the Supreme Court and judges of the High Court should be appointed by a president on the advice of the Judicial Services Commission and subject to the approval of the National Council of State.⁷⁸

In relation to separation of powers, the general consensus was that the powers of the executive, legislature and judiciary should be separated and the provisions of checks and balances between these branches of government should be recognised in the new constitution as a means of preventing dictatorship, while ensuring that the government functions smoothly.⁷⁹ Controls on the presidency, first by ensuring direct elections by the people, who should have control over a

⁷⁴ *ibid* 333.

⁷⁵ The draft Constitution (n 18), art 120.

⁷⁶ Odoki's Report (n 18) 443.

⁷⁷ *ibid* 444.

⁷⁸ The draft Constitution (n 18), art 199(a).

⁷⁹ Odoki's Report (n 18) 95.

president, and second by putting effective checks and balances on executive powers, were deemed as necessary tools of ensuring constitutionalism in the new constitution.⁸⁰ Evidence of the Commission's attempt to separate the three arms of the government is seen in the provision of the draft Constitution which stipulates that a president should not be a member of Parliament,⁸¹ which is an innovation in Uganda's constitutional history. Regarding the armed forces, the Commission noted that they were concerns among Ugandans who desired that it should be a national army that is insulated from the influence of a president and any government or any political party. However, the majority approved of the presidency being the commander-in-chief of the armed forces.⁸² The Commission observed that while appreciating the concerns of the minority, military operations involve military secrets known only by the commander-in-chief and those pertaining to the operations. It thus proposed that a president should be the commander-in-chief of the armed forces, and should appoint the commander of the armed forces subject to the approval of the National Council of State, who could also advise a president on operational command of the armed forces, but the president should not be bound by the advice.⁸³

The Commission proposed that operations of the armed forces should be authorised by Parliament, it should defend the constitution and democratic institutions and that its main responsibility should be to defend the sovereignty and the territorial integrity of Uganda.⁸⁴ The Commission also noted the desirability and importance of constitutional safeguards to ensure that

⁸⁰ *ibid* 96.

⁸¹ The draft Constitution (n 18), art 105(a).

⁸² Odoki's Report (n 18) 373.

⁸³ *ibid* 374.

⁸⁴ *ibid* 370.

the constitution is respected and upheld by all institutions and all sections of society so that it is not arbitrarily abrogated or suspended as was done by leaders in the past.⁸⁵ The measures suggested included building strong democratic institutions and writing safeguards in the new constitution to emphasise their sanctity.⁸⁶ To ensure maximum scrutiny of any proposed amendments to the provision relating to the exercise of executive authority, presidential elections, removal from office of the president and the emergency powers of the presidency; the draft Constitution requires a Bill passed by a vote of not less than two-thirds of all members of Parliament and which has been ratified by two-thirds of all the district councils.⁸⁷

With regard to elections, the Commission noted that there were widespread concerns about past Constitutions failing to provide sufficient safeguards against manipulation of the electoral process by former leaders which allowed them to achieve their own ends rather than to reflect the choice of the electorate.⁸⁸ For example, under the Republic Constitution, a president could dissolve Parliament almost at any time and call for fresh elections.⁸⁹ This power was open to abuse and gave unfair advantage to a ruling government in that it allowed the president to call for elections at the convenience of the ruling government to the detriment of other political parties who may require sufficient notice and time to campaign in order to effectively contest elections. It also increased the power of the executive over the legislature which was at the mercy of the

⁸⁵ *ibid* 86.

⁸⁶ *ibid* 102.

⁸⁷ The draft Constitution (n 18), art 371.

⁸⁸ Odoki's Report (n 18) 259.

⁸⁹ The Republic Constitution, art 62(1).

president who could dissolve Parliament whenever he wished and, therefore, weakened the system of checks and balances between the two branches of the government.⁹⁰ There was a consensus that fair electoral laws should be built into the new constitution to ensure that elections are the mechanism for smooth transfer of power from one administration to another.⁹¹ Thus, the Commission recommended that elections should be conducted in such a way that the results would be respected and accepted by all parties and the people of Uganda.⁹² It also supported the people's view that voting in national elections should be on the basis of universal adult suffrage.⁹³

The Commission reported that there was consensus for an impartial body to organise elections.⁹⁴ The majority of Ugandans considered that the system that allowed a president to choose members of the Electoral Management Body was open to abuse by the incumbent government.⁹⁵ Among the proposals submitted to the Commission was that the electoral management body should be composed of the chief justice and other judges of the Supreme Court; be made of religious leaders and representatives of the United Nations and the Organisation of the African Unity (now the African Union), or other international or regional organisations; be elected by Parliament; be appointed by the president, subject to the approval of Parliament; and be composed of representatives of political parties or persons selected with the

⁹⁰ Odoki's Report (n 18) 260.

⁹¹ *ibid* 262.

⁹² *ibid*.

⁹³ *ibid* 263.

⁹⁴ *ibid* 267.

⁹⁵ *ibid*.

involvement of political parties.⁹⁶ The Constitution Commission noted that there was a genuine concern that the powers of the presidency to appoint persons to the Electoral Management Body could be used to appoint persons who were biased in favour of the ruling party.⁹⁷

It however did not agree that the Electoral Management Body should consist of members of the judiciary. It reasoned that members of the judiciary should be insulated from the arena of political decision, which it might be required to adjudicate on. As its work might require full-time attendance, therefore, it might deprive the judiciary of its personnel.⁹⁸ In dismissing the other proposals on the composition of the Electoral Management Body, the Constitution Commission argued that in a secular Uganda, it is not proper to involve religious leaders in organising elections, and that it would not be proper for an independent state to routinely subject its electoral process to external scrutiny of the international community.⁹⁹ Thus, it recommended that the Electoral Management Body should consist of a chairperson and not less than two but not more than six other members appointed by the presidency with the approval of the National Council of State.¹⁰⁰ It also proposed that the chairperson of the Electoral Management Body should be a justice of the Supreme Court or a judge of the High Court or a person qualified to be appointed a justice or judge.¹⁰¹ It did not make recommendations on the qualification of the other members of the Electoral Management Body.

⁹⁶ *ibid.*

⁹⁷ *ibid.* 268.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

It has been claimed that the Commission reacted vociferously when opinions were given that differed from its ‘gospel sermons’.¹⁰² Further evidence that it was under the influence of the NRM government has been inferred from its report that recommended for a no-party system while allowing the Movement System of the NRM government a free reign.¹⁰³ A referendum conducted by the government in 2001 also confirmed the Commission’s reported position.¹⁰⁴ However, three years after, the Constitution Review Committee reported that Ugandans had a strong desire to return to multi-party politics.¹⁰⁵ Indeed, in a second referendum, more Ugandans than those who participated in the 2001 referendum overwhelmingly voted to return to multi-party politics in 2005.¹⁰⁶ By this time, however, many Ugandans had bought into the Movement System of the NRM. It may therefore be stated that by criminalising other political parties while allowing its Movement System to operate, the NRM aimed at selling its political ideology to Ugandans in order to allow it to entrench and dominate power.

¹⁰¹ *ibid* 269.

¹⁰² Joe Oloka-Onyango (n 46).

¹⁰³ *ibid*.

¹⁰⁴ On 29 June 2000, a referendum on restoring multi-party democracy was held. Voters were asked which political system they wished to adopt, the movement (no-party) or multiparty. A reported ninety-one percent of the voters opted for Movement System. Voter turnout was fifty-two percent. See Africa Elections Database, ‘Elections in Uganda’ http://africanelections.tripod.com/ug.html#2000_Referendum accessed April 2015.

¹⁰⁵ Republic of Uganda, *The Report of the Commission of Inquiry (Constitutional Review): Findings and Recommendations* (Ministry of Justice and Constitutional Affairs 2003) (Sempebwa’s Report) para 7. 93.

¹⁰⁶ On 28 July 2005, second referendum on restoring multi-party democracy was held. Voter turnout was sixty-eight percent. Ninety-five percent of the voters opted for the return to multi-party democracy. See Africa Elections Database (n 104).

The Commission dismissed well-founded demands for reforms to the presidency and countered popular concerns of Ugandans with its preferences. The Commission's Report acknowledged the problems Ugandans had suffered as a result of past executive excess, but it failed to address them. This indicates a reluctance to rethink the presidential authority which had previously been designed to entrench in power heads of states. On close analysis, what emerged from a seemingly participatory and consultative constitution-making process, are a not well legally-reasoned Report and a draft Constitution that ignored the genuine concerns presented by Ugandans. The Commission did not make any notable recommendations that would provide sufficient constraints against presidential authority. For example, it endorsed the continuation of the executive presidency, which it reported was proposed by the majority of Ugandans without qualifying why it supported the proposal, but it dismissed almost all the views intended to circumscribe its powers and privileges with fallible reasoning. The Commission's Report also notes that there were widespread concerns about the manipulation of the electoral process by past leaders, yet it dismissed any attempt to insulate the Electoral Management Body from interference of the presidency. One of the reasons the Constitution Commission gave for maintaining an Electoral Management Body whose members would be appointed by a president was the undesirability of exposing the electoral process of a sovereign country to the external scrutiny of the international community.¹⁰⁷ Yet election observation by the international community is a common occurrence in Uganda and many other countries.

The Commission laid the foundations for establishing an uncircumscribed presidency in the 1995 Constitutions and for the NRM's transition from an interim government to a permanent holder of

¹⁰⁷ See (n 99).

political power. This was achieved by imbedding in the draft Constitutional a presidential model that disregards the aspirations of the people of Uganda, and which does not embody tenets of constitutionalism. In sum, the Constitution Commission's contribution towards restraining the presidency was at best negligible. Its role cannot be described as a sincere attempt to transform the institution that was unlimited before 1995 into that which is subjected to the mandate of the people and that is subordinated to the constitution.

4.2 The constitution-making environment

4.2.1 Ban on political activities

When the NRM seized power, it brought members of other political parties into its leadership coalition and used them to present itself as a broad-based 'Movement System' representing the interests of all Ugandans, and one which was opposed to sectarianism.¹⁰⁸ Under the Movement System, political parties continued to exist but could not campaign in elections or field candidates directly. In July 1992, the interim legislature- the NRC, adopted a resolution suspending political activity. Just after that, the Constitution Commission released its report and the draft Constitution in which it proposed the continuation of the proscription of multi-partyism and the retention of the Movement System in order to avert the risks posed by the revival of political activities.¹⁰⁹ A year later in July 1993, the Constituent Assembly Statute¹¹⁰ was

¹⁰⁸ For example Paul Kawanga Ssemogere the former leader of the Democratic Party (DP) served as Minister of Internal Affairs, Foreign Affairs and Public Service. He also held the post of Deputy Prime Minister in Museveni's NRM government.

¹⁰⁹ The draft Constitution (n 18), art 52(f)

¹¹⁰ Constituent Assembly Statute No.5 1993 (The Constituent Statute).

instituted, as recommended by the Constitution Commission, for the purposes of creating the Constituent Assembly that would provide the necessary legitimacy for adopting a new constitution.¹¹¹ The Statute also prohibited party candidates from running for elections for the Constituent Assembly that was established to adopt the new constitution.¹¹² Candidates could only participate in campaign rallies or meetings organised by the government.¹¹³ No other rallies or any forms of public demonstration in support of or against a candidate were allowed.¹¹⁴ Therefore, although on seizing power the NRM presented itself as tolerant to other political parties, during the constitution-making process, political parties could not mobilise freely. It was not impossible to obtain the free opinions of the people of Uganda on any constitutional issues other than through mediums devised and dictated by the NRM. Political parties could issue press releases but the law prohibited them from holding workshops, party congresses or conferences.¹¹⁵ Consequently, political parties the most basic pillars for democracy were unable to influence the constitution-making process. Meanwhile, it has been claimed that the NRM continued to use the media to assert their views.¹¹⁶ As Judy Geist points out, the underlying objective of the transition to a new constitution was:

To deal as many blows to the old parties as possible. To prevent the emergence of a new leadership. To foster the incipient internal divisions presently hindering any constructive party development or rehabilitation, and generally to discredit the parties.¹¹⁷

¹¹¹ See (n 51).

¹¹² The Constituent Statute (n110), Constituent Assembly Elections Rules-Schedule 3s 4(2)(a) rule11(2).

¹¹³ *ibid.*

¹¹⁴ *ibid* s 4(2)(a) rule 11(3).

¹¹⁵ *ibid* s 4(2)(a) rule 11(4).

¹¹⁶ David Mukholi, *A Complete Guide to Uganda's Fourth Constitution: History, Politics and Law* (Fountain Publishers 1995) 63.

The prohibition on political parties also suppressed the public debate on the new constitution in that public debates on contentious issues in the draft Constitution ran the risk of being perceived as representing a political ideology. By proscribing political party activities, the possibility of their development let alone their effectiveness towards challenging the NRM's agenda diminished and so did the development of competitive politics, while the NRM under the guise of the Movement System continued to promote itself and to grow. The NRM justified the ban as based on the purported need to unify the country through building a no-party movement that would represent all interests.¹¹⁸ According to this thinking, to the NRM, most of the country's past problems related to party politics. In the words of Joe Oloka-Onyango banning political parties was tantamount to a condemnation of future generations to the atonement of the sins of their forbears.¹¹⁹

The restriction on political activities was compounded by the intimidation of multiparty advocates.¹²⁰ All meetings and discussions on the new constitution were to be conducted through the organs of the NRM—the Resistance Councils (RCs). It should be noted that the Republic Constitution which was the fundamental law of the land guaranteed freedom of association and

¹¹⁷ Judith Geist, 'Political Significance of the Constituent Assembly Election' in Holger Hansen and Michael Twaddle (eds), *From Chaos to Order: The Politics of Constitutional-Making in Uganda* (Fountain Publishers 1995) 90, 97.

¹¹⁸ Aili Mali Tripp, 'The Politics of Constitution-Making in Uganda' in Laurel Miller (ed), *Framing State in the Times of Transition: Case Studies in Constitution Making* (United States Institute for Peace 2010) 158, 162.

¹¹⁹ Joe Oloka-Onyango, 'Constitutional Transition in Museveni's Uganda: New Horizons or Another False Start' [1995] 39 (2) *Journal of African Law* 156, 163.

¹²⁰ The media reported that Interim President Museveni issued a warning to the DP party activists who were planning to hold a rally that blood would flow if they showed up. See Sara Kintu, 'Museveni Stops May 8th Rally' *New Vision* (Kampala, 5 May 1993) 3.

freedom of assembly.¹²¹ Human Rights Watch reported that Cecil Ogwal, one of the members of the leadership of the UPC tried to challenge the restrictions on political rallies by attempting to hold a series of rallies in northern Uganda.¹²² The police arrested sixteen of her followers and charged them with belonging to an illegal organisation.¹²³ Thus in the case of *Ogwal v DPP*,¹²⁴ the UPC sought an injunction to stop the government from interfering with its political activities. The petitioners alleged that the ban on political parties violated the constitutional rights to freedom of association and assembly¹²⁵ and that the provisions governing campaigning adversely affected the right to free expression.¹²⁶ The High Court dismissed the petition on the grounds that the ban on party activities was a temporary measure which was necessary to prevent a revision of the political chaos of the past.¹²⁷ Therefore, during the constitution-making process it was impossible for Ugandans to engage in political debates on the new constitution that did not conform to the NRM's views. It may therefore be stated that the constitution-making environment was inimical to freedom of expression and freedom of association and assembly, which are essential for a meaningful consultative and participatory constitution-making process in order to bestow popular legitimacy on a constitution.

¹²¹ The Republic Constitution (n 89), art 28; art. 29.

¹²² Human Rights Watch, *Hostile to Democracy: The Movement System and Political Repression in Uganda* (Human Rights Watch Report of December 1994) 23.

¹²³ Penal Code Act of 1950 Chapter 120, s58 creates an offence of being a member of an unlawful society.

¹²⁴ HC, 7 May 1993.

¹²⁵ The Republic Constitution (n 89) art 29.

¹²⁶ *ibid* art 28.

¹²⁷ See (n 125).

4.2.2 Conflict in eastern and northern Uganda

Some parts of northern and eastern Uganda were not accessible to members of the Constitution Commission during the time when the new constitution was being debated because the NRM was still engaged in an armed struggle with various rebel groups. The people at that time in these war-infested areas did not participate in the consultation exercise for the new constitution. As the government which was deposed by the NRM had its tribal roots in these parts of the country, the contribution of the people from eastern and northern Uganda towards forming the new democratic dispensation was either deliberately ignored or unfortunately not considered. This lays fertile grounds for the allegation that the constitution-making process was not fully participatory or inclusive, and the 1995 Constitution is a product of retributive and vindictive southerners.

4.2.3 Non-Government Organisations involvement in civic education

The Commission's Report notes that at least two non-government bodies, the Uganda Joint Christian Council (UJCC) and the National Organisation for Civic Education and Election Monitoring (NOCEEM), attempted to supplement the civic education activities of the Commission.¹²⁸ However, the controlled nature of civic education during the constitution-making process was highlighted by the difficulties these organisations experienced in carrying out their work. NOCEEM is described as an umbrella organisation of fourteen human rights, religious and media organisations aimed to provide civic education as well as monitoring

¹²⁸ Odoki's Report (n 18) 21.

elections to the Constituent Assembly.¹²⁹ On 26 January 1994, Interim President Museveni accused NOCEEM of being a partisan organisation.¹³⁰ Soon after that, its accreditation was withdrawn.¹³¹ There was no reason given for the withdrawal. NOCEEM admitted that one of its members was a former UPC activist with a plaid political history.¹³² It has however been claimed that the complaints against NOCEEM were instigated by NRM officials who were trying to rig elections for the Constituent Assembly in order to delegitimise its non-partisan activities.¹³³ Although NOCEEM was later allowed to operate, the experience illustrated the limits of autonomy during the constitution-making process and the NRM's intolerance of alternative views.

4.3 From the establishment of the Constituent Assembly up to the point of promulgation of the 1995 Constitution

4.3.1 The composition and the election of the Constituent Assembly

The establishment and work of the Constituent Assembly were governed by the Constituent Assembly Statute.¹³⁴ The rules for the election of members of the Assembly were also provided

¹²⁹ Nana Thue, Apollo Makubuya and Maureen Kirunda, *Report of a Study on Civil Society in Uganda* (Norwegian Agency for Development Cooperation 2002) 13.

¹³⁰ Samuel Kibirige, 'Museveni Warns NOCEEM' *New Vision* (Kampala, 26 January 1994) 2.

¹³¹ Ofono Opondo, 'Akabway Rejects NOCEEM' *New Vision* (Kampala, 13 February 1994) 1.

¹³² Mukholi (n 117) 87.

¹³³ John Nzinjah 'NOCEEM Man Sacked' *New Vision* (Kampala, 24 February 1994) 4.

¹³⁴ The Constituent Statute (n 110).

for under the Statute.¹³⁵ The Assembly was an important body in the constitution-making process. It was supposed to act as ‘the people’s check’ on the work of the Constitution Commission, which was a restricted group of people selected by the NRM government. In order to furnish the new constitution with popular legitimacy and to avoid allegations of exclusive constitution-making process that blighted past fundamental laws, the Constituent Assembly had to be independent from the NRM government and it had to consist of persons elected through the free will of Ugandans. The Assembly was to consider the draft Constitution clause by clause, as meticulously as possible, scrutinise, debate and approve or dismiss its provisions, introduce new ones and enact a new constitution.¹³⁶ In relation to the presidency, the Assembly shared the common responsibilities with the Constitutional Commission of ensuring that the powers and privileges of the presidency are subjected to sufficient mechanisms and of incorporating the liberal views of Ugandans in the new constitution, in order to furnish it with legal and popular legitimacy respectively. For these reasons, the Assembly’s structure and work deserve closer scrutiny as they are important for understanding the office of the president as provided for in the 1995 Constitution. The logic is that to understand the design of the office of the president and the Constitution as a whole; one needs to comprehend the motivations of its framers.

The Constituent Assembly Statute displays bad craftsmanship and it is poor in content.¹³⁷ Indeed, at the time of its passage, a constitutional law expert counselled the government to return it to the

¹³⁵ *ibid* Constituent Assembly Elections Rules, sch 3.

¹³⁶ *ibid* s 4(1).

¹³⁷For example s 5(d) makes reference to s 4 subsection (1) paragraph (b) which in fact is not in the text of the Statute.

National Assembly for the purpose of ironing out its imperfections.¹³⁸ The Statute provided for a special selection of seventy-four delegates in addition to the two hundred and fourteen members directly elected from the districts.¹³⁹ Out of the seventy-four delegates, ten were appointed by Interim President Museveni¹⁴⁰ and another ten from the armed forces-the NRA; eight were appointed by the political parties the UPC, DP, UPM and CP; two delegates were appointed by the National Organisation of Trade Unions; four were appointed by a National Youth Council; one was appointed by the National Union of Disabled Persons; and thirty-nine women delegates were elected from each District by an electoral college comprising all councillors at the RC level, within all the Districts and all members of the Sub-County Women's Councils within the District.¹⁴¹ It should be noted that the Interim President was the Commander-in-Chief of the NRA and, therefore, it is reasonable to conclude that he had a hand in appointing the delegates allocated to it. The Chairperson, Deputy Chairperson, Commissioner and the Clerk of the Assembly were also appointed by the Interim President.¹⁴² Membership of the Constituent Assembly was contested through direct elections in all the Districts.¹⁴³ Members of the Assembly were to consult members of their constituencies for their views about the issues under discussion and not to rely on their own emotions.¹⁴⁴ The structure of the Constituent Assembly was shrouded in controversy. The NRA, was allocated more delegates than the old political parties put together,

¹³⁸ Oloka-Onyago (n 120) 163.

¹³⁹ The Constituent Statute (n 111), s 4(2).

¹⁴⁰ *ibid* s 4(2)(iii).

¹⁴¹ *ibid* s 4(2)(ii).

¹⁴² *ibid* s 9.

¹⁴³ *ibid* s 4(2)(i).

¹⁴⁴ *ibid* s 5(3).

perhaps as an indication of its role as the determinant of the holder of political power. The allocation of delegates to the armed forces can be viewed as a continuing support of the allegory of its superiority over political parties in the political process. Its delegates were also aligned to the NRM political ideology and can be viewed as representatives of the NRM.

At the same time, political parties were allocated positions,¹⁴⁵ despite the ban on political activities.¹⁴⁶ Consequently, the UPC refused to send its delegates in protest against the ban on political parties.¹⁴⁷ The Uganda Patriotic Movement (UPM) - Museveni's old party, did not send any delegates because it reasoned that its views were already represented by the NRM.¹⁴⁸ Therefore, similar to the selection of members of the Constitution Commission, the Constituent Statute allowed Interim President Museveni and his NRM organs to dominate the selection process for members of the Constituency Assembly. Twenty-two out of the seventy-four delegates, including the two allocated to the UPM, in addition to the Chairman and Deputy, Commissioner and Clerk of the Assembly were appointed by the NRM organs. The Statute did not state on what basis such persons were to be selected. At the same time, members of the NRM were free to contest for membership of the Assembly through direct elections in all the Districts. The Democratic Party (DP) insisted that political parties be consulted in view of the selection of the presidential nominees.¹⁴⁹ However, no such consultation occurred. It is therefore reasonable to conclude that the interests that the NRM appointees represented were those of the appointing

¹⁴⁵ *ibid* s 4(3)(ii).

¹⁴⁶ See (n 113).

¹⁴⁷ Mukholi (n 117) 37.

¹⁴⁸ Republic of Uganda, *Proceedings of the Constituent Assembly* (Minister of Constitutional Affairs 1995) (The Constituent Assembly Proceedings) 38.

¹⁴⁹ Mukholi (n 117) 58.

authorities- Interim President Museveni and his NRM. The aim was to ensure that the resulting constitution provides for their wishes.

Aili Tripp contends that although the number of delegates to the Constituent Assembly who were institutionally beholden to the NRM did not form the majority, they represented a major block of NRM supporters who could be relied on to adopt a pro-NRM position.¹⁵⁰ Critics argue that out of the 284 members of the Assembly, roughly 220 supported NRM politics.¹⁵¹ The facts are that 198 members of the Constituent Assembly were either involved in the NRM armed struggle or have served under the NRM government.¹⁵²

Constitutional law experts in Uganda counselled that if the Assembly was to debate and enact a viable and objective constitution, it was important that the delegates elected to do so should be disqualified by law from standing as candidates for Parliament to be elected immediately following the promulgation of the new constitution.¹⁵³ However, the idea was overwhelmingly rejected by the government.¹⁵⁴ It has also been claimed that there was no fair distribution of members to the Assembly from different parts of the country.¹⁵⁵ For example, Kalangala District with an estimated population of twenty thousand people was represented by three members,

¹⁵⁰ Tripp (n 119) 171.

¹⁵¹ Mukholi (n 117) 62; also see Wapakhabulo (n 15).

¹⁵² This figure is based on members of the Constituent Assembly who were involved in the NRM armed struggle and those who have served under the NRM government.

¹⁵³ The Constituent Assembly Proceedings (n 148) 35.

¹⁵⁴ *ibid* 36.

¹⁵⁵ Atwoki (n 21) 8.

while Apac with a similar population size was represented by one.¹⁵⁶ This imbalanced representation in the Assembly also offered an unfair advantage to the NRM who had strong support in southern Uganda areas such as the Kalangala District as many of its leadership originated from southern Uganda, but it lacked support in the northern Districts such as Apac, which was a strong base for the government that it deposed.

Elections for the Constituent Assembly took place in March 1994.¹⁵⁷ They were meant to be non-partisan and based on the merits of each individual candidate.¹⁵⁸ Every registered voter who did not have a criminal record and who could afford the required nominators and financial backing was eligible to run.¹⁵⁹ During candidate meetings, each candidate was individually introduced and allowed a 'reasonable amount of time', but in any case, not less than twenty minutes to address the meeting.¹⁶⁰ Public rallies and any form of public demonstration in support of any candidate were proscribed, as was the holding of meetings other than the so-called candidate meetings.¹⁶¹ It was reasoned that to do otherwise, would be to invite the old political squabbles and draw away the people's attention from the noble cause of making a constitution.¹⁶² Notwithstanding these restrictions on political parties, it has been claimed that the reality on the ground was different. Many candidates identified themselves during the campaigns either with

¹⁵⁶ *ibid.*

¹⁵⁷ The Constituent Assembly Proceedings (n 148) 2.

¹⁵⁸ The Constituent Statute (n 110), s 4(2)(a) rule11(1).

¹⁵⁹ *ibid* s 6.

¹⁶⁰ The Constituent Assembly Proceedings (n 148) 33.

¹⁶¹ The Constituent Statute (n 110), s 4(2) rules 12(10) and (13).

¹⁶² The Constituent Assembly Proceedings (n 148) 7.

the NRM or other parties and the electorate got to know who supported what and whom.¹⁶³ The manner in which the Constituent Statute inhibited candidates from actively campaigning raised serious questions relating to freedom of expression and assembly. The press reported that a newspaper editor was arrested on charges of sedition for publishing an article in which he commented on the suitability for one of the candidates of the Assembly.¹⁶⁴

The establishment of the Constituent Assembly became a political forum in which the NRM subdued other political forces involved in the struggle for power and positioned themselves for the ultimate prize of political dominance. As Nelson Kasfir observed:

The elections also posed a challenge by adding a transitional stage in the struggle for power and the return to democracy... At stake was the question if the National Resistance Movement will be the dominant political force in years to come.¹⁶⁵

Mahmood Mamdani aptly notes that the basic thrust of the NRM's move during the constitution-making process was calculated to gain political capital at the expense of other parties and guarantee the perpetuation of the Movement System of government.¹⁶⁶

Voter turnout in the Assembly elections was very high with as much as ninety-seven percent reported in some areas.¹⁶⁷ However, the elections were marred by reports of vote buying, intimidation of candidates and the use of unfair tactics by NRM candidates.¹⁶⁸

¹⁶³ Wapakhabulo (n 15) 17.

¹⁶⁴ Tony Mugwanya, 'Cheye Arrested' *New Vision* (Kampala, 2 October 1993) 2.

¹⁶⁵ Nelson Kasfir, 'The Movement Democracy, Legitimacy and Power in Uganda' in Justus Mugaju and Joe Oloka-Onyago (eds), *No-Party Democracy in Uganda Myths and Realities* (Fountain Publishers 2000) 60, 62.

¹⁶⁶ Mahmood Mamdani, 'The Politics of Democratic Reform in Uganda' [1995] 2 (1) *East African Journal of Human Rights* 91, 99.

In its entirety, the framework for the establishment of Constituent Assembly was tipped in favour of the NRM and fraught with potential for conflict. As a result, the establishment of the Assembly became a turning point, out of which the NRM dictated the contents of the new constitution and emerged as the *de facto* single ruling party. The NRM had intended to have its organs to serve as the Constituent Assembly,¹⁶⁹ as Obote did in 1966.¹⁷⁰ However, its intended mode of adopting the new constitution faced stiff resistance when the UPC questioned the representativeness of organs which consisted of NRM members who owed their positions to the contribution they had made to the armed struggle that brought Museveni to power.¹⁷¹ Although the NRM consequently dropped its stance in favour of a more representative Assembly, it used the Constituent Statute to tilt the playing field in its favour. There was not to be a fully representative Assembly, its composition was to be dominated by NRM sympathisers. The Constituent Statute which was passed by the NRM government ensured that the Assembly's composition did not differ from that of the organs of the NRM. This also allowed the NRM to design a fundamental law that would entrench their power.

¹⁶⁷ Geist (n 118) 99.

¹⁶⁸ *ibid*; also see Betty Mukisa 'CA Aspirants Accuse RCs' *New Vision* (Kampala, 4 October 1993) 5.

¹⁶⁹ See (n 19).

¹⁷⁰ See chapter two section 3 of this study.

¹⁷¹ See Atwoki (n 21).

4.3.2 Assessing the work of the Constituent Assembly

Several caucuses were formed during the Assembly debates. The main ones included the Buganda Caucus, the National Caucus for Democracy, the Women Caucus, and the NRM Caucus.¹⁷² The result of this was that instead of examining and considering the draft Constitution dispassionately, the Assembly was polarised along sharply divided political lines. George Kanyeihamba cites several examples of these. They include the rejection of an inexpensive and convenient motion that presidential and parliamentary elections should be conducted on the same day, which was rejected without after the NRM caucus held a private meeting and spoke against the motion for political expedience and advantage; and the establishment of the Movement as a political system of governance which was caucused wholesale amid the drowning of moderate and rational voices.¹⁷³

Deliberations on the draft Constitution commenced by way of a general debate, followed by a consideration stage and then a reconsideration stage.¹⁷⁴ The general debate stage was intended to heal the wounds of the past, minimise mistrust, build confidence between delegates and lay the foundation for reconciliation, mutual respect, and consensus.¹⁷⁵ At this stage, the draft Constitution was divided into contentious and non-contentious provisions. Each member was allowed 30 minutes to comment on its provisions and to deliver a message from his or her

¹⁷² The Constituent Assembly Proceedings (n 148) 18.

¹⁷³ Kanyeihamba (n 1) 255.

¹⁷⁴ The Constituent Assembly Proceedings (n 148) 12.

¹⁷⁵ *ibid* 9.

constituency.¹⁷⁶ John-Jean Barya writes that during the debate stage, rational and sensible motions were rejected simply because they were perceived by the NRM as originating from groups that were deemed as opposition, in favour of those that the NRM caucus considered to be its own or its supporters, however divisive or inferior they were.¹⁷⁷ The motions dismissed included creating the National Council of State to advise a president on the exercise of presidential powers.¹⁷⁸ Another for an Electoral Management Body chaired by a justice of the Supreme Court appointed by a president from a group of persons nominated by all political parties was snubbed too.¹⁷⁹ The Assembly also rejected the provision in the draft Constitution prohibiting cabinet ministers who are appointed by the presidency from becoming members of Parliament.¹⁸⁰ The failure by the NRM diehards to discuss and come to a political compromise with other political forces on the design of the presidency and other contentious issues demonstrate their intent to adopt a constitution whose provisions would allow them to dominate power. It also highlights the extent at which they were willing to undermine the views of the majority of Ugandans that commented on the presidency during the public consultation stage despite, its promises to adopt a popular constitution. It is therefore not surprising that during the proceedings of the Assembly there were many walk-outs by dissenters.¹⁸¹

¹⁷⁶ *ibid.*

¹⁷⁷ John-Jean Barya, 'Popular Democracy and the Legitimacy of the Constitution; Some Reflections on Uganda's Constitutional Making Process' (Centre for Basic Research Working Paper No. 38, 1993) 19.

¹⁷⁸ The Constituent Assembly Proceedings (n 148) 32.

¹⁷⁹ *ibid* 33.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid* 47.

The Constituent Statute provided that with regard to decisions affecting the provisions or the draft Constitution or any amendment to those provisions, a motion would be carried only after it obtained the majority of not less than two-thirds of the delegates voting, subject to the requirements of the quorum.¹⁸² On the other hand, it would be lost if it was supported by less than the votes or the majority of the delegates voting.¹⁸³ On any matter on which consensus could not be obtained, the Statute provided that a motion would be carried if it was supported by fifty or more delegates.¹⁸⁴ It may well be that the purpose of these provisions with regard to decision-making, was to ensure that the substance of the new constitution was arrived at with the support of as many delegates as possible. The provisions could have also been tailored to protect the views of a substantial minority by giving them another chance, without bringing in the citizenry through consultation or referendum. It has been reported that some of the dissenting members of the Assembly opted to walk out during the decision-making stage too.¹⁸⁵

Under the rules, the enactment of the new constitution was to take place not earlier than seventy-two hours from the date of the laying on the table of the final text.¹⁸⁶ Upon enactment, the rules required that the approved constitution be certified by the Chairman, witnessed by the Deputy, the Commissioner and the Clerk to the Assembly and any delegate who wished to do so.¹⁸⁷

¹⁸² The Constituent Statute (n 110), s 22(1).

¹⁸³ *ibid* s 22(5).

¹⁸⁴ *ibid* s 17(3).

¹⁸⁵ See (n 181).

¹⁸⁶ The Constituent Statute (n 110), s 4(2)(a) rule 12(2).

¹⁸⁷ *ibid* s 4(2)(a) rule 12(5).

Members of the Assembly were under no obligation to sign the text.¹⁸⁸ This was a significant provision because withholding signature by a member, as eventually forty did¹⁸⁹ was not detrimental to the validity of the new constitution.¹⁹⁰ The rules required the chairman to notify Interim President Museveni immediately after enactment in writing through the Minister of Constitutional Affairs, so that he might fix a date for promulgation of the new constitution.¹⁹¹ Under the Statute, the Interim President was required to fix by statutory instrument a date for the promulgation of the new constitution ¹⁹² and the day for this purpose was to be not more than sixty days after the day on which the Constituent Assembly enacted the Constitution.¹⁹³ A reported one hundred and ninety-eight meetings of the Constituent Assembly were held.¹⁹⁴

The Constituent Assembly proceedings indicate that the majority of the decisions relating to the provisions of the 1995 Constitution were reached by consensus except those on the national language, land, federalism, and the political system which were supported by fifty or more delegates.¹⁹⁵ The Statute directed that the Assembly complete its work within a period of four months.¹⁹⁶ However, the deliberations took much longer and this timeframe turned out to be

¹⁸⁸ *ibid* s 4(2)(a) rule 12(7).

¹⁸⁹ The Constituent Assembly Proceedings (n 148) 93.

¹⁹⁰ The Constituent Statute (n 110), s 6 (2)(b) rule 13(1).

¹⁹¹ *ibid* 6(2)(b) rule 13(5).

¹⁹² *ibid* s 19.

¹⁹³ *ibid* s 19(2).

¹⁹⁴ *ibid* s 21(3).

¹⁹⁵ The Constituent Assembly Proceedings (n 148) 95.

¹⁹⁶ The Constituent Statute (n 110), s 32(1).

inadequate. Extensions were sought from the government and seventeen months after it began its work, the Assembly approved the new constitution which was promulgated on 8 October 1995 as the Constitution of the Republic of Uganda, 1995.¹⁹⁷

5. The legitimacy of a Constitution

Following the above analysis of the events that shaped the presidential model as established by 1995 Constitution, it is important to discuss the two components which determine the scope, content and acceptability of modern constitutions, and which all constitutions must embrace namely, popular and legal legitimacy. These two elements are relevant to measure the legitimacy of the presidential model and the Constitution as a whole. They were lacking in the fundamental laws that Uganda adopted before 1995. This explains the misallocation of state powers and their subsequent misuse. Popular legitimacy is commonly referred to as ‘popular sovereignty’ while legal legitimacy is often described as ‘constitutionalism’. The two essential components must be built into a constitution during the constitution-making exercise. It may therefore be stated that the absence of one or both of the important elements renders a constitution a sham.¹⁹⁸ They are also important for understanding the allocation of power in a constitution. Thus, they are vital for explaining presidential authority in the 1995 Constitution and by extension, the constitutionalism deficit in the Constitution as a whole.

¹⁹⁷Constitution of Uganda 1995 (The 1995 Constitution), Preamble states that the enactment of the Constitution was completed on 22 September 1995.

¹⁹⁸ There are many reasons why a constitution might be deemed a sham, these include its failure to embody certain substantive principles such as limited government and the rule of law, and if it bears no relationship with the people for whom it is made but it is designed to suit the ambitions of those who wield power. See David Law and Mila Versteeg ‘Sham Constitutions’ [2013] 110 (4) California Law Review 863, 880.

Carl Schmitt posits that only a constitution created by the people is legitimate.¹⁹⁹ Schmitt's theory focuses on the link between the will of the people and the constitutional decision as the yard-stick for constitutional legitimacy.²⁰⁰ Thus a constitution is only legitimate when there is a direct link between the people as the originator and the constitution itself.²⁰¹ Richard Fallon notes that the term constitutional legitimacy invites three concepts namely, legal, sociological and moral.²⁰² First, the legal legitimacy of a constitution depends more on its sociological acceptance rather than on the (questionable) legality of its formal ratification.²⁰³ Therefore, for a constitution to acquire legal legitimacy, it should be founded on accepted principles that aim to address social problems and questions, especially those that relate to distribution of state powers in order to minimise its misuse.²⁰⁴ Second, for a constitution to be recognised as morally legitimate, it has to enjoy unanimous consent.²⁰⁵ In this regard, it may be stated that unanimous consent bestows popular legitimacy on a constitution. Third, because a constitution invites disagreement about what it means and how it should be interpreted, many claims about the legal legitimacy of practices under the constitution rest on inherently uncertain foundations.²⁰⁶ He therefore concludes that any realistic discourse about constitutional legitimacy must therefore

¹⁹⁹ Carl Schmitt, *Verfassungslehre* (Duncker u. Humblot GmbH 2002) 17.

²⁰⁰ *ibid* 87

²⁰¹ *ibid*.

²⁰² Richard Fallon 'Legitimacy and the Constitution' [2005] 118 (6) *Harvard Law Review* 1789, 1794.

²⁰³ *ibid*.

²⁰⁴ *ibid* 1795.

²⁰⁵ *ibid* 1803.

²⁰⁶ *ibid* 1813.

reckons with snarled interconnections among its ability minimise misuse of state power, its sociological foundations, and the felt imperatives of practical exigency and moral right.²⁰⁷

Randy Barnett takes a deferent approach to defining constitutional legitimacy. He contends that constitutional legitimacy is to establish why anyone should obey the command of a constitutionally-valid law.²⁰⁸ A law-making system is legitimate if there is a prima facie duty to obey the laws it makes.²⁰⁹ Neither ‘consent of the governed’ nor ‘benefits received’ justifies obedience.²¹⁰ Rather, a prima facie duty of obedience exists either (a) if there is actual unanimous consent to the jurisdiction of the lawmaker or, in the absence of consent, (b) if laws are made by procedures which assure that they are not unjust. In the absence of unanimous consent, Barnett propounds that a written constitution should be assessed as one component of a law-making system.²¹¹ To that extent, where a particular constitution establishes law-making procedures that adequately assure the justice of enacted laws, it is legitimate even it has not been consented to by the people.²¹² Barnett’s account of constitutional legitimacy does not assume any particular theory of justice, but rather is intermediate between the concept of justice and the concept of legal validity. Although Barnett and Fallon take a different approach to defining constitutional legitimacy, they advocate unanimous consent, either by the citizenry in the case of

²⁰⁷ *ibid* 1839.

²⁰⁸ Randy Barnett, ‘Constitutional Legitimacy’ [2010] 103 (111) *Columbia Law Review*, 111, 117.

²⁰⁹ *ibid*.

²¹⁰ *ibid*.

²¹¹ *ibid* 121.

²¹² *ibid* 127.

Fallon,²¹³ or by the citizenry to the jurisdiction of the lawmaker for Barnett,²¹⁴ as an essential component that bestows popular legitimacy to a constitution. In the absence of unanimous consent, Barnett contends that just laws or just procedures for making laws bestow legal validity (legitimacy)²¹⁵ on a constitution and the laws which flow from it, while for Fallon, a constitution's ability to minimise opportunities for any person to misuse state power confers legal legitimacy on it.²¹⁶

With this in mind, it is important to discuss in details the two important components which determine the legitimacy of modern constitutions.

5.1 Popular legitimacy as an essential component of constitution-making

Because people in pluralistic societies do not share the same values or interests, the legitimacy of their fundamental political institutions ultimately depends on some kind of consent among all those that who are subjected to such institutions. There is a long-standing tradition that conceives institutional legitimacy and political justice in terms of consent. This was established by the social contract theory as articulated in the philosophies of Thomas Hobbes, Immanuel Kant, John Locke, Jean-Jacques Rousseau²¹⁷ and much later by John Rawls.²¹⁸ In the broadest terms, a

²¹³ See (n 205).

²¹⁴ See (n 211).

²¹⁵ *ibid.*

²¹⁶ See (n 204).

²¹⁷ For a discussion of the similarities and differences among the respective social contract advocated by these scholars see Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract* [1985] 70 *Iowa Law Review* 769-857.

constitution conceived a social contract between the citizenry and the government, the legitimacy of the government depends on the consent of the citizenry. For some such as Locke it seems to be the actual consent of the governed,²¹⁹ while for others as Rawls, a hypothetical consent on the basic institutions of society suffices.²²⁰ Notwithstanding these differences among various consent-based theories, legitimation based on consent appears to be the optimal, if not the exclusive means of normative justification for constitutional legitimacy.

The principle of popular legitimacy is the basis of all contemporary constitutions no matter how different the experiences and problems of the people for whom they are written.²²¹ It is founded on the notion of popular rule. It is the starting point for constructing new legal and political orders.²²² An attempt towards democratisation must rest on the assurance that the whole body of the citizenry should be included in processes that affect them, more so in the allocation of power over them.²²³ The essential requirement is that the citizenry taken as a whole, must be directly involved in governing themselves.²²⁴ The reason for this is to avert tyrannical regimes which refuse to submit to the popular will of the people. Thus, most constitutions begin by asserting

²¹⁸ See generally John Rawls, *A theory of Justice* (Revised Edition Harvard University Press 1999).

²¹⁹ See generally John Locke *The Second Treatise of Government and a Letter concerning Toleration* (Hackett Publishing Company 1980).

²²⁰ Rawls (n 218) 11-13.

²²¹ Markus Böckenförde, Nora Hedling and WinluckWahiu, 'A Practical Guide to Constitutional Building' (International Institute for Democracy and Electoral Assistance 2011) 3.

²²² *ibid* 4.

²²³ *ibid* 6.

²²⁴ Jule Lobel, 'The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution' [1988] 49 (3) *University of Pittsburgh Law Review* 823, 871.

that they rise out of a participatory and consultative process; often stating that ‘We the people.....’²²⁵ This indicates that the constitution is an ‘expression of the people’ and as such it has acquired popular legitimacy.

One of the biggest criticisms of independence constitutions in Africa, which may also be ascribed to the fundamental laws in Uganda before 1995, is that they were adopted without the involvement of the people they were meant to govern over.²²⁶ This allowed the founding fathers of African states to rule their citizens as subjects but not as citizens. This is because populace did not contribute to determining how they are governed. As a result, Africa’s leaders have generally lacked the legitimacy to govern because they have ruled under laws that were designed to serve them and not the citizens. Modern constitutionalism seeks to address this anomaly by requiring the meaningful involvement of the citizens in determining how they are governed. Popular legitimacy is also important for understanding the allocation of powers in a constitution. During constitution-making, the people decided how they are to be governed and who should exercise powers in terms of the constitution. While it is impossible to reach an entire agreement between the citizenry on each provision of a constitution, such agreement could be reached through suitable procedures in the act of making a constitution. Herbst proposes the principle of collective autonomy in order to address the problem of traditional polity. He notes that the specific problems of decision-making in a multi-personal collective are part of collective

²²⁵ For example see the Constitution of the Republic of South Africa 1996, Preamble.

²²⁶ Independence Constitutions were like negotiated treaties. They were often more the product of ad hoc bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. See James Paul, ‘Some Observations on Constitutionalism, Judicial Review and the Rule of Law in Africa’ [1974] 35 Ohio State Law Journal 851, 855.

autonomy.²²⁷ To Herbst, a constitution is more legitimate if the more of those that agree to it are permanent subjects of power deriving from the constitution and the contentious decision are resolved through adopting liberal views which are aimed at addressing challenges facing the people for whom a constitution is written.²²⁸ In this regard, it may be stated where the liberal wishes of the people are not embodied in a constitution, such constitution is devoid of popular legitimacy.

The principle of popular legitimacy which indicates governance according to wishes of the people identifies the people as the source of state power and provides legitimacy for its exercise.²²⁹ A constitution acquires popular legitimacy where the constitution-making process is both meaningfully consultative and participatory and when the liberal views of the people are incorporated into the constitution.²³⁰ This occurs during the constitution-making process. The core components of popular legitimacy include transparent and fair constitution-making procedures, popular participation and the adoption of liberal views of the citizenry in a constitution. These factors confer factual legitimacy on a constitution.

Anyone may make a fundamental law. As often has been seen in Uganda, such fundamental laws reflect the maker's wishes; the decrees of a dictator, the orders of a military junta, or the declarations of an oligarchy. However, such constitutions will not acquire popular legitimacy

²²⁷ Toby Herbst, *Legitimation durch Verfassunggebung-Ein Prinzipienmodell der Legitimität staatlicher und supranationaler Hoheitsgewalt* (Baden-Baden: Nomos, 2003) 284.

²²⁸ *ibid.*

²²⁹ Hence, the 1995 Constitution (n 197), art 1(1) provides that power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

²³⁰ Böckenförde, Hedling and Wahiu (n 221) 4.

because they are framed pursuant to a particular agenda. Consequently, they are devoid of the necessary wishes of the populace that can often be reflected through constitutionalism and which bestow legitimacy on a constitution; instead, there are the dictators, military junta and oligarch's commands. They are more adhered to through coercion and therefore not sacrosanct.

A constitution is the highest law of the land, which defines and limits the powers of the government and its various branches, *vis-à-vis* each other and the people and provides the foundation for a state based on the rule of law.²³¹ Communities all over the world depend upon predetermined rules of conduct which have general acceptance and are enforceable. It therefore follows that the contents of a constitution provide an agreed framework for the operation of a state, guarantees rights and outlines mechanisms for their enforcement, as well as shaping the future of a nation. Popular support for a constitution gives it authority superior to other domestic laws. It also confers respect on a constitution, thereby protecting its sanctity and ensuring its longevity. Thus, constitutions should be built on the doctrine of popular legitimacy.

Constitutions that are made by one person or the elite who wield political power are most likely not to be respected by the citizenry and often end up discarded when governments that imposed them on the people are out of power. Similar to Uganda, Niger's experience illustrates this. Since 1959, the country has adopted seven constitutions which were all written by the ruling elite without the involvement of the people and they were repealed after each government was removed from power.²³² The absence of popular legitimacy for the Constitutions resulted in their

²³¹ *ibid* 5.

²³² Decalo, Samuel, *Historical Dictionary of the Niger* (Scarecrow Press 3rd Edition 1997) 41.

disparagement. For example, each government was overthrown by a military *coup* despite clear provisions in some of the fundamental laws which prohibited armed seizure of power.²³³ This may be because the people of Niger did not view the constitutions as made by them but made for them by the governments which lacked popular support. It is exactly for the same reasons that Ugandans have denigrated previous fundamental laws. Uganda's and Niger's experience indicate that the consensual nature of constitutions lowers the underlying risk of coups and constitution disparagement in the emerging political environment.

The Roman dictum of '*What concerns all must be decided by all*' is very relevant in constitution-making. A constitution that has been achieved through popular participation commands respect and support, and political leaders are more likely to desist from illegally tampering with it as this would create a public uproar.²³⁴ The manner in which a constitution is made and approved may also safeguard its sanctity. Constitutions that emerge in the aftermath of conflicts are often as a result of negotiated settlements and competition between many forces. They come onto the public agenda when it is time to change to better political and legal systems. During constitution-making exercises, people search for constitutions that will facilitate the resolution of past and modern problems of the state and of governance. Therefore, constitutions often reflect the

²³³ *ibid* 22. See Constitution of the Republic of Niger 1989, art 52(c); Constitution of the Republic of Niger 1992, art 57(a); Constitution of the Republic of Niger 1996, art 55(b).

²³⁴ For example attempts to repeal the presidential terms limits form the Constitution of the Republic of Benin 1990 was fiercely resisted by the citizenry and the judiciary. See Bruce Magnusson, 'Testing Democracy in Benin' in Richard Joseph (ed), *State, Conflict and Democracy in Africa* (Lynne Rienner Publishers 1999) 203, 211; also in Burundi, attempts to amend the popular constitutions failed see Patrick Nduwimana, 'Burundi's ruling apart fails in its first bid to change the constitution' *Reuters*(on-line, 21 March 2014) <http://uk.reuters.com/article/2014/03/21/uk-burundi-politics-idUKBREA2K1MO20140321> accessed 20 April 2014.

struggles of the people and provide foundations of renewed hope. It is therefore understandable that people insist upon processes of legitimising constitutions that are inclusive and democratic. When one group dominates the process, the constitution-making process fails to reach a genuine consensus among the citizenry. This concept has both philosophical and practical connotations. The practical element is satisfied through popular involvement while the philosophical element is fulfilled through addressing the challenges facing the state.

In conclusion, as Tobias Herbst notes, the exercise of sovereignty is only legitimate, if done within a constitutional framework and a constitution itself is only legitimate if it is given by the constitutional authority- the citizenry.²³⁵ I refer to this as popular legitimacy.

5.2 Legal legitimacy as an essential ingredient of a constitution

On the other hand, a constitution acquires legal legitimacy when it embodies principles of constitutionalism. Charlton Roger writes that the modern political concept of constitutionalism establishes a constitution as the supreme law which integrates the way the citizens choose to be governed, democracy and a limited government.²³⁶ He contends that the legal legitimacy of a constitution derives from popular belief and acceptance that the actions of the government are legitimate because they abide by the law codified in a constitution which is founded on acceptable constitutional norms.²³⁷ Carl Friedrich observes that in dividing political power

²³⁵ Herbst (n 227) 19.

²³⁶ Charlton Roger, *Political Realities: Comparative Government* (Longman 1986) 23.

among the organs of government, a constitution effectively restrains the actions of the government and, only this way, it is legally legitimate.²³⁸ Therefore, principles of constitutionalism that are aimed at defining and limiting the nature and parameters of the exercise of state powers bestow legal legitimacy on a constitution. According to Herbst, minimising the abuse of state power and the protection of freedom and individual rights have historically always been a central aim of a constitution²³⁹ For Herbst, it is still the central precondition for constitutional legitimacy.²⁴⁰ Therefore, the more the constitution can reach these aims, the more legitimate it is. Gretchen Carpenter contends that where a constitution adheres to agreed principles such as the doctrine of separation of powers, the rule of law and it embodies fundamental democratic principles, it is seen as an effective guarantee of rights and liberties, and can be said to be a constitution born out of constitutionalism.²⁴¹ Dante Gaytman writes that the idea behind constitutionalism is to design constitutions that should be capable of promoting respect for the rule of law, separation of powers and democracy, rather than just documents that are to be used by politicians to manipulate the people.²⁴² Therefore, during constitution-making, efforts to promote democracy and the rule of law, minimise opportunities to misuse state power and to eradicate authoritarianism, legal legitimacy is a critical element for consideration.

I will now discuss the principles that embody constitutionalism in a constitution.

²³⁷ *ibid* 24.

²³⁸ Carl Friedrich, *Constitutional Government and Politics, Nature and Development* (Friedrich Press 2007) 41.

²³⁹ Herbst (n 227) 104.

²⁴⁰ *ibid* 106.

²⁴¹ Gretchen Carpenter, *Introduction to the South African Constitutional Law* (Butterworth 1987) 9.

²⁴² Dante Gatmaytan, 'Can Constitutionalism Constrain Constitutional Change?' [2010] 3 *Northwest Interdisciplinary Law Review* 22, 32.

5.2.1 Liberal democracy

While popular legitimacy seeks inclusiveness, this should not compromise substantive agreements on key constitutional principles or undermine the rights of minorities. Robert Dahl insists that ‘every advocate of democracy of whom I am aware of includes the idea of restraints on majorities’.²⁴³ In any society, there is always a risk that the majority will take advantage of the minority if they are not restrained. So, in order to prevent the majority from tyrannising the minority, a constitution must be designed to achieve the protection of the minority.²⁴⁴ Therefore, it is not democracy in the conception of views of the majority that must be written in a constitution but principles of liberal democracy that seeks to moderate the views of the majority for the protection of the minority. The added element which seeks to constrain adds liberalism to democracy. Liberal democracy in the constitution defined the character of state. The purpose of a constitution is seen as to limit the authority of the powerful such as the majority and the government for the protection of the minority. It therefore emphasises separation of powers and the rule of law which are necessary checks and balance for anyone exercising state power.

A constitution may promote liberal democracy through ensuring that its mechanisms intended to protect minority rights are sufficiently fastened. For example, article 160 of the Constitution of the Republic of Angola 1992 prohibits amendments of its provision guaranteeing fundamental rights, freedoms and guarantees to citizens; a state based on the rule of law and party political pluralism; separation of powers and the independence of courts. Similarly, article 241 of the

²⁴³ Robert Dahl, *A Preference to Democratic Theory* (Chicago University Press 1965) 36.

²⁴⁴ Carpenter (n 240) 21

Constitution of Columbia 1991 empowers the Constitutional Court to review any proposed amendment to the Constitution even where such proposal is supported by the majority/

In some countries, constitution-making processes have been a subject of judicial supervision in order to ensure that the resulting fundamental law embodies principles of liberal democracy, among other aims. South Africa is one such example where the Constitutional Court played an important and unique role in the writing of the Constitution of the Republic of South Africa 1996. The various political parties hotly contested the role of local governments in the post-apartheid South Africa. The Democratic Party and the Inkatha Freedom Party wished for the powers of local governments to be provided for under the new constitution while the majority party- the African National Congress (ANC), sought that the new constitution should permit Parliament to pass law for the purpose of defining the powers of local governments.²⁴⁵ Principle XXV of the draft Constitution presented to the Constitutional Court in May 1996 did not convey an overall structural design or scheme for local governments and their functions. It also did not indicate how local government executives were to be appointed, how they were to make decisions and their formal legislative procedures, thus reflecting the interests of the ANC. Meanwhile, the ‘thirty-four Principles’²⁴⁶ required that a framework for local government powers, functions and structures shall be set out in the new constitution.²⁴⁷ The Constitutional

²⁴⁵ Jeremy Sarkin, ‘The Political Role of the South African Constitutional Court’ [1997] 114 South African Law Journal 134, 138.

²⁴⁶ Early political negotiations produced an agreement on 34 fundamental and legally binding principles, including commitments to a unitary state with common citizenship, the powers of local government, racial and gender equality, and constitutional supremacy. These principles served not only as a foundation for the [interim] constitution but also as a framework for negotiating and drafting the Constitution of South Africa 1996. They were also important for bringing the independent home lands to the negotiations discussions. *ibid* 135.

²⁴⁷ Constitution of the Republic of South Africa 1993, Principle xxiv , Schedule 4 as amended by s 13(a) of Act 2 of 1994.

Court held that Principle XXV, as provided for under the draft Constitution, did not provide an adequate framework for the structures of local government and it ordered that the draft Constitution should be amended.²⁴⁸ The Court struck down the provision of the draft Constitution that was favoured by the majority ANC and, in doing so, it provided a legal safeguard against the majoritarian view, allowing for liberal democracy.

5.2.2 Separation of powers

A constitution embodies a social contract that limits the use of power by a government for the benefit of the citizens in exchange for their allegiance and support.²⁴⁹ The term constitutionalism represents this idea of limiting the use of state power to avoid its abuse, founded on the doctrine of separation of powers. It embodies the fundamental principles manifested in a constitution to prevent the concentration of power in one person, a body or one group. This traditional conception sees the separation of powers in terms of the executive, legislature and judiciary. Whichever of the three arms of government is given the power to exercise; there must be constitutional limit of that power and institutions which guarantee that power is exercised responsibly for the common good of the citizenry.²⁵⁰ A limited government that ensures the distribution of power is seen as an effective guarantor of the rights and liberties, a guarantee formally incorporated in a structured form in a constitution.²⁵¹ Constitutionalism is a concept

²⁴⁸ *Certification of the constitution of South Africa 1996* (CT 23/96) [1996] ZACC26.

²⁴⁹ *Böckenförde, Hedling and Wahiu* (n 221) v.

²⁵⁰ *Gatmaytan* (n 205) 29.

²⁵¹ *Gretchen Carpenter* (n 204) 23.

whose main fixture is a clear defined mechanism that ensures that the limitation placed on any person who is exercising state power can be legally enforced.²⁵² The concept of separation of power is born out of the pessimism about intentions of political leaders who, even though they might mean well, can act selfishly and abuse state power. The goal is to maximise the protection of the citizenry from one another and to minimise the opportunities for government to harm citizens.²⁵³

The classical theories of the French and American Revolutions emphasises the essence of the principle of separation of power. In the American Revolution, the creation of the Constitution of the United States of America 1789 was firstly as a method to protect the people from public authority.²⁵⁴ The constitution stands at the top of legal hierarchy because it emerged from a constitutional convention, which separates it from legislation.²⁵⁵ By this way of separation of power, the individual rights of citizens should be saved from violation. A similar approach can be found in the works of Emanuel Sieyes, the paramount theorist of the French Revolution. Sieyes comprehends a constitution as a means to protect the declaration of the basic rights and through separation of power from the abuse of power too.²⁵⁶ Separation of powers aims at preventing tyranny.

²⁵² Gatmaytan (n 205) 30.

²⁵³ Stephen Elkin and Karol Soltan (eds), *A New Constitutionalism; Designing Political Institutions for a God of Society* (University of Chicago Press 1993) 21

²⁵⁴ Christoph Ritzer, 'Constitutional Legitimacy: Thoughts on Tobias Herbst's Legitimation *durch Verfassunggebung*' [2004] (5) 4 German Law Journal 403, 407.

²⁵⁵ Erick Thompson, *Popular Sovereignty and the French Constituent Assembly 1789-91* (Manchester University Press 1952) 100.

²⁵⁶ Emanuel Sieyes, *What is the Third State?* M Blondel (trans), S Finer (ed) (London Phaidon Press 1964) 34.

5.2.3 The rule of law

The rule of law is a cornerstone of contemporary constitutionalism.²⁵⁷ This can be demonstrated by its role in cementing transitions from authoritarian and totalitarian regimes to constitutional democracy in Eastern Europe and elsewhere.²⁵⁸ It is therefore an ideal worth striving for in the interests of good governance, and in an effort to eradicate autocratic rule. As Michel Rosenfeld aptly notes, in the absence of the rule of law, contemporary constitutionalism would be impossible.²⁵⁹ Beyond that, it is important to define the characteristics that the rule of law must possess in order to help sustain constitutionalism. According to Tom Bingham, the rule of law dictates that comprehensible and accessible written laws, whether constitutions or legislations, guide the courts, governments and everyone's decisions and actions.²⁶⁰ There is also an additional requirement that the rule of law must conform to clearly defined and commonly accepted legal values.²⁶¹ It may therefore be stated that the rule of law is not inferred from what a constitution provides, but from a constitution's adherence to accepted legal norms. Moreover, the

²⁵⁷ Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity' in Michel Rosenfeld (ed), *Constitutionalism, Identity and Legitimacy* (Duke University Press 1994) 3, 3.

²⁵⁸ The rule of law has been one of the founding principles on which Constitutions in Hungary and Poland were built in order to facilitate the transition from authoritarian rule to constitutional democracy, See Mark Brzezinski and Leszek Garlocki, 'Judicial Review in Post-Communist Poland: The Emergency of a Rechtsstaat?' [1995] 31 *Stanford Journal of International Law* 1, 35; also so see Krisztina Morvai, *Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court* [Fall 1993- Winter 1994] 2 (4) *East European Constitutional Review* 1, 32.

²⁵⁹ Michel Rosenfeld 'The Rule of Law and the Legitimacy of Constitutional Democracy' [2001] 74 *South California Law Review* 1307, 1307.

²⁶⁰ Tom Bingham, *The Rule of Law* (Penguin Press 2010) 8.

²⁶¹ *ibid.*

rule of law must apply fairly and consistently to everyone, including government officials and everyone must have access to justice and the enforcement of the laws.²⁶² Its essence is that all persons and authorities within a state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect generally in the future and publicly administered in the courts.²⁶³ A commonly accepted and practical, rather than theoretical, conception of the rule of law adds an element of justice to a constitution. So, in addition to the law being predictable, accessible and universally applicable, the rule of law requires a just legal system. Therefore, the rule of law demands more than merely adhering to a validly promulgated constitution. A constitution must encompass equality and human rights and must not discriminate unjustifiably among classes of people.²⁶⁴ Indeed, a constitution should have the force of law and thus its provisions limiting the powers of government and those devoted to the protection of fundamental rights may become part and parcel for the rule of law regime.²⁶⁵ Thus, constitutions express commitment to the rule of law by establishing their supremacy.²⁶⁶ The implied belief is that they embody accepted principles of the rule of law which are superior to other domestic laws. It is for the same reason why domestic law may be adjudged unconstitutional if it falls short of promoting and protecting equality, human rights and other

²⁶² Nora Hedling, 'A Practical Guide to Constitution Building: Principles and Cross-cutting Themes' (International Institute for Democracy and Electoral Assistance 2010) 9.

²⁶³ Bingham (n 260) 11.

²⁶⁴ *ibid* 10.

²⁶⁵ For example in the case of *Marbury v. Madison* 5 U.S. 137.1 Cranch 137 2 L Ed.60 (1803), the Supreme Court of the United State of America announced for the first time the principle that a court may declare an act of Congress void if it is inconsistent with the Constitution.

²⁶⁶ For example the Constitution of the Republic of South Africa 1996, art 2 provides that 'this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations by it must be fulfilled'.

values enshrined by a constitution.²⁶⁷ Finally, in terms of institutional frameworks necessary for constitutionalism, the rule of law appears to rest on a paradox. With regards to protecting fundamental constitutional rights, the rule of law seems to be on the side of the citizenry; at least to the extent that constitutional law can be invoked by the citizenry against laws and policies of the state.²⁶⁸ In contrast, in terms of popular democracy and of implementation of the will of the majority through law, the rule of law seems to be decidedly on the side of the state and often against the citizenry.²⁶⁹

5.2.4 Safeguards against arbitrary constitutional amendments

The absence of sound safeguards on the ‘amendments’, ‘revisions’ or ‘alterations’ of a constitution makes it extremely difficult for a constitution to serve as the basis of and to promote constitutionalism.²⁷⁰ This is because constitutionalism is premised on defined mechanisms of ensuring limitations on a government, of which control over governments’ arbitrary amendment of a constitution is one. A clearly set out and higher standard for the amendment of the constitution than of ordinary legislation must be built into a constitution in order to discourage rash changes to the fundamental law. The logic is that if rights and founding values contained

²⁶⁷ In the case of *Muwanga Kivumbi v Attorney General* Constitutional Petition No.9 of 2005, the Constitutional Court of Uganda declared provisions of the Police Act, Chapter 303 unconstitutional because they offended the right to freedom of assembly as protected by Art.29 (d) the Constitution of the Republic of Uganda 1995.

²⁶⁸ *ibid.*

²⁶⁹ This seems to be the case whenever a citizen is coerced to abide by laws which she or he deems oppressive and unjust, notwithstanding that such laws were approved by duly elected legislative majorities.

²⁷⁰ The terms amendment, revision and alternation have been used in several African Constitutions to mean the process of changing a constitution. For example the Constitution of the Democratic Republic of Congo 2006, arts 218-220 use the term ‘revision’; the Constitution of the State of Eritrea 1997, art 59 uses the term ‘amendment’; while the Constitution of the United Republic of Tanzania 1977, s 98 and 99 refer to the same process as ‘alteration’.

therein are to be protected, they would need some security. However, in contrast, if governments are to be based upon the consent of the governed, constitutions should be alterable to allow for the people to reflect changes in value systems across the population. Constitutions perceived as reflection of the people's struggle and hopes must naturally evolve to meet the new hopes of the societies that they are written for. They are not a final completed works, but ideal products of an open society and pluralism, as well as a subject to ongoing development. Therefore, the need to guarantee that durability of a fundamental law must also not make it unalterable at all.

The paradox and the problem of amending founding values of a constitution in order to reflect the changes in value systems across societies are a subject of controversy in the United States of America. Charles Beard argues that the Constitution of the United States of America 1789 was based only on the avarice and greed of its authors and that economics was the sole reason that the country was formed.²⁷¹ According to Beard, it was the economics of exclusion, greed and elitism that the framers embedded in the Constitution.²⁷² In contrast, Forest McDonald posits that they are philosophical influences as well as the economic ones that guided the minds of the founders of the United States of America and their contemporaries.²⁷³ He contends that exclusion, elitism and avarice were not some of those principles and philosophies on which the United States of America Constitution was founded, but it was premised on the protection of the individual against the state.²⁷⁴ Although Beard and McDonald disagree on the founding values on which the

²⁷¹ Charles Beard, *An Economic Interpretation of the Constitution of the United State* (Macmillan 1921) 23.

²⁷² *ibid.*

²⁷³ Forest McDonald, *E Pluribus Unum: The Formulation of the American Republic: 1776-1790* (2nd Edition, Liberty Fund Inc, 1979) 37.

²⁷⁴ *ibid.*

United States of America and its Constitution were built, the Supreme Courts' decision in *District of Columbia v Heller*²⁷⁵ which declared that the right to use weapons for self-defence and to defend personal property as protected under the second amendment- a constitutional provision which is unamendable, maybe viewed as affirming both their positions that the Constitution was founded on values that protect economic and property rights of individuals, and also the rights of the individual to defend themselves against the state. Although the decision in *Heller* may have shocked, saddened and outraged many who believe that the constitutional right to bear arms should be repealed in order to ensure that many Americans do not continue to die senselessly, according to Brian Doherty, the principle laid out by the Court in *Heller*, is perfectly natural to nearly any American of the founding era.²⁷⁶ Doherty contends that the right to bear arms has its origin in the founding values of the American Constitution - the idea that the government would never dare become tyrannical, since the people as a body would have the superior firepower to fight back.²⁷⁷ Therefore, although the right is a subject of disagreements, it may be stated that it is founded on unamendable founding values of the Constitution. It is important to note that although they are commonly referred to as amendments; the first ten amendments to the Constitution of America 1789 are collectively known as the Bill of Rights.²⁷⁸ They were proposed and added to the Constitution to assuage the fears of the anti-federalist who

²⁷⁵ 554 U.S, 570 (2008).

²⁷⁶ Brian Doherty, *Gun Control on Trail: Inside the Supreme Court Battle Over the Second Amendment* (Cato Institute 2009) 11.

²⁷⁷ *ibid.*

²⁷⁸ John Vile, *The Constitutional Making Proceeds in American in American Political Thought* (Praeger 1992) 19.

were against the ratification of the Constitution.²⁷⁹ Therefore, they may be conceived as part of the original fundamental law but not as a further amendment to it.

Notwithstanding the position in the United States of America, a constitution must go hand in hand with the progress of human mind and they should be alterable to address the challenges facing societies for which they are made. However, there must be a higher degree of acquiescence to constitutional amendments than is required to pass laws. To achieve this aim, Brazil has built into its constitution safeguards to ensure that constitutional revisions attain popular approval.²⁸⁰ At the same time, the rule of law, liberal democracy and separation of powers may be considered to be so entrenched in constitutionalism that their absence, or revision to remove them from a constitution, would render the resulting document legally illegitimate.²⁸¹

A government which exercises state powers granted by the people must not sanction constitutional alterations not proposed by the people. It must also be wary of changes to the fundamental law that are not formally sanctioned by the majority. As Jean-Jacques Rousseau the most unambiguous of all proponents of democracy argued, the moment a people adopts representatives it is no longer free.²⁸² This distrust of political leaders is based on a well-founded belief that politicians, even in representative democracies, may have a particular political agenda

²⁷⁹ *ibid.*

²⁸⁰ For example the Constitution of the Federative Republic of Brazil 1988, art 60 requires a super-majority for any amendment.

²⁸¹ Under the Constitution of the People's Democratic Republic of Algeria 1996, art 178 the scope of matters that are not subject to amendment include fundamental liberties and citizens' rights, and the democratic order based on multiparty system.

²⁸² Maurice Cranston (tr), *Jean-Jacques Rousseau, The Social Contract* (1987 Penguin) 24.

that does not represent the views of the citizenry. Political leaders might therefore, be a source of tyranny unless additional stringent requirements are interposed to prevent them. Thus when it comes to amending its key provisions, the Constitutional Court of Benin affords higher consideration to the direct expression of the people over the decision of their representatives.²⁸³

Some countries have opted to subject constitutional amendments to judicial scrutiny. Judicial activism has expanded this realm to ensure that even where supported by the majority, constitutions may not be altered so substantially as to erode core values of constitutionalism or founding principles of a constitution. For example, the Colombian Constitution grants its Constitutional Court the authority to review constitutional amendments only with regards to their procedure and not their substance.²⁸⁴ The provisions of the Constitution are divided into those that may be amended by Congress and the Constituent Assembly, and others that may be amended by Congress and the people through a referendum.²⁸⁵ This notwithstanding, the Colombian Constitutional Court has developed a doctrine according to which a procedural judicial review must include whether an amendment was issued by the competent authority.²⁸⁶ According to the Court, the power to amend a constitution must be distinguished from the power to replace a constitution. The Court has the authority to examine whether constitutional amendments truly modify the constitution or completely replace it, and the latter

²⁸³ *DCC 06-074* of 8 July 2006.

²⁸⁴ Constitution of the Republic of Colombia 1991, art 241.

²⁸⁵ *ibid* art 374.

²⁸⁶ Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' [2013]11(3) *International Journal of Constitutional Law* 339, 342.

would be considered *ultra vires*.²⁸⁷ This thinking is inspired by two ideologies. First, that there are unamendable characteristics in a constitution and second that constitution alterations are subject to judicial review.

Courts are also deemed as competent to amend constitutions. The Supreme Court of the United States of America effectively amended the country's Constitution when it ruled in *Roe v Wade*²⁸⁸ that the right to privacy protects a woman's right to an abortion. The right to privacy is not expressly provided for in the text of the Constitution. Likewise, the same Court effectively amended the Constitution when it struck down campaign finance limits on independent corporate speech.²⁸⁹ Constitutions in some countries authorise courts to review the constitutionality of laws and to interpret the constitution.²⁹⁰ Such judicial powers may be said to grant the courts power to 'look into' a constitution, that is, to apply and interpret it. Although the courts are not often vested with the powers to repeal a provision of a constitution and often an Act of Parliament is required to affect the amendment, the implication of such a judicial review powers is the same as an actual powers to amendment because courts may declare a provision of the constitution to be in conflict with another other and, therefore, initiate the process of amending a constitution.

It may therefore be stated that various jurisdictions have imposed stringent legal requirements when it comes to changing the constitution to ensure that the original 'social contract' between

²⁸⁷ *ibid.*

²⁸⁸ 410 U.S. 113 (1973).

²⁸⁹ See *Citizens United v Federal Election Commission* 558 US310 (2010).

²⁹⁰ For example see Constitution of Uganda 1995, art 137; Constitution of the United States of America of America 1789, arts II and VI.

the people and the state which was founded on popular and legal legitimacy is not easily altered to satisfy the desires of a few.

In the final analysis, the presence of principles of constitutionalism in a constitution denotes legal legitimacy of a constitution. Their absence, however, symbolises a lack of consensus based on constitutional norms. Therefore, a constitution should embody principles of constitutionalism that are aimed at minimising the opportunity of abusing state power for the protection of the citizenry. A constitution that is devoid of constitutionalism signifies misallocation of state powers and it likely to allow for its misuse. It is also indicative of a society that is governed according to the constitution as opposed to the rule of law. A society under the rule of law is governed according to accepted legal norms of which constitutionalism is one. It is within the context and definition that I have discussed in this section that the terms constitutionalism and legal legitimacy are used in this study.

6. Mini-conclusion

The constitution-making process took place against a backdrop of a number of NRM initiatives designed to ensure that its objectives of dominating and entrenching power were met. It was also stricken by the same fate which afflicted erstwhile fundamental laws, that is, it was commandeered by those who wielded political power during.

The exercise provided the first opportunity for the majority of Ugandans who were excluded from the making of the past fundamental laws, to contribute towards developing the first ever

truly home-grown constitution and to rethink the allocation and use of state powers. It however cannot be claimed that the process of making the 1995 Constitution facilitated the meaningful contribution among the majority of Ugandans to enable them to determine how they are governed and to reconstruct the institution of the presidency.

The presidency as designed by the framers of 1995 Constitution may be conceived as result of a fundamental law, whose provisions were dictated by an NRM government which was determined to fortify power. Efforts to achieve this aim can be traced to occurrences during the constitution-making process which favoured the NRM. The manner in which the bodies that framed and adopted the 1995 Constitution were constituted, the legal instrumentalities that were established for the purpose of adopting the new constitution and the disregard of the legitimate liberal wishes of Ugandans do not merit credit to the process of constitution-making, or the NRM's role in ushering in a truly home-grown constitution founded on constitutionalism.

It may also be said that the NRM did not act differently from the governments before it in that by coming to power through violence and unconstitutional means, they managed to establish a fundamental law whose provisions they dictated, to legitimise their exercise of state power and to entrench their rule. As Akinola Aguda observes:

Most governments that are founded upon wielding the gun, or upon palpable illegality...can hardly be expected to have much regard for legality and the rule of law... most principles of legality and the rule of law are ridden rough-shod as if they do not exist or as if they are obstacles to be crushed.²⁹¹

²⁹¹Akinola Aguda, 'The Judiciary in a Developing Country' [1984] 7 Malayan Law Journal 131, 143.

In this context, having come to power through an armed struggle, the NRM could not be expected to preside over the process of making a constitution that is founded on norms of constitutionalism.

Joe Oloka-Onyago aptly sums up the interim NRM government's role in the transition. He writes that the NRM acted as both mother and midwife in the transition process and from the first point, the NRM or at least President Museveni, saw themselves as critical components of the post-interim period.²⁹² It should be noted that the Constituent Assembly is not always the final body that adopts a constitution. In a country with an unenviable record of exclusive constitution making, to be more transparent, the NRM government had the option of returning the Constitution which was approved by the Constituent Assembly to the people for a referendum before promulgation. In France, for instance, President Charles De Gaulle in 1958 put before the French people the final draft of the Constitution of France for approval.²⁹³

Aili Tripp sums the constitution-making exercise as follows:

At no time was Uganda's constitution-making process a neutral and open process, free of manipulation; the entire exercise was part of a broader political agenda of those in power who sought to use the new constitution to remain in power at all costs. From the outset, this limited what could be accomplished through the process of adopting a new constitution. Though the level of popular engagement in the process was unprecedented, that engagement had little impact on the substance of the constitution and may have lent unwarranted legitimacy to the more undemocratic aspects of the process and the resulting Constitution, giving the Movement (NRM) more time to entrench itself.²⁹⁴

²⁹² Oloka –Onyago (n 120) 166.

²⁹³ Sieyes (n 257) 19.

²⁹⁴ Aili Tripp (n 119) 172.

James Rwanyarare observes that:

President Museveni had a personal hand in the making of the constitution: First of all, he wanted to continue entrenching his movement system of government in power thereby fighting with all his mechanics to influence the constitutional debate proceedings. He was the architects of the whole thing.²⁹⁵

Commenting on the criticisms of the role of the Constitution Commission during the exercise, the Chairman of the Constitution Commission argued that:

Such criticisms are based on the mistaken understanding of the role of the Commission as a technical committee of experts and specialists charged with the task of collecting the views of the people, analysing them and engaging the government and the country in the process of making a new constitution. It is the people themselves who will write the final version of the constitution.²⁹⁶

Benjamin Odoki's belief that the people would write the final version of the new constitution conflicts with the manner in which the Constitution Commission that he chaired consistently disregarded the liberal wishes of the majority of Ugandans who commented on the presidency. It also cannot be said that the Constituent Assembly which adopted the final version of the 1995 Constitution was constituted in such a way that would indicate that it was truly representative of the people.

A survey carried out by the Centre for Basic Research in Uganda concluded that there was strong support for establishing an Electoral Management Body whose members are nominated by all political parties in order to insulate it from the influence of a serving president and government; and also that there was strong opposition to putting that armed forces at the

²⁹⁵ Quoted by Sauda Nabukenya, 'Why Constitutions in Africa Do Not Stand the Test of Time: Lessons and Perspectives from Uganda' (Constitutional-Building in Africa Conference, Cape Town, 6 September 2013).

²⁹⁶ Benjamin Odoki, 'Democratic Writing of a Democratic Constitution' [1993]1 (2) East African Journal of Peace and Human Rights 195, 199.

command of the presidency.²⁹⁷ However, these controversial aspects did not make it into the draft Constitution. It is therefore reasonable to conclude that they were excluded because their inclusion would have limited the powers of the presidency and negated the NRM's ability to control the electoral process and also restrict its access to the potent instrument of coercion, the armed forces.

It may therefore be stated that the presidency as designed the framers of the 1995 Constitution is devoid of popular legitimacy because it is not founded on the legitimate liberal views of Ugandans. As Jule Lobel notes, it is the free involvement of the people in determining how they are governed and the representative nature of the bodies that adopt a constitution which are determinative of the popular legitimacy of a constitution.²⁹⁸ The design of the presidency also lacks legal legitimacy because it does not conform to the norms of constitutionalism that are aimed at circumscribing state power in order to avoid its abuse.²⁹⁹

It is through a focused and diligent analysis of the events and legal instruments which shaped the constitution-making process that we can best understand influences behind the design of model of the presidency in the 1995 Constitution. It suffices to conclude that there was no real attempt by the framers of the 1995 Constitution to rethink and limit the power of the presidency, despite a history of self-grants of unlimited state power and its misuse. Like fundamental laws before it,

²⁹⁷ Joe Oloka-Onyango and SamTindifa, 'Constitutionalism in Uganda: Report of a Survey and Workshop of Organised Groups' (Centre for Basic Research Working Paper No 10, 1991) 28.

²⁹⁸ Jule Lobel (n 224) 871-872.

²⁹⁹ Constitutionalism is a concept whose main goal is to bring the government under control by limiting its powers see Gatmaytan, (n 242).

the 1995 Constitution may also be perceived as another law, this time authored under the leadership of President Museveni and his NRM government for their sustenance in power.

In the following chapter, I will critically analyse the powers and privileges of the presidency as established by the 1995 Constitution of Uganda.

Chapter Four

Critical Analysis of the Model of Executive Presidency as Established By the 1995 Constitution of Uganda

1. Introduction

This chapter critically analyses the model of the presidency created by the 1995 Constitution of Uganda. It focuses on the powers and the privileges assigned to the presidency under the Constitution and the manner in which they have been exercised. Several arguments form the contents of this chapter. It will be contended that the presidential excesses as were provided for in fundamental laws before 1995 re-emerged in the 1995 Constitution and thus, Constitution fails to tame the institution of the head of state whose powers and privileges originated from the fundamental laws that were designed without the involvement of the majority of Uganda and which were aimed at granting heads of state and governments, under whose influence they were written, permanent ownership of power. It will also be inferred that the 1995 Constitution creates a presidency with such enormous powers that it has become impossible to meaningfully subject the presidency to elections and to supervise the manner in which presidential authority is exercised. Thus, the current occupier of the office of the president does not depend on the Uganda citizens' votes for his power, and neither can his actions be sufficiently constrained.

Furthermore, it will be argued that the constitutional constraints in the 1995 Constitution which masquerade as imposing checks and balances on the presidency in the exercise of its constitutional roles were purposely or negligently not secured effectively and in some cases they have been disregarded by President Museveni. It is therefore, the presidency's control over the instruments of power and institutions of government and his flouting of the Constitution that President Museveni depends on for power. In this regard, the 1995 Constitution may be perceived as a fundamental law designed to fortify President Museveni's incumbency.

The chapter will also demonstrate that the allocation of some of the powers and privileges to the presidency as provided for by the 1995 Constitution are not always based on valid reasons. It will also be argued that presidential authority must be exercised for the purposes envisioned and granted by citizenry. The chapter also aims to discuss how Constitutions and Courts in other jurisdictions have defined the scope of presidential authority.

Section 2 sets out the principles for allocating and transferring political power found in the 1995 Constitution, thereby providing a background to understanding the allocation of powers in the Constitution. Section 3 analyses the design of the presidency in the 1995 Constitution. It investigates the reasons for granting some of the powers and privileges to the presidency, and it proposes how presidential authority may be exercised. It also discusses how President Museveni has exercised the power and privileges of the presidency. Section 3 also examines the designation of presidents in African Constitutions; firstly to demonstrate that the model of presidency found in the 1995 Constitution is fairly common in most African Constitutions, and secondly to highlight the implications of such presidential models on democracy and good

governance in many parts of the continent. Section 4 compares the designations of the presidency in the Constitution of Benin 1990 to the presidency provided under the 1995 Constitution of Uganda. The aim is to not only to draw lessons for Uganda on how to create a limited presidency, but also for other African countries. The concluding section reflects on the effects of the designation of the executive president and the smooth transfer of power in Uganda.

2. Fundamental principles for allocating, exercising and transferring political power under the 1995 Constitution

With two hundred and eighty-eight articles and seven schedules, the 1995 Constitution is one of the most voluminous in the world.¹ In the Preamble, the framers of the Constitution recall the country's history which has been characterised by political and constitution instability, making reference to the period after independence and the subsequent twenty-three years.² They also recall the struggles of the people against the forces of tyranny, oppression and exploitation,³ perhaps making reference to the devastation that colonialism and authoritarian leaders have had on the country since its border were drawn. The Preamble envisages a better future for Uganda by establishing a socio-economic and political order through a popular and durable national constitution based on the principles of peace, unity, equality, democracy, social justice, freedom

¹ Constitution of India 1949 is the longest written constitution of any sovereign State in the world. It is made up of four hundred and forty-eight articles and twelve schedules. See United Nations Development Programme, 'Fast Facts; Democratic Governance' (United Nation Development Programme 2011) 3.

² Constitution of Uganda 1995 (The 1995 Constitution), Preamble.

³ *ibid.*

and progress.⁴ The Preamble declares that the National Objectives and Principles of State Policy enshrined in the Constitution are intended to 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.⁵ In other words, the framers of the Constitution outline the principles that explain its purpose and the normative foundation that guides the understanding of the Constitution as a whole. These principles contribute to a sense of unity among the citizenry and an enhanced belief in and commitment to the Constitution. They attempt to foster a link to the history and governance of the country, provide justification and rationalisation for the values on which the Constitution is built, and establish a connection between the citizenry and the Constitution. They also provide guidance for the interpretation of the Constitution and the application of the laws that flow from it.

The most important principle is one which encapsulates the principle of popular legitimacy. It states that it ‘all power belongs of the people⁶ who must be governed by their consent,⁷ through organs created therein, and whose personnel are elected or appointed in conformity with the rules and procedures laid down in it or other properly promulgated or enacted instruments and laws.’⁸

The Constitution prohibits any person or groups from taking or retaining control of the

⁴ *ibid.*

⁵ *ibid* National Objectives and Directive Principles of State Policy.

⁶ *ibid* art1(1).

⁷ *ibid* art1(3).

⁸ *ibid* art 1(4).

government of Uganda except in accordance with its provisions.⁹ A person who singly or in cooperation with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends the Constitution or any part of it or attempts to perpetrate any such act commits the offence of treason.¹⁰ All citizens of Uganda are empowered to and have the duty at all the times to defend the Constitution and in particular, to resist any person seeking to overthrow the constitutional order; and to do all in their power to restore the constitutional order after it has been suspended or overthrown, abrogated or amended contrary to its provisions.¹¹ These principles suggest a condemnation of *coup d'états*, any other form of unconstitutional change of government and self-grants or seizures of powers that are not founded on the will of the people. Any person or group of persons who resists the suspension, overthrow or abrogation of the Constitution commits no offence.¹² The 1995 Constitution is the supreme law of the country and has binding force on all authorities and persons throughout Uganda and any other law or custom that is inconsistent with any of its provisions is void at any rate, to the extent of the inconsistency.¹³

The duty imposed on the citizens to defend the Constitution and to be absolved of any penal consequences while doing so is a major innovation in Uganda's constitutional history in that for the first time in Uganda, the fundamental law puts the people, who are the source of power, at the center of the Constitution and makes it clear that citizens by this fundamental law, are

⁹ *ibid* art 3(1).

¹⁰ *ibid* art 3(2).

¹¹ *ibid* art 3(4).

¹² *ibid* art 3(5).

¹³ *ibid* art 2.

required to stop at nothing in defence of the constitutional order. It is aimed at preserving the sanctity of the fundamental law, at reconstructing the nation that has been scarred by the scourge of unconstitutional rule and at promoting the principles and values on which Uganda is to be built and developed. It is also aimed at demanding the conscious fulfillment by the citizenry towards the realisation of the aspirations provide under the Constitution. The emphasis on the preservation of the 1995 Constitution is certainly justified given the rate at which Uganda's post-independence leaders have undermined and abrogated constitutional orders in order to acquire and entrench power. However, the duty to protect the Constitution is also susceptible to abuse by persons who may take it upon themselves to carry out acts such as an armed usurpation of power in the defence of the Constitution. Would such armed usurpation of power in the defence of the Constitution be justified given that the Constitution prohibits all unconstitutional changes of government? Only the citizenry may amend a constitutional order and authorise the exercise of state power. Courts and Parliament as constitutional organs may also amend a constitutional order where their actions are supported by the citizenry or for the protection of the minority. However, the dilemma in Uganda before 1995 has been that the independence of constitutional organs from the executive has not been assured. In such circumstances where the constitutional order is restored immediately after the unconstitutional change of government, the answer to this question seems to be yes.

In relation to protecting the sanctity of the Constitution against arbitrary amendments or alterations, as it has been the practice of past heads of state and governments to abrogate and pass decrees that superseded the Republic Constitution; the 1995 Constitution prohibits any person or groups of persons from taking power except in a manner that is in accordance with its

provisions.¹⁴ It further states that the Constitution does not lose its force and effect even where its observance is interrupted by a government established by force or arms and as soon as the people recover their liberty, its observance shall be restored.¹⁵

Articles 259 to 263 outline the different procedures for amending the various provisions of the Constitution.¹⁶ All amendments require an Act of Parliament.¹⁷ Some require the approval of District councils.¹⁸ Parliament is authorised¹⁹ to amend the most fundamental provisions including, but not limited to the sovereignty of the people as the source of power,²⁰ the supremacy of the Constitution,²¹ the provision relating to prohibition of derogation from particular human rights and freedoms,²² the term limits on the presidency²³ and the political system.²⁴ A referendum however, must be held for the purpose of changing a political system²⁵ and for extending the term of five years that a president may serve.²⁶

¹⁴ See (n 9).

¹⁵ The 1995 Constitution (n 2), art 3(3).

¹⁶ *ibid.*

¹⁷ *ibid* art 259(2).

¹⁸ *ibid* art 261.

¹⁹ *ibid* art 260.

²⁰ See (n 6).

²¹ See (n 13).

²² The 1995 Constitution (n 2), art44.

²³ *ibid* art 105.

²⁴ *ibid* art 74(1).

²⁵ *ibid* art 260(1) (d).

²⁶ *ibid* art 26 (1) (f).

Although many of these provisions appear as statements of aspirations without any accompanying mechanisms for their enforcement, and as such appear superfluous and simply used to add to the general verbiage of the document, they are indicative of ‘the spirit’ of the 1995 Constitution as they set out an unambiguous commitment to the values which underpin it. The normative claims they make, the limitations they place on the exercise of power, and their expressions of how state power should be exercised are of legal significance. Their legal significance is similar to that of the principles of constitutionalism. Some of these values require additional specification before they impose a legal obligation. For instance, a commitment to defend the Constitution is enforced through more specific provisions in articles 50 (1) and 137 (1) of the 1995 Constitution which allows the citizenry to bring constitutional petitions to challenge the constitutionality of acts and omissions of the state. This, however, is not to say that those values such as the one which provides that all power belongs to the people, that are not supported by accompanying enforcement provisions, have no legal effect because they provide clear guidance to courts on the interpretation and implementation of the Constitution.²⁷ Read together, they form the fundamental principles for allocating and transferring political power in the 1995 Constitution.

²⁷ The Supreme Court of India relied on both written and unwritten principles of the Constitution of India 1949 to guide it on unforeseen issues or issues otherwise not specifically addressed in the Constitution. See *His Holiness Kesavananda Bharati v The State of Kerala and Others*, Supreme Court of India (AIR 1973 SC 1461); also see *The State v T Makwanyane and M Mchunu* Constitutional Court of the Republic of South Africa, Case No CCT/3/94.

3. Model of executive presidency as provided for by the 1995 Constitution

3.1 Desirability of maintaining an executive presidency

Similar to the Republic Constitution, the 1995 Constitution retains the notion of a domineering executive presidency.²⁸ This is injudicious given the role such past executive heads of state have played in undermining constitutionalism, democracy and human rights in the Uganda. However, according to the Constitution Commission, the change from an executive presidential institutional system was not the aspiration of the people of Uganda.²⁹ Indeed, there have been few changes in the basic structure of constitutions in the last ten years when considering transitions between parliamentary institutional frameworks on the one hand and presidential or semi-presidential institutional frameworks on the other.³⁰

It may well be that in considering institutional systems changes, states have maintained institutional systems that they are familiar with as a case of ‘better the devil you know’ without a reasoned basis for their continuation. In regards to Uganda, this appears to have been the situation as the Constitution Committee’s report neglects to make the case for the continuation of

²⁸ The 1995 Constitution (n 2), art 99.

²⁹ Republic of Uganda, *The Report of the Uganda Constitution Commission: Analysis and Recommendations* (Ministry of Justice and Constitutional Affairs 1992) (Odoki’s Report and the draft Constitution) 312.

³⁰ These include Brazil, France, the Gambia, Moldova, Slovakia and Sri Lanka. See Nora Hedling, ‘A Practical Guide to Constitution Building: Principles and Cross-cutting Themes’ (International Institute for Democracy and Electoral Assistance 2010) 13.

the executive presidential system.³¹ On the other hand, it has been argued that where executive presidential systems have been established in countries emerging from military dictatorship, a democracy of any kind stands a lesser chance.³²

Given the catastrophic experience Uganda has had at the hands of powerful executive heads of state, there is no reason why the country could not return to the system that it had immediately after independence when executive powers were shared between the presidency and parliament.³³ It has been argued that African countries have unanimously opted for strong executive presidential systems, after independence, because a strong presidency is a guarantee of strong government and a symbol of national sovereignty.³⁴ In contrast, evidence from South America suggests that executive presidential systems have been prone to executive versus legislative deadlocks and ineffective leadership, especially at the times when presidents are not supported by the majority in the legislature.³⁵

In the case of Uganda, history indicates that there have been no legislative dead-locks but instead, the tendency has been for strong executive heads of state to undermine the legislators and to bully them into obedience, for examples as Obote did when he imposed the Interim Constitution on the country and also dictated the provisions of the Republic Constitution. It is

³¹ Odoki's Report (n 29).

³² Jose Cheibub, *Presidentialism, Parliamentarism and Democracy* (Cambridge University Press 2007) 178.

³³ Uganda (Independence) Order in Council 1962 (The Independence Constitution), chapter VII.

³⁴ Goran Hyden, 'Political Representation, Stability and Development' (Developing Uganda Conference, LyngbyLand Brugsskole, 2-5 June 1994).

³⁵ Arend Lijphart, 'Constitutional Choices for New Democracies' [1991] 2 (1) *Journal of Democracy* 72, 84; also see Scott Mainwaring, 'Presidentialism in Latin America' [1990] 25 (1) *Latin American Research Review* 167, 170.

also evident that when the Republic Constitution was adopted, the propositions for designating a presidency which shared executive powers with the legislature, as was in the Independence Constitution, was dropped in favour of a powerful executive presidency in the Republic Constitution. The increment in powers to the presidency coincided with the contempt of constitutionalism and the beginning of dictatorship with disastrous consequences.

As the Constitution Commission indicated that Ugandans opted for the continuation of an executive presidency,³⁶ it was important for Ugandans and the bodies which framed the 1995 Constitution to ensure that the presidency did not degenerate into a dictatorship. To achieve this aim, the executive presidency had to be bounded by provisions in the new constitution which would provide sufficient checks and balances on the exercise of presidential authority. In summary, it is not objectionable for Uganda to have an executive presidency; the problem is the bestowal of such enormous powers on the presidency that it slides into autocracy.

I will now examine the effectiveness of the new measures designed to prevent a dictatorial presidency.

3.2 Effectiveness of some of the new measures intended to limit the executive presidency

The 1995 Constitution attempts to introduce some changes relating to institution of the presidency that were not found in erstwhile fundamental laws such as instigating direct elections

³⁶ See (n 29).

for the presidency.³⁷ Of course it is appropriate that a president, who exercises enormous state powers, enjoys many state privileges and holds the highest office in the land should have the mandate of the people as a whole. It is also suitable that a president should be elected by the majority of the electorate. Thus, the Constitution provides that the president should acquire more than fifty-percent of the total votes cast in presidential elections.³⁸ There is, however, a danger that direct elections for the presidency may encourage the belief that the mandate afforded to the president by the people permits the president to exercise constitutional roles without limits. This danger can only be overcome by constitutional safeguards against the misuse of presidential authority and the leadership style of a president. It should be remembered, as I have discussed in chapter two of this study, that Uganda's heads of state have exhibited little self-restraint in the past. There are also several welcome stipulations in the 1995 Constitution regarding the qualifications for the office of the president. One of these is that a person under a death sentence or a term of imprisonment exceeding nine months imposed by any competent court without the option of a fine is excluded from running for the office of president.³⁹ The Republic Constitution did not exclude a person serving a prison sentence from the presidential candidacy.⁴⁰

However, this prohibition does not appear to have any meaningful effect as it only excludes the presidential candidates who are serving such a sentence at the time of the presidential elections. Any person may contest the office of the president regardless of their criminal past. To weed out unworthy presidential candidates, the 1995 Constitution should have at least excluded persons

³⁷ The 1995 Constitution (n 2), art 103.

³⁸ *ibid* art103 (4).

³⁹ *ibid* art 102(c) read with art 80(2)(e).

⁴⁰ Constitution of the Republic of Uganda 1967 (The Republic Constitution), art 25(c) read with art 42(e).

who have been convicted of crimes such as murder, corruption or rape as well as those who have been involved in attempts to acquire power through unconstitutional means. This restriction could, of course, be contested by the person it affects before the Constitutional Court to avoid malicious disqualification.

There are also differences between the almost unlimited presidential authority under the Republic Constitution and the 1995 Constitution. For example, although a president in consultation with the cabinet may, by proclamation, declare a state of emergency,⁴¹ this power and the derogation from basic rights during a state of emergency are now closely controlled by Parliament and monitored by the Human Rights Commission.⁴² Furthermore, before assuming office, a president is required to take an oath to uphold, preserve, protect and defend the Constitution and the laws of Uganda, and to protect the welfare of the people of Uganda.⁴³ This provision suggests an intention to subject the president to the Constitution, at least in principle. The 1995 Constitution also introduces the possibility of the removal of a president on grounds of abuse of office or willful violation of the oath of allegiance, the presidential oath or any provisions of the Constitution or misconduct or misbehaviour.⁴⁴

A written notice signed by not less than one-third of all members of Parliament setting out the grounds for impeachment is required to commence impeachment proceedings against a

⁴¹ The 1995 Constitution (n 2) art 110(1) and (2).

⁴² *ibid* arts 46, 48, 50 and 110(3)-(8).

⁴³ *ibid* art 98(3).

⁴⁴ *ibid* art 107(1).

president.⁴⁵ The Speaker of Parliament is required within 24 hours after receiving the notice, to forward a copy to the president and the Chief Justice.⁴⁶ The Chief Justice, within seven days after receiving the copy is mandated to constitute a tribunal comprising three Justices of the Supreme Court to investigate the allegation presented in the notice; and to report its findings to Parliament stating whether or not there is a *prima facie* case for the removal of a president.⁴⁷ These impeachment provisions suggest that the judiciary and the legislature may dismiss a president for violations of the Constitution. The Constitution Commission opined that the impeachment process it proposed would be sufficient to ensure that a president who commits serious offences could be removed from office and, therefore, proposed immunity against legal proceedings for a president during the term of office.⁴⁸ This measure has however not been sufficient to curb the actions of President Museveni against the abuse of the Constitution. The fact is that despite several attempts to impeach the President for acts which amount to flouting the provisions of the Constitution, such as the appointment of General Aronda Nyakairima, a top official of the armed forces, as the Internal Affairs Minister⁴⁹ and the use of thirty million Pounds in British aid to purchase a presidential jet without the approval of Parliament,⁵⁰ to mention a couple of acts

⁴⁵ *ibid* art 107(2).

⁴⁶ *ibid* art 107(3).

⁴⁷ *ibid* art 10(4).

⁴⁸ Odoki's Report (n 29) 330.

⁴⁹ The 1995 Constitution (n 2), art 208(2) prohibits a serving Army officer from participating in partisan politics.

⁵⁰ See Julius Birigaba 'Move to Impeach Museveni a Non-Starter' *The East African* (Nairobi, 24 March 2012) 3.

amounting to abuse of office and misconduct,⁵¹ have failed to garner support because of the majority his party holds in Parliament.⁵²

Nevertheless, the concept of impeaching a president for infringing the Constitution and the presidential oath that compels the president to swear allegiance to the Constitution point towards an acknowledgement of the superiority of the Constitution over the presidency, at least on paper, and it represents a positive step towards in minimising the authority of a president. It also marks a departure from article 39(2) of the Republic Constitution which eroded the supremacy of the Constitution over the presidency by preventing the courts from declaring acts of a president the unconstitutional.

The 1995 Constitution empowers Parliament to pass laws for the granting of benefits to former presidents.⁵³ Thus, section 7 of Emoluments and Benefits of the President, Vice President and Prime Minister Act 2010 entitles former presidents to a monthly pay equivalent to sixty per cent of a serving president's gross salary and four hundred and fifty million Ugandan Shillings (approximately one hundred thousand Pound Sterling at the time of writing) for a house purchase fund and, a car and driver among other benefits. This provision appears to be have been motivated by a desire to discourage leaders from holding on to power endlessly as has happened in the past. It would be foolhardy to assume though that a presidential retirement package could outweigh a serving president's remuneration package and other financial benefits and privileges

⁵¹ See (n 44).

⁵² In the serving ninth Parliament, two hundred and sixty-seven out of three hundred and eighty-two Members belong to the NRM. See Parliament of the Republic of Uganda. www.parliament.go.ug/new/index.php/members-of-parliament/members-of-parliament accessed 30 April 2015.

⁵³ The 1995 Constitution (n 2), art 106(2).

and encourage presidents to retire. Nevertheless, these provisions were not provided for in the Independence and Republic Constitutions. They appear to minimise the powers of the presidency, to ensure that the office holder continues to enjoy the support of the people and to respect the Constitution during their tenure. They can also be conceived as efforts to circumscribe the previously almost unchecked powers of the presidency. However, the reality is that they have been largely ineffective.

3.3 Presidential immunity from legal proceedings

The 1995 Constitution establishes a president who is not liable to any court proceedings during his or her tenure of office⁵⁴ and who is above all other Ugandans.⁵⁵ In this way, the hitherto authoritarian ideology of the Independence⁵⁶ and Republic⁵⁷ Constitutions and a colonial relic⁵⁸ that has in the past created imperial heads of state re-emerges in the new constitution. As I discussed in chapter two; sections 1 to 3 of this study, before Uganda acquired independence, the privilege of head of state immunity was enjoyed by the institution of the kabaka in Buganda and the colonial governor. However, there was no constitutional provision that provided for it although it could be deduced from the decisions rendered by the courts. As a constitutional privilege for a president, it was introduced by the Independence Constitution which was founded

⁵⁴ *ibid* art 98(4).

⁵⁵ *ibid* art 98(2).

⁵⁶ See the Independence Constitution (n 33), art 34(2).

⁵⁷ See the Republic Constitution (n 40), art 24 (3).

⁵⁸ See *R v Besweri Kiwanuka* High Court Criminal Appeal No.38 of 1937 discussed in chapter two, section 3 of this study.

on the principles and philosophy of the British and whose provisions favoured the then rulers of Buganda. Therefore it could be argued that in Uganda, the privilege of presidential immunity has its origin in pre-colonial governance system as was practiced in Kingdom of Buganda merged with the constitutional principles and philosophy of England. In England, it provided that the Crown cannot be prosecuted or proceeded against in either criminal or civil cases,⁵⁹ while in Uganda it was based on the kabaka of Buganda's despotism of 'sovereign immunity'. It is founded on the assumption that 'the king can do no wrong' as the Latin maxim states, '*rex non potest peccare*'. Only God can judge an unjust king because the king's right to rule derives from the will of God not from the citizenry. In England, the rule has its origin in the ancient common law, predicated on the principle that the king, being the fountainhead of justice, could not be sued in his own courts.⁶⁰

Where the source of authority and powers of government is not vested by a divine right in a ruler, but rests in the people who have adopted a constitution by creating a government with defined state powers, the source of state powers of the government becomes the constitution that created it. Thus, a head of a state and the government have no power other than that which is granted to them by the people under a constitution. The head of state cannot declare him or herself to be above the law if the people, who constitute the source of the state powers, demand

⁵⁹ Under the general rule at common law no proceeding, civil or criminal, was maintainable against the Sovereign in person, for, it was said, the courts, being the king's own, could have no jurisdiction over him. This position was altered by the Crown Proceedings Act 1947 which allowed criminal and civil proceeding to be brought against the Crown when it is acting as the government. See Halsbury's Law of England (4th edition 1997) Vol.11, para.1.

⁶⁰ Frederick Pollack & Frederic Maitland, *History of English Law before the Time of Edward I* (2nd edition, Liberty Fund Inc 2010) 514.

that they should be subjected to the law.⁶¹ It is important to recall that the majority of Ugandans who commented on the presidency were opposed to the inclusion of a provision in the constitution that provided a president with immunity from legal proceedings. The Constitution Committee's report notes that:

Many people have questioned the rationale of the President's immunity from prosecution [under the Constitution]. People argue that such provision have been misused by past presidents. The majority views submitted on this issue were opposed to the immunity. They argued that a President is like any other person and if he or she does commit a crime he or she should face the court of law like any other person.⁶²

However, in rejecting the people's demand for a legally accountable presidency, the Constitutional Committee reasoned that:

The immunity is meant to preserve the dignity of the office of the president. Although the consensus is that the President should not above the court proceedings, it is our considered view that the President should be above prosecution in any court of law. It would be absurd if the President who takes precedence over all people in the country is liable to court proceedings. The office of the president should have dignity, honour and respect from the people. However, the President who has committed serious mistakes could be removed from office by either a vote of no confidence or impeachment by Parliament. He could be taken to court when he is no longer the President. However, while the President should not be taken to court, in case of an offence committed by the office of the president (e.g. vehicle accident involving a presidential convoy), the victim should be in position to sue the Attorney-General. The Immunity of the President refers to the person as the President and not government institutions or property.⁶³

⁶¹ This may be inferred from the principle of popular legitimacy which indicates governance according to wishes of the people and identifies the people as the source of state power who provide legitimacy for its exercise. For a detailed discussion of the principle of popular legitimacy see chapter three, section 5.1 of this study.

⁶² Odoki's Report (n 29) 330.

⁶³ *ibid* 332.

During the Constitutional Assembly debates, some delegates argued that the people they were representing supported the provision granting a president immunity from prosecution or any court proceedings, while others insisted that their constituents demanded that the presidency should be subjected to legal proceedings to ensure that the holder of the office conforms to the law. One delegate submitted that the people he represented were of the view that the president should be immune from ordinary prosecutions, but added that his people were in agreement that it is necessary to impinge the president when they fail to perform, disregard the Constitution or abuse the office.⁶⁴ Another argued that the people he represented supported the provision of the draft Constitution granting the presidency immunity because they wanted to protect a president against legal harassment, however adequate provision should be put in place to ensure that a president is not above the law,⁶⁵ while another stated that the people he represented did not support granting immunity against prosecution to the presidency, because they believed subjecting the presidency to legal proceedings was the only way to guarantee exemplary behavior by a president.⁶⁶ It may therefore be deduced from the submissions made during the constitution-making exercise that Ugandans envisioned that the holder of the office of the president would respect the law or that constitutional provisions would be developed to ensure that a president does not break or disregard the law. Despite this, the Constituent Assembly Proceedings report notes that no amendments were proposed to the provision as provided under the draft Constitution and on that basis, the Assembly recommended that the provision as recommended by the Constitution Committee should be adopted without amendment.⁶⁷

⁶⁴ Republic of Uganda, *Proceedings of the Constituent Assembly* (Minister of Constitutional Affairs 1995) (The Constituent Assembly Proceedings) 312 submissions by Mr. Omute.

⁶⁵ *ibid* 314 submission by Dr. Aniku.

⁶⁶ *ibid* 316 submission by Mr. Chepsikor.

The stipulation that court proceedings may only be brought against former presidents⁶⁸ encourages serving presidents to want to hold on to power at all costs, possibly for life, in fear that legal proceedings for their transgressions may be brought against them when they leave office. Given the atrocities committed by former heads of state of Uganda during their tenures, and the manner in which power has been transferred from one head of state to another, only one out of the seven former heads of state has returned to live in the country after being exiled.⁶⁹

Following the adoption of the 1995 Constitution, the jurisprudence on presidential immunity indicates the failure to refer to the drafting history of the Constitution. It also points out that the privilege of presidential immunity serves no justifiable constitutional purpose, but it is aimed at putting the person who is the president above the law. In the case of *Brigadier Henry Tumukunde v Attorney General and the Electoral Commission*⁷⁰ the petitioner, who was a representative of the armed forces in Parliament, argued, amongst other things, that President Museveni's act of forcing him to resign from Parliament was unconstitutional. The respondent argued that the presidential immunity from legal proceedings under articles 98(4) & (5) of the 1995 Constitution prohibits the Court from investigating the matter as a president's actions are unchallengeable before any court. In dismissing the petition, Justice Kavuma opined that:

The sum total of these provisions is clearly, in my view, to grant the President total immunity against court proceedings both criminal and civil arising out of his/her acts or omissions done or omitted to be done either

⁶⁷ *ibid* 323.

⁶⁸ The 1995 Constitution (n 2), art 98(5).

⁶⁹ Only Godfrey Binaisa has returned to reside in Uganda after we was deposed from power.

⁷⁰ Petition No.6 [2005] UGCC 1.

before or during his/her term in office as President. Any person who wishes to challenge those acts or omissions of the President has to wait until the President has seized to be one [...] This may appear a hard position but, that is what the Constitution says. If the framers of the Constitution had intended that the acts of an incumbent President should be challengeable in court, they would have clearly stated so given the fairly detailed manner in which the Constitution deals with the question of Presidential immunity in article 98.⁷¹

Justice Kavuma further declared that:

It would greatly undermine the rationale behind the article which is to cater for the peoples aspirations about the person and the office of the President. This is the preservation of the dignity of both the person and the office of the President. It would be absurd if the President, who takes precedence over all people in the county is liable to or his/her acts are challenge in court proceedings. The office of the President and his/her acts should have dignity, honour and respect.⁷²

Justice Kavuma failed to consider the drafting history of the provision which indicates that the majority of Ugandans did not wish to design a presidency under which the office-holder was above law. However, this desire was ignored by the framers of the 1995 Constitution. Like the framers of the 1995 Constitution, according to Justice Kavuma, to subject a serving president to court proceedings is to undermine the dignity, honour and to disrespect the person that is the president.

In the later case of *Professor Gilbert Balibaseka Bukenya v Attorney General*,⁷³ the appellant, a former vice-president, was prosecuted for corruption for some of his acts while he was

⁷¹ *ibid* 4.

⁷² *ibid* 32.

⁷³ Petition No.30 [2011] UGCC 9.

occupying the office. He petitioned the Constitutional Court and argued, among other things, that his prosecution was unconstitutional because the alleged corruption activities were committed in his capacity as vice-president acting on behalf , and on the instructions of President Museveni who is immune from prosecution under the provisions of article 98 (4) & (5) of the 1995 Constitution. The Constitutional Court held unanimously that:

[T]he Constitution intended the ‘immunity’ under Article 98 (4) and (5) to be the exclusive preserve of the Head of State, Head of Government and Commander-in-Chief of the People’s Defence Forces and the fountain of honour. The irrefutable presumption here is that the legislature must have intended it that way. It thus emerges very clearly that the Vice Presidency is distinct inferior to the Presidency. It has no home in the immunity arena.⁷⁴

What emerges from this judgment is that the grant of immunity from legal proceedings to the presidency serves no justifiable constitutional purpose and it is intended to serve the person that is the president by declaring them above the law. The judgment indicates that although under articles 94 (4), 108 (3) (a) (b), 113 (3) of the 1995 Constitution a president may assign executive power to ministers and the vice-president, acts or omissions committed during the exercise of such assigned powers attract legal liabilities for the assignees. However, where the holder of executive power commits similar acts or omission, a president is provided with immunity from legal proceedings. This interpretation of the provision granting immunity to the presidency supports the contention that the powers and privileges of the presidency in Uganda, have emerged out of fundamental laws designed to grant uncircumscribed authority to the head of state and governments. If the privilege of presidential immunity is intended to protect a president against legal harassment for his or her acts and omissions as it has been argued by proponents of

⁷⁴ ibid 22.

the provision,⁷⁵ some of which may occur while a president is exercising executive powers, it must then follow that whoever the president assigns executive powers to, must also benefit from the immunity while exercising the assigned powers. To only protect a person that is the president is to suggest that the privilege of presidential immunity is a person benefit of a president which is not aimed at protecting a president against legal harassment in the exercise of constitutional power.

The reasoning by the Constitutional Committee that it is absurd for a head of state to appear in court has been injurious to the protection of individual rights and the observation of due legal process in Uganda before. In the case of *Rex v Yowasi K Pailo & 2 Others*,⁷⁶ the applicants sought a revision of a judgment in which they had been accused and convicted of making seditious comments against the Kabaka. The prosecutor, on behalf of the state, did not appear. However, the Court found nothing lacking in this procedure and simply held that the appellant could not rely on the absence of the supreme authority who is exempt from appearing before the Court as indicative that the state could not substantiate the allegations against the appellants. The Court also held that in a prosecution for exciting hatred and contempt against the institution of the kabaka, it is no justification to claim that they were actuated by feelings of patriotism and only sought to improve the conditions of the country. In recent times, in the case of *Rtd. Col. Dr .Kizza Besigye v Electoral Commission & Yoweri Kaguta Museveni*,⁷⁷ a petition was brought to challenge the outcome of 2006 presidential election in which President Museveni emerged

⁷⁵ See (n 65).

⁷⁶ Criminal Revision No.43 of 1922.

⁷⁷ Election Petition No.1 [2006] UGSC 24.

victorious. The petitioner, who was the runner-up in the election, alleged, among other things, that electoral offences were committed by President Museveni personally and by his agents, with the President's consent, or approval during the presidential election.⁷⁸ He therefore sought a declaration annulling the election from the Supreme Court.⁷⁹ However, President Museveni could not be summoned to appear before the Supreme Court to explain his actions because the Constitution shields a president with immunity from legal proceedings during the term of office. Therefore, President Museveni's political competitors and the populace were unable to put to legally scrutinise the President's conduct during the election.

It may be expedient, to consider the effect that legal proceedings against a president may have on the smooth running of the government and the country at large. While such considerations may necessitate creating a different legal process from that which applies to the general public to be applied to a president, blanket immunity from legal proceedings is not the solution, neither is the impeachment process proposed by the Constitution Committee effective. The decision to invoke legal proceeding should at least be at the discretion of the court where the independence of the court from the presidency is assured.

In the United States of America and in the United Kingdom, courts have pronounced themselves on the issue of presidential immunity in cases that I find valuable for the present discussion. In

⁷⁸ Presidential Elections Act 2005, ss 11-28 creates several electoral offences. The offences will be discussed in the next chapter.

⁷⁹ *ibid* s 59 (6)(c) provides that the Supreme Court may invalidate a presidential election where it is satisfied that electoral offences were committed by a victorious presidential candidate personally or by his agents with his or her knowledge and consent or approval.

the case of *United States v Nixon*,⁸⁰ President Nixon refused to hand over crucial tapes relating to the ‘Watergate Saga’. The Supreme Court of the United States of America addressed the issue of presidential immunity from the proceedings. When ordering the President to hand over the tapes, Justice Sirica declared that:

Neither the doctrine of separation of powers nor the need for confidentiality of high-level communication, without more, can sustain an absolute, unqualified, presidential privilege of immunity from judicial proceedings under all circumstances.⁸¹

In the United Kingdom, the House of Lord held in the case of *Re Pinochet*,⁸² that some crimes are just so heinous that nobody has any immunity from them and least of all, the head of state whose primary responsibility is to protect citizens.⁸³

The position in international law in relation to the immunity of a head of state, as Micaela Frulli observes, originates from the will to ensure respect for the principle of sovereign equality of states, a rationale that has progressively lost importance with respect to personal immunities.⁸⁴ It may therefore be argued that the concept of the head of state’s immunity in international law was aimed at treating heads of states as equals, and to protect them from legal proceedings while they are acting in their official capacity at the international forum, but it was not intended at insulating heads of state from personal legal liability. International criminal justice strengthens further the

⁸⁰ 418 U.S. 683 (1974).

⁸¹ *ibid* [27] (Justice Sirica).

⁸² [1999] 2 W.L.R. 272, [1999] 1 All E.R. 577.

⁸³ *ibid* [43] (Lord Browne-Wilkinson).

⁸⁴ Micaela Frulli, ‘Head –of-State Immunity: Lessons from the Taylor Trial’ (*academia.edu*, August 2014) https://www.academia.edu/6185800/Head_of_State_Immunity_Lessons_from_the_Taylor_Trial accessed 28 April 2015.

legal position that serving presidents cannot be availed of blanket immunity from heinous crimes.⁸⁵ Whereas constitutions are vulnerable to manipulation by those who wield political power in the states where they are adopted as often has been in Uganda, principles of international criminal justice represent a global consensus on the standards of criminal responsibility to be attributed to individuals. Therefore, we can rely on the precepts of international law as forming commonly accepted legal standards. It may also be justifiable to protect the president by granting him or her immunity from legal proceedings relating to civil actions for slanderous or libelous utterances made in Parliament for example, while in the course of his or her role as the head of state. Similar protection is afforded to legislators in the Westminster System.⁸⁶ This permits the demarcation of the president's individual and official liability to legal proceedings accordingly, by allowing him or her to remain immune while acting in official capacity but not while acting as an individual.

Lessons can also be learnt from South Africa which has devised mechanisms to subject the conduct of any holder of public office, including the president, to scrutiny to ensure accountability, civil and criminal liability. Chapter 9 of the Constitution of South Africa 1996 provides for the establishment of a number of state institutions to strengthen the country's constitutional democracy. These institutions which include the Auditor General, the Independent Electoral Commission and the Public Protector, have a constitutional obligation to carry out their duties in an impartial manner and without fear, favour or prejudice.⁸⁷ The South African

⁸⁵ See the Rome Statute of the International Criminal Court 2002, art 27; also see *Prosecutor v Charles Ghankay Taylor*, Case No SCSL- 03-1-T, Appeals Chamber (May 31, 2004).

⁸⁶ Legislators in the Westminster Parliament are protected from civil action for slander and libel by parliamentary immunity whilst they are in parliament. This protection is known as Parliamentary Privilege. See Malcom Jack, *Erskine May's Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis 2011) 47-53.

Constitution further states that no person or organ of state may interfere with the functioning of these institutions.⁸⁸ In the case of the presidency, this mechanism operates alongside the impeachment process.⁸⁹ Section 89 of the South African Constitution empowers Parliament to dismiss a president for serious violation of the Constitution or law and for serious misconduct.

Besides the impeachment process, the Public Protector is mandated among other things, to investigate and to report on any conduct in state affairs or in the public administration within any sphere of government,⁹⁰ to report on that conduct⁹¹ and to take appropriate remedial action.⁹² The Prevention and Combating of Corrupt Activities Act 2004 makes it a criminal offence for anyone receiving a public salary to accept undue material benefits in exchange for a particular action.⁹³ These provisions make the president of South Africa liable to legal proceedings. It should be noted that under article 193(4) of the South African Constitution, the Public Protector is appointed by the president on the recommendation of Parliament, while under article 181(2) of the Constitution the office is independent and its subject only to the Constitution and the law. Thus, a president is restricted to appointing a Public Protector from persons recommended by Parliament. Articles 181 (2) and 193(4) are aimed at minimising the influence of a president on the Public Protector. This is one of the measures in the South African Constitution which is

⁸⁷Constitution of the Republic of South Africa 1996, art 181(2).

⁸⁸ *ibid* art 181(4).

⁸⁹ *ibid* art 102.

⁹⁰ *ibid* art 182(1)(a).

⁹¹ *ibid* art 182(1)(b).

⁹² *ibid* art 182(1)(c).

⁹³ Chapter 2, s 4.

aimed at building constitutionalism by ensuring that institutions that are meant to check and balance presidential authority are not subordinate to the presidency.

Pursuant to her constitutional powers, the Public Protector has investigated allegations of impropriety and unethical conduct relating to the refurbishments carried at President Zuma's home in Nkandla using state funds, and she has concluded that the President unduly benefited from the non-security upgrades.⁹⁴ The Constitution of the Republic of South Africa 1996 does not provide a serving president with immunity from legal proceedings. As the Public Protector has the constitutional power to 'take any appropriate remedial action', could such action include invoking civil proceedings against the President to recover the misappropriated state funds? Also, could President Zuma be prosecuted under the Prevention and Combating of Corrupt Activities Act 2004? While the Public Protector has the constitutional authority to compel the President to pay back the state funds, and Parliament may impeach the President for violation of the law or the Constitution, where the President fails or refuses to pay back the money, the answer to both questions appears to be yes.

The Constitution Commission in Uganda reasoned that subjecting a president to legal proceedings disrupt the running of government and the state, among other things.⁹⁵ There is however a greater threat to constitutional and general legal order when the law shields a serving president from legal proceedings than when it allows for legal liability of the president. It

⁹⁴ See Public Protector of South Africa, *Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in KwaZulu-Natal Province* (Public Protector of South Africa, 19 March 2014).

⁹⁵ See (n 63).

encourages the idea that presidents are above the law and not subordinate to it. In Uganda, this has led to the disregard of the law and the abuse of power by former heads of state. Subjecting a president to legal proceeding relates to his personal capacity and not to his role as the president of the country. Where a serving president is facing legal proceedings and therefore cannot continue to perform presidential duties, a constitution should provide procedures for the president to be replaced with minimum disruption to the state's constitutional order and the smooth functioning of the government. Most constitutions including that of Uganda provide for an acting president to step in⁹⁶ and a mechanism for replacing the serving president permanently, for example as the result of death, resignation or impeachment.⁹⁷ The idea that the person who holds the office of president should be shielded from legal proceedings because bringing legal proceedings against a president would violate the dignity, honour and respect for the presidency and disrupt the running of the government and the country, cannot justify encasing the president in impunity. It resonates with the concept of an indispensable president on whom the country depends for its existence and survival, and who is not constrained by the law. This has led to the creation of imperialist heads of state in the past.

To conclude, it may be stated that granting the president immunity from legal proceedings is not founded in law, not justified with logic and it serves no meaningful purpose in a just and democratic society. Its purpose is to create an absolute president who is not legally accountable.

⁹⁶ The 1995 Constitution (n 2), art 108(3)(a).

⁹⁷ *ibid* art 109.

The Constitution Commission report⁹⁸ does not make a strong argument for recommending its continuity given the history of disregard for the legal and constitutional order and the human rights violations committed by past heads of state. Most importantly, the people of Uganda expressed a desire to establish a constitutional system under which a president is subject to legal proceedings.⁹⁹

3.4 The president as commander-in-chief of the armed forces

The 1995 Constitution designates a president who is also the commander-in-chief of the armed forces.¹⁰⁰ Subjecting the armed forces to the command of the president is ill-advised given the historical role the armed forces have played as an instrument of repression and the final arbiter of political disagreements in Uganda. In this regard, the Constitution bestows on the presidency excessively disproportionate powers over the incumbent's political competitors and the citizenry, by placing the armed forces, a potent and brutal weapon of political coercion and historically an instrument for accessing and retaining power, at the president's disposal to call upon to settle political disputes and to retain power.

Although the Constitution sets out one of the functions of the armed forces as to preserve and defend the sovereignty and territorial integrity of Uganda,¹⁰¹ the historical role of the armed forces in Uganda indicates that it has been used more as a tool for unconstitutional change of

⁹⁸ Odoki's Report (n 29).

⁹⁹ *ibid* 330.

¹⁰⁰ The 1995 Constitution (n 2), art 98(1).

¹⁰¹ *ibid* art 209(a).

government and for arbitrating political conflicts rather than for maintaining the territorial sovereignty of the country.¹⁰² This has led to a widely held belief that any political organisation that does not have an army cannot hold power. The army has also been used as an oppressive instrument by governments against the people of Uganda in order to manipulate elections and to maintain in power corrupt and undemocratic governments. Furthermore, having an army that is affixed to the president and the political leadership that created it cannot be conducive to democracy. The National Resistance Army (NRA), which is the military wing of the National Resistance Movement (NRM) which waged the armed conflict that brought President Museveni to power, is now the Uganda's People Defence Force (UPDF) - the national army. Its top leadership is comprised of veterans of the guerrilla war which brought President Museveni to power. After President Museveni took power, there was no attempt to restructure the armed forces in order to make it a national army as opposed to one that was created by and which serves the President and the NRM. A survey carried out by one of the country's leading newspaper concluded that twenty-three of the highest-ranking positions in the armed forces are occupied by persons from the President's tribe.¹⁰³ This is despite the 1995 Constitution calling for the creation of a nonpartisan army, which is national in character, patriotic, professional and which is subordinate to civilian authority.¹⁰⁴ Therefore, like heads of state before him, President Museveni understand that he has to rely on members of his tribes in influential positions in the armed forces who are loyal to him to stay in power. Having an army whose high command is

¹⁰² Since independence in 1962 the armed force of Uganda have only been involved in interstate combat in war in Congo in 1966; against the Tanzanian forces in 1979 after Amin invaded Tanzania; in 1992 in the Democratic Republic of Congo; and in hunting down Kony's Lord's Resistance Army in South Sudan; as part of the African Union Mission in Somalia (AMISOM) in 2007; and in 2014 response to the civil war in Southern Sudan.

¹⁰³ Sam Mukasa, 'Family Rule in Uganda: How Museveni's clan runs government' *Independent* (Kampala, 25 March 2009) 3.

¹⁰⁴ The 1995 Constitution (n 2), art 208(2).

made up of his tribe helps the President in several ways: it reduces discontent in the inner circle of the NRM power and it enhances loyalty, and most importantly it cements the President's control over the instrument of power that is the armed forces. Furthermore, it creates a group of loyal high-ranking army officers with a subjective interest in the President holding power. In addition, under article 78(1)(C) of the 1995 Constitution, Parliament should consist of members of the armed forces who are appointed by the president. It is therefore reasonable to conclude that this provision is aimed at increasing the interest group of the presidency in the legislature.

It would have been prudent to include a provision in the Constitution prohibiting persons who attempt to access state power through armed violence from acquiring public office. This would amount to a further rejection of armed seizures of power and of the involvement of the army in the country's politics. Persons affected by the provision would of course have the right to challenge their political isolation before a court.

Some countries such as the Central African Republic which have experienced military *coups* have constitutionally prohibited military rule and the involvement of the armed forces in politics.¹⁰⁵ Ideally, the armed forces respect the constitution that has been agreed upon by the people, and does not lend its weight to the promotion or the entrenchment of power of a particular leader or a government. It must also be committed to defending the sovereignty of the people according to the framework of the constitution and must therefore be prepared to serve under any government

¹⁰⁵ Constitution of Central African Republic 2004, art 119. It is however acknowledged that in March 2013 the Central African Republic experienced a military coup, following which the Constitution was suspended and the National Assembly was dissolved. At the time of writing, it has been reported that general elections will be conducted in 2016 to restore a civilian government. See Yuki Yoshida, 'Understanding the 2013 *Coup d'état* in the Central African Republic' (*University of Peace and Conflict Monitor*, January 2014) http://www.monitor.upeace.org/innerpg.cfm?id_article=1026 accessed 28 April 2015.

that is freely and lawfully elected by the people. However, when his alleged plan to transfer the presidency to his son Brigadier Muhoozi Kainerugaba was challenged, President Museveni was quoted as declaring that the armed forces would not permit destabilisation of the country and would not allow his authority to be challenged.¹⁰⁶ In this context, according to the President, he does not only embody the power of the state but is also the incontrovertible component for the stability of the country. Therefore, challenging the President's succession plans or his presidency is tantamount to destabilising the country. It may also be argued that President Museveni's possession of the ultimate authority over the armed forces makes him reluctant to submit to the people or the Constitution and makes him reliant on the army for his power. Evidence of the President's sole ownership of the institution of the army may be further deduced from its deployment in South Sudan in January 2014 without Parliament's approval in contravention of the Constitution.¹⁰⁷

In conclusion, it should be recalled that the idea of placing the armed forces under the supreme authority of ahead of state is not an invention of Uganda's post-colonial leaders. When the former colonial authorities created the army in Uganda and named it the King's Rifle Army, its purpose was the preservation of colonial rule regardless of whether the challenger to the colonial rule had a legitimate claim as did the native population had when they sought participation in the affairs of its country.¹⁰⁸ Since then, there has never been an alteration in the operation and public

¹⁰⁶ It has been reported that President Museveni would like to transfer the presidency to his son and that he has declared that the armed forces would not allow anyone to challenge his succession plans. See Aloysious Kasoma, 'Museveni Should Explain the Army Takeover – UPC' *Independent* (Kampala, 23 January 2013) 2.

¹⁰⁷ The 1995 Constitution (n 2), art 210 provides that Parliament's approval should be sought by the president for any deployment of the armed forces outside Uganda.

¹⁰⁸ Grace Ibingira, *The Forging of an African Nation: The Political and Constitutional Evolution of Uganda from Colonial rule to Independence 1894-1962* (Viking Press 1973) 201.

perception of the Army in Uganda. It is arguable that in Uganda the notion of subjecting the armed forces to the command of a head of state has mainly been aimed at allowing heads of state authority over the army, a force which they can call upon to quash any challenge to their power. To address this challenge, constitutional provisions should have been adopted to ensure that the army is insulated from the influence of the head of state or a government. One of the ways of achieving this is to ensure that the law provides for the qualifications of membership of the army and that its ethnic composition is proportionate to the various tribes of Uganda. This would minimise the opportunity of a head of state and government from distorting the ethnic structures of the army and from appointing high-ranking army officials that are favourable to a head of state and a government.

3.5. The president's powers to appoint and to dismiss top public officers

The presidency's dominance over the document that is the 1995 Constitution is further demonstrated by the president's powers of appointment. A president exercises inordinate powers over all institutions of the civil service by way of appointments over employees in any government agency. In fact, the manner of governance of the entire country's civil service, corruption and the distortion the ethnic composition of public bodies can be traced to the appointment power vested in the presidency. The absolutism of the presidency of Uganda may be identified by its total control over all state institutions granted by its constitutional role in appointing and dismissing almost all those who serve in the in high positions in the public service from the top judicial officers,¹⁰⁹ the Director of the Public Prosecution Service,¹¹⁰ the

Inspector General of the Government,¹¹¹ the Auditor General,¹¹² the Chairperson of the Human Rights Commission,¹¹³ the Head of the Public Service Commission¹¹⁴ and the Governor of the Central Bank,¹¹⁵ Cabinet Ministers,¹¹⁶ the Chairperson of the Education Service Commission,¹¹⁷ the Chairperson and members of the Electoral Commission,¹¹⁸ the Inspector General of the Police,¹¹⁹ the Commissioner of Prisons¹²⁰ and the District Commissioners¹²¹ to mention some, but not all of the heads of government departments.

This trend has encouraged an increased focus on President Museveni's personalisation of politics, as 'a hope for economic survival'. Welfare and career prospects have been almost entirely vested in the person that is the president, particularly where holding public office is concerned as one must be indebted to President Museveni and be able to perform his wishes unquestioningly. These powers of appointment have also allowed President Museveni and his

¹⁰⁹ The 1995 Constitution (n 2), art 142(1).

¹¹⁰ *ibid* art 120(1).

¹¹¹ *ibid* art 223(4).

¹¹² *ibid* art 163(1).

¹¹³ *ibid* art 51(2).

¹¹⁴ *ibid* art 165(2).

¹¹⁵ *ibid* art 161(3)(a).

¹¹⁶ *ibid* art 111(3).

¹¹⁷ *ibid* art 167(2).

¹¹⁸ *ibid* art 60(1).

¹¹⁹ *ibid* art 213(2).

¹²⁰ *ibid* art 216(2).

¹²¹ *ibid* art 203(1).

appointees to dish out jobs in the public service as political rewards without any consideration for aptitude, and conversely to exclude and victimise real and perceived non-sympathisers from public office and public services. According to a recent survey conducted by one of the newspapers in Uganda, three hundred and ninety-seven out of eight hundred and twenty-six highest public civil service jobs are held by persons of the same tribe with President Museveni who are also supporters of his NRM party, while another three hundred and ninety-seven similar jobs are held by persons who are not of the same tribe with the President but who are supporters of his party.¹²² This has resulted into the creation of civil service composed of persons from the President's tribe and NRM supporters. It should be noted that paragraph 5 Code of Conduct and Ethics for Uganda Public Service 2005 which sets out standards of behaviour for public officials, prohibits public officers from engaging in active politics, canvassing political support for candidates, participating in public political debates and from displaying party symbols. It is however difficult to envisage how such a measure can ensure impartiality, objectivity, transparency and to guarantee the integrity of public officers when they are performing their duties when the majority of them are aligned to the NRM.

The presidency's powers of appointment also undermine the creation of professional government department that could render the presidency and make the government accountable to the people. Moreover, they have created a public service that is beholden to President Museveni and his NRM but has constitutional and statutory duties of delivering services to all Ugandans of different political persuasion, including managing political contestation between the President and his political competitors. For example, the powers to appoint the Chairperson and members

¹²² Sadab Kitatta Kaaya 'West Dominates State Jobs' *The Observer* (Kampala, 14 July 2014) 3.

of the Electoral Commission,¹²³ an institution that is constitutionally vested with the responsibility of conducting elections¹²⁴ from which the President have emerged victorious four times since the 1995 Constitution was promulgated, severely dents the integrity of the electoral process and consequently that legitimacy of the NRM's government.

Apart from cabinet ministers who a president may have a freehand in appointing because they constitute a president's choice of persons to assist with the administration of the country, strong constitutional provisions should have been put in place to ensure that all recruitments and promotions in the public service are merit-based and that disciplinary measures are based on a breach of established disciplinary procedures but not the political whims or considerations of a president.¹²⁵ The only limits to these powers of appointment are the ineffectual constitutional constraints that stipulate that such appointments must 'acquire the approval of Parliament' for example, in relation to the appointment of the Commissioner of Prisons¹²⁶ and those that require that a president 'acts on the advice' of institutions such the Judicial Service Commission in appointing top judicial officers.¹²⁷ In practice, attempts to deter the misuse of the presidency's powers of appointment have not been able to guarantee non-partisan appointments. Parliament has endorsed most presidential appointments. Hansard notes that in 2012, out of the forty-three

¹²³ See (n 118).

¹²⁴ The 1995 Constitution (n 2), art 61.

¹²⁵ It is acknowledged that the Code of Conduct and Ethics for Uganda Public Service, 2005, para.6 provides a list of sanctions that may be brought against any public officer depending on the offence or misconduct. These include removal from the public service in the interest of the public and dismissal. However because the Constitution of 1995 allows a president to dismiss almost all the top public officer, only a president at his discretion may invoke it against a top public officer.

¹²⁶ *ibid* art 216(1).

¹²⁷ *ibid* art 142(1).

presidential appointments, only two¹²⁸ were vetoed by the Parliamentary Committee on Presidential Appointments for lack of integrity.¹²⁹

The constitutional constraints against partisan presidential appointments are as a result of the Constituent Assembly's substitution of the role of the National Council of State, as envisioned by the Constitution Commission, with institutions such as the Judicial Services Committee. As discussed in chapter three, section 4.1.3, in its draft Constitution, the Constitution Commission proposed the creation of the National Council of State to advise a president on public appointments and the exercise of other executive powers, et cetera.¹³⁰ It reported that it was motivated by the fear expressed by Ugandans that previous heads of state had bullied institutions such as Parliament into submission.¹³¹ Similarly, the history of Uganda's Parliament discussed in chapter two, section 4 demonstrates that it has not been a bastion for constitutional rights. However, the National Council of State which was proposed by the Constitution Commission was to comprise of cabinet ministers appointed by the president¹³² and was to be chaired by the president.¹³³ Therefore the Constitution Commission's proposal put the National Council of State and its operation in the hands of the presidency in a manner that is not dissimilar from the way the 1995 Constitution provides for presidential appointments in that they are approved by

¹²⁸ These are Dr. Pascal Odoch and Mr. Gideon Mudunga who were nominated by the President for the membership of the National Planning Authority.

¹²⁹ Parliament of Uganda, 'The Official Report of the Parliament of Uganda' (*Hansard*, 9 December 2012) www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard accessed 30 April 2015.

¹³⁰ The draft Constitution (n 29), art.114.

¹³¹ Odoki's Report (n 29) 213.

¹³² The draft Constitution (n 29), art 114(1).

¹³³ *ibid* art 114(2).

institutions whose members are appointed by a president.¹³⁴ Thus, subjecting presidential appointments to the scrutiny and approval of a National Council whose members are appointed by a president¹³⁵ would have been equally inadequate in avoiding partisan appointments.

The defined roles of the expert constitutional institutions, such as the Judicial Service Commission, and the democratic constitutional institutions, such Parliament, by the use of terms for example ‘acting on the advice’ or ‘acquire the approval of’ suggest that a president is bound to accept or follow the advice given, and the approval by the relevant institution must be given. This is because such constitutional constraints are founded on constitutionalism which aims to regulate the president’s powers of appointment. They are based on the idea of installing separation of powers in a constitution in order to limit executive excesses and abuse of the presidency’s powers of appointment. Their purpose is to control arbitrary appointments by a president. Such institutions are therefore supposed to be insulated from presidential influence in order for them to effectively perform their functions of ensuring that presidential authority is exercised for the purposes envisaged by the Constitution and in a manner that is consistent with the principles of constitutionalism.

In the case of *Karuhanga v Attorney General*¹³⁶ a constitutional petition was brought to challenge the re-appointment of Chief Justice Benjamin Odoki. The petitioner argued that President Museveni sought the advice of the Attorney General in re-appointing the Chief Justice and

¹³⁴ The 1995 Constitution (n 2), art 146(2) provides that members of the Judicial Service Committee shall be appointed by the president with the approval of Parliament. It is also the same Committee which advises a president on judicial appointments. See (n 115).

¹³⁵ The 1995 Constitution (n 2), art 111(3).

¹³⁶ Constitutional Petition No.0039 [2014] UGCC 13 (August 2014).

ignored persons nominated by the Judicial Service Commission contrary to the Constitution. It was also submitted that there are no set procedures for a president to seek and to be granted advice on judicial appointments.¹³⁷ Justice Odoki is reported to have reached the constitutionally imposed retirement age of seventy on the 23 of March 2013.¹³⁸ The Constitution provides that the Chief Justice, the Deputy Chief Justice, Justice of the Supreme Court and the Justice of Appeal shall vacate their offices on attaining the age of seventy years.¹³⁹ The Court declared by a majority of four to one that no person may be appointed Chief Justice unless and until the Judicial Service has first given advice to the president and that no one can be appointed as Chief Justice after they have attained mandatory age of seventy years. However, the Court did not order that a procedure should be established under which a president should seek advice from the Judicial Service Commission neither did it address this matter. In this regard, an opportunity was missed was to comprehensively direct the Judicial Service Commission and the presidency on the procedure under which top judicial officers should be appointed. Odoki's re-appointment as Chief Justice is another indication of the President Museveni's contempt for the Constitution both in relation to disregarding the age limitation provided for by the Constitution and also in relation to the procedure that a president must follow when making appointments.

The constitutional structure for the appointment of heads of institutions of government has also hampered attempts to fight corruption in Uganda. Presidential appointees, members of the President's 'inner-circle' and several politicians have been accused of grand corruption and

¹³⁷ *ibid* [21] (Bossa JC).

¹³⁸ See Peter Otim 'Court Set to Hear Odoki's Case' *Red Pepper* (Kampala, 8 January 2014) 3.

¹³⁹ The 1995 Constitution (n 2), art 144 (1) (a).

failure to comply with their legal obligation to disclose their wealth. Corruption is a direct threat to the rule of law and accountability as well as an illegal diversion of available resources from basic services that are needed to meet fundamental rights obligations.¹⁴⁰ It undermines the government obligations to protect human rights by diverting money from essential government services such as health and education, causing consistent and dire underfunding of these sectors.¹⁴¹ Corruption also poses a threat to human rights in that it erodes accountability and results in impunity. According to Transparency International, Uganda ranks as the 127th country in the world with a corruption index of 2.5.¹⁴² The African Peer Review Mechanism Report 2007 notes that Uganda loses approximately two hundred and sixty million US Dollars a year due to corruption and procurement malpractices.¹⁴³ Uganda's anti-corruption legal framework relating to government officers includes the Anti-Corruption Division of the High Court which has exclusive jurisdiction over offences under the Anti-Corruption Act 2009 and the also hears cases under the Penal Code Act 1950 and the Leadership Code Act 2002. Article 255 of the 1995 Constitution mandates the office of the Inspector General of Government (IGG) to fight corruption and abuse of authority and of public office. Under section 9 of the Inspectorate of Government Act 2002, the IGG can only prosecute government officials. In addition, under article 118 (1) of the 1995 Constitution, Parliament may by a resolution supported by more than half of all its members of pass a vote of censure against a minister on the grounds of abuse of

¹⁴⁰ Human Rights Watch *Letting the Big Fish Swim: Failure to Prosecute High –Level Corruption in Uganda* (Human Rights Watch 2013) 17.

¹⁴¹ *ibid* 18.

¹⁴² Transparency International, *Watching Your Health: Mapping Transparency and Integrity Risks in Health Service Delivery in Africa* (Transparency International June 2011) 2.

¹⁴³ Global Integrity, 'Uganda; Tough Talk, Much Noise, No Improvement' (*Global Integrity*.1 March 2009) <http://www.globalintegrity.org/node/385> accessed 30 April 2015.

office or wilful violation of the oath of allegiance or oath of office; misconduct or misbehaviour; or mismanagement; or incompetence.

In the case of *Fox Odoi-Oywelowo and James Akampumiza v Attorney General*¹⁴⁴ the petitioner, a presidential advisor, was dismissed by the IGG for failure to make a financial declaration of his wealth as required by article 4 (2) of the Leadership Code Act 2002. He subsequently challenged his dismissal before the Constitutional Court which ruled that the Leadership Code Act does not apply to presidential appointees and only the appointing authority, a president, may dismiss the appointees. In the case of *John-Ken Lukyamuzi v Attorney General and Another*,¹⁴⁵ the appellant, then the leader of the Conservative Party, was dismissed from Parliament by the IGG for failure to declare his financial information. He challenged his dismissal in the Constitutional Court. The Court ruled that the IGG cannot address violations of the Leadership Code Act because it is not the appropriate body to adjudicate cases for breaches and that this must occur in the Leadership Tribunal.¹⁴⁶ Justice Engawu urged that:

It is important that the government establishes Leadership Tribunal urgently in order to enforce values of integrity and proper conduct in the leadership of this country, values which I consider to be critical in the pursuit of development, democracy, good governance and the promotion of the rule of law, and so that the Leadership Code of Conduct can be effectively enforced¹⁴⁷

¹⁴⁴ Constitutional Petition No. 8 [2003] UGCC4 (May 2004).

¹⁴⁵ Constitutional Petition No. 19 [2006] UGCC2 (March 2007).

¹⁴⁶ *ibid* [18] (Engawu JA).

¹⁴⁷ *ibid* [20].

At the time of writing, the Leadership Tribunal has not been yet established. On 19 July 2005 the Access to Information Act of 2005 came into force. The purposes of this, as provide by under section 3 of the Act are to promote an efficient, effective, transparent and accountable government and to protect persons disclosing evidence of contravention of the law, maladministration or corruption in government bodies. Under section 5 of the Act, every citizen has a right of access to information and records in the possession of the state or any public body, except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of any other person. Hopefully, the Act will compel government institution to account to the public on how they use public resources and it will also provide a mechanism for making financial declarations made by politician available to the public. It has however been reported that the Attorney General has contended that the law cannot be applied to release asset declarations made by politicians to the public.¹⁴⁸ This has not yet been tested in the courts. There would be no purpose for politicians to make declarations of their assets if those declarations cannot be made available to the public to whom the politicians are accountable. Guidance on this matter can be sought from the United Kingdom's Supreme Court decision of *R and Another v Attorney General*.¹⁴⁹ In this case the appellant, a journalist, requested disclosure of communications passing between various government departments and the Prince of Wales under section 1 of the Freedom of Information Act 2000 which provides that 'any person making a request for information to a public authority is entitled:- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him. The departments refused to disclose the letters on the ground that they considered that the letters were

¹⁴⁸ Human Rights Watch (n 140) 29.

¹⁴⁹ [2015] UKSC 21.

exempt under section 40 (2) as they constituted personal data which do not fall within section 1 of the Act. The department's decision was upheld by the Information Tribunal in the case of *Rob Evans v Information Commissioner and Ministry of Defence*.¹⁵⁰ After the decision of the Information Tribunal, there were judicial review proceedings in the Divisional Court with a subsequent appeal to the Court of Appeal, and finally the Supreme Court. The Supreme Court's decision was handed down by its President Lord Neuberger who opined that the right to privacy and the strong public interest in transparency makes the nature of the information which was requested by the appellant public information.¹⁵¹ His decision was grounded in the constitutional principles of the rule of law and separation of powers. He articulated them as follows at paragraph 52:

It is also fundamental to the rule of law that decisions and actions of the executives are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions reviewable by the court at the suit of interested citizen.

Based on this decision, it may be stated the asset declarations by politicians in Uganda clearly fall within the ambit of public information that may be requested and provided under section 5 of the Access to Information Act 2005.

In the case of *Hon. Kutesa and Two Others v Attorney General*,¹⁵² three Cabinet Ministers brought a constitutional petition challenging their prosecution for corruption by the office of the IGG. Section 3 of the Inspector General of Government Act 2002 provides that the inspectorate is

¹⁵⁰ EA/2006/0064.

¹⁵¹ See (n 149) [49] (Neuberger LCJ).

¹⁵² Constitutional Petition No.46 [2012] UGCC2 (April 2012).

headed by the Inspector General and two Deputy Inspectors, while section 4 provides that the Inspector General and the two deputies shall be appointed by the president with the approval of Parliament. At the time of their prosecution in 2011, the second Deputy position was not filled since the office was established by the Constitution in 1995. Thus, the Ministers argued among others things, that the office of the IGG was not dully constituted and therefore it cannot prosecute or cause prosecution in corruption cases. The Constitutional Court ruled that the office of the IGG was not dully constituted and the three Ministers could not be prosecuted.¹⁵³ The IGG appealed. At the time of writing, the appeal has not been heard because under article 131 (2) of the Constitution, when sitting as an appeal court in cases originating from the Constitutional Court, the Supreme Court must consist of a full bench of eleven members. Currently, they are only eight members because the President has not appointed the other three. It should be noted that under article 223(4) of the 1995 Constitution, the Inspector General is appointed by a president for four years with the approval of Parliament. Parliament may reappoint the Inspector General for another four years under article 223(4) of the 1995 Constitution. This constitutional structure for re-appointment via parliamentary approval could potentially deter an Inspector General from prosecuting parliamentarians who could deny reappointment.

In 2012, around thirteen million US Dollars in donor funds was reportedly embezzled from the office of the prime minister, a position appointed by the president and where the appointee is also member of Parliament. Given the decisions rendered by the Courts on the amenability of presidential appointees for prosecution for corruption, and the President's failure to appoint the second Deputy Inspector General of Government, no prosecutions followed. Also President

¹⁵³ *ibid* [12] (Kavuma JC).

Museveni is reported as stating that he will not run away from supporting his old friend, the then Prime Minister Amama Mbabazi¹⁵⁴ Similarly, when a former NRM Minister Mike Mukula was convicted of embezzlement by the Ant-Corruption Court,¹⁵⁵ the President offered to pay the legal bill for the his appeal¹⁵⁶ and following which the conviction was overturned. It is difficult to imagine that the presiding judge could have upheld the former Minister's conviction knowing that the appellant had the full support of the President. It is important to note here that one of the Ministers who was charged with corruption, and who was acquitted because the office of the IGG was not dully constituted,¹⁵⁷ Mr. Sam Kutesa, at the time of writing is the President of sixty-ninth session of the United Nations General Assembly.

In July 2013, Mariam Wangandya was appointed by President Museveni as the Second Deputy Inspector General of Government. The effect of this appointment in terms of the Constitutional Court's decision in *Hon. Kutesa and Two Others v Attorney*,¹⁵⁸ is that the office of the IGG became dully constituted. It remains to be seen if the appointment of Wangadya will kick start the processes of bringing to account politicians that are suspected of corruption. It suffices to conclude that fight against corruption in Uganda has been hindered by the constitutional structure for appointments, presidential patronage and the failure to develop constitutional institutions that can adequately constrain persons who exercise state powers. In this regard, the 1995 Constitution failures in its envisioned task of providing institutional arrangements that

¹⁵⁴ Human Rights Watch (n 140) 37.

¹⁵⁵ *Flt. Cpt. George M. Mukula v Uganda*, CT-00-AC-CN-0001 2003.

¹⁵⁶ Human Rights Watch (n 140) 38.

¹⁵⁷ See (n 152).

¹⁵⁸ *ibid.*

adequately constrain those who exercise state powers. President Museveni's reluctance to appoint persons to positions that would ensure the full and effective operation of the anti-corruption legal framework, such as judges of the Supreme Court and the office of the IGG, and his public support of his 'inner-circle' who have been accused of corruption, poses a challenge to fight against corruption. Furthermore, the failure by the President to make appointments to positions that would ensure the effective and full operation of the anti-corruption legal framework appears to be unconstitutional in that it has obstructed the fight against corruption. This is because the presidential authority may only be exercised for the purposes of promoting democracy, good governance and the rule of law which are all affected by the President's failure to make the appointments.

In various countries, courts have rendered decisions that seek to define scope of the executive's constitutional powers of appointment. In the case of *Reference re Supreme Court Act*,¹⁵⁹ the Supreme Court of Canada dealt with the issue of the legality of a politically questionable judicial appointment. The Court annulled Canada's Prime Minister, Stephen Harper's appointment of Justice Marc Nadon to the Supreme Court of Canada, declaring that it was void.¹⁶⁰ Justice Marc Nadon had been sworn-in five months earlier. General qualifications for appointment appear in section 5 of the Supreme Court Act 1985. Section 5 refers to current and former judges and to a person who is or has been a lawyer of at least ten years standing at the Bar of a province. The controversy centered around section 6 of the Supreme Court Act of 1985 which provides that three justices are to be drawn from among the judges of the Court of Appeal or of the Superior

¹⁵⁹ 2014 SCC 21 (Can LII) s 5 and 6.

¹⁶⁰ *ibid* [97] (McLachlin C.J).

Court of the province of Quebec, or from the advocates of that province. Justice Nadon came instead from the Federal Court of Appeal. Although formerly a member of the Quebec Bar for more than ten years, he was no longer a member. In addition, the Court found that the Parliament of Canada's *ex-post* amendments to the Supreme Court Act purporting to clarify that Justice Nadon was eligible were unconstitutional.¹⁶¹ The Court found that they amounted to a constitutional amendment requiring the unanimous consent of Parliament and all provinces. This judgment stands for the proposition that presidential appointments are reviewable by the court to ensure their constitutionality.

In the case of *Democratic Alliance v President of South Africa and Others*,¹⁶² the petitioner, the main opposition party, challenged the appointment of Mr. Menzi Silimane as the National Director of Public Prosecution by President Jacob Zuma arguing that the appointment was irrational and invalid. Before his appointment, Mr. Silimane had given evidence to the Giniwala Commission of Enquiry in the conduct of the then National Director of Public Prosecution Mr. Vusi Pikoli. The Report of the Giniwala Commission criticised his evidence and recommended that disciplinary proceeding be instituted against Mr. Silimane by Public Service Commission. However, no such disciplinary proceedings were brought and President Zuma ignored the Giniwala Commission's recommendations in the process of appointing Mr. Silimane.

The Constitutional Court of South Africa held that a president may exercise no power and perform no function beyond that conferred by the law and that the power must not be

¹⁶¹ *ibid* [121] (McLachlin C.J).

¹⁶² (CCT 122/11) [2012] ZACC 24.

misconstrued.¹⁶³ The Court also ascertained that the presidency's powers of appointment must be rationally related to the purpose for which they are conferred, otherwise the exercise of the power would be arbitrary and at odds with the Constitution.¹⁶⁴ The Court declared that:

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not; they fall short of the standard demanded by the Constitution.¹⁶⁵

The Constitutional Court evaluated Mr. Simelane's evidence at the Ginwala Enquiry and concluded that the evidence was contradictory and on face value, indicative of Mr Simelane's dishonesty and that it raised serious questions about Mr. Simelane's conscientiousness, integrity and credibility.¹⁶⁶ The appointment of Mr. Silmane was set aside. This judgment indicates that the presidency's powers of appointment must be exercised for the reasons granted by a constitution, which include appointing persons that would promote good governance, and that they must not be exercised irrationally. Further evidence of the latter can be found in the case of *National Labor Relations Board v Noel Canning et al*¹⁶⁷ in the United States of America in which Supreme Court held that President Obama violated the Constitution when he bypassed the

¹⁶³ *ibid* [27] (Yacoob ADCJ).

¹⁶⁴ *ibid* [21] (Yacoob ADCJ).

¹⁶⁵ *ibid* [30] (Yacoob ADCJ).

¹⁶⁶ *ibid* [35].

¹⁶⁷ 705 F. 3d 490 (12-1153) 26 June 2013.

Senate to appoint an official to the National Labour Relations Board during the period when the Senate was in recess in

Judging by these cases, a president may not exercise appointment powers in conflict with the principles of constitutionalism and may not do so irrationally and without legal restraint. In relation to President Museveni's appointment of Justice Odoki without the advice of the Judicial Service Commission, the appointment does not only appear unconstitutional but it also amounts to an unconstitutional amendment of the Constitution in relation to repealing the provision stipulating the retirement age of a chief justice.¹⁶⁸ It would also be irrational if the appointment was based on factors other than competence and eligibility.

With regards to the judicial appointments in Uganda, the presidency's quest to control the judiciary can be traced to the case of *Uganda v Commissioner of Prison ex parte Matovu*,¹⁶⁹ which challenged executive authority that I discussed in chapter two, section 4. Soon after that case, the judiciary became indebted to the presidency for their positions in the subsequent Constitution.¹⁷⁰ In retaining the president as the appointing authority of the top judicial officials, the 1995 Constitution endorses presidential benefaction of the judiciary and therefore, raises questions regarding the independence of the judiciary. It thus comes as no surprise that in a dissenting opinion, following the unsuccessful presidential electoral petition which sought to annul the election of President Museveni after the 2006 presidential election, Justice

¹⁶⁸ See (n 136).

¹⁶⁹ [1966] EALR 514.

¹⁷⁰ The Republic Constitution (n 40), art 76.

Kanyeihamba questioned the independence of the quorum from the President.¹⁷¹ This case will be discussed in the next chapter.

In the case of *TSR Subramanian v Unions of India*,¹⁷² the Supreme Court of India arguably provided the latest in a fascinating line of jurisprudence from a court attempting to insulate parts public servants from the domination of politicians. The petition was brought by eighty retired public servants who invoked article 32 of the Constitution of India 1949 which empowers the Supreme Court to issue directions or order or writs including *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, to enforce a constitutional remedy. The petitioners highlighted the necessity of various reforms for preservation of the integrity and the independence of public servants. They prayed that the Court to orders the government to implement three specific recommendations that had been put forward by a number of expert committees over the years that aimed at reforming the public service. These included to; (1) create an independent civil service boards at the center and in the states for promotions and transfers of bureaucrats; (2) provide fixed tenures of office for public servants, so as to give them some protection against indiscriminate or biased transfer by politicians; and (3) to require all civil servants to record all directions they receive from their administrative superiors, and also from political authorities or business interests.

¹⁷¹ See (n 78).

¹⁷² Writ Petition (Civil) No. 82 of 2011.

The two-member bench¹⁷³ ruled in favour of the petitioners. The Court instructed the various states to constitute public service boards, comprising of the top bureaucrats, until such time as Parliament would pass an Act that would specify in greater detail the composition and powers of such boards.¹⁷⁴ The Court also compelled the central and local governments to set out terms of tenure for different types of public servants within three months.¹⁷⁵ Finally, the Court instructed that public servants must respond only to documented instructions. The logic is that any attempts to unduly influence civil servants would be backed by evidence.¹⁷⁶

In contrast, in the United States of America, the Democrats used a rare parliamentary move to change the rules so that federal judicial nominees and executive office appointments can advance to confirmation votes by a simple majority of senators, rather than the sixty-vote supermajority that has been the standard for nearly four decades.¹⁷⁷ Since President Obama was elected, Republican senators have often blocked his nominees with no justification, preventing the Democrats from having a fair, functioning, and diverse judiciary.¹⁷⁸ They have blocked nearly as many of President Obama's nominees as all previous Senates had for all previous Presidents combined.¹⁷⁹ The effect of the changes is that presidential nominees will now require a simple

¹⁷³ Justices Radhakrishnan and Ghose.

¹⁷⁴ See (n 171) [22] (Radhakrishnan, J).

¹⁷⁵ *ibid* [17] (Ghose J).

¹⁷⁶ *ibid* [29] (Radhakrishnan, J).

¹⁷⁷ Janet Hook and Kristina Peterson, 'Democrats Rein in Senate Filibusters' *The Wall Street Journal* (21 November 2013) <http://online.wsj.com/news/articles/SB10001424052702304607104579211881413579404> accessed 22 March 2015.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

majority of senators to be confirmed and so increases their chances of being confirmed by the senate. In this regard, under the new rules, the president has been granted an increment in the powers of appointment because persons nominated by a president are more likely to be confirmed by senators than the position was under the old rules.

In principle, it is not constitutionally intolerable to confer powers of appointment of heads of government institutions on the presidency. It is however unconstitutional for a president to exercise such powers in a partisan manner, with the aim of allowing domination of public offices by persons favourable to a president and a government. This is liable to create a 'winner-takes-all' mentality. And in this regard, politics is viewed as a means to wealth and to unlimited state powers, and not as a practice intended to serve the country for its advancement.

States have generally allowed presidents the constitutional powers to appoint heads of government institutions. It is however desirable to align such powers with workable mechanisms that seek to control presidential appointments in a manner which would prevent abuse and would avoid the creation of a partisan civil service in order to make the president accountable to the people. This restricts a president to exercising the powers of appointment for the purposes for which they are granted by a constitution. In the case of Uganda, the legislature and other institutions such as the Judicial Service Commission appear to be designed to check presidential appointment powers but in reality, their constitutional powers to 'approve' or 'advise' the president have been disregarded by President Museveni and are therefore inept and they have no discernable impact. In some cases, there are no defined procedures to be followed when the president is exercising appointment powers. The President has also failed to exercise the powers

of appointment in order to fight corruption which is necessary to promote good governance, democracy and rule of law. The constitutional constraints against the misuse of the president's power of appointments were either carelessly not fastened effectively, or they were deliberately unfastened. This may be deduced from the manner in which they allow a president to be supervised by constitutional bodies that are beholden to a presidency. This is symbolic of a constitution that endows the presidency with such excessive powers that all institutions that are supposed to ensure checks and balances on the powers of the presidency are subservient to the presidency. It is also indicative of a fundamental law designed for the purpose of granting the person that is the president unlimited powers.

Thus, the existence of a constitutional mechanism for checking and balancing executive excesses, including procedures for impeaching a president for disregarding of the Constitution, are ineffective. This denotes a constitution lacks actual constitutionalism; there is a pattern of weak institutionalisation and problems with the formal distribution of power between the presidency and other arms of government. It is impossible for a document such as the 1995 Constitution to confer so much authority on the presidency and to confine its powers at the same time. The leadership style of President Museveni, his disregard for the constitutional constraints that seek to supervise the presidency, have led to the misuse of the presidential authority. The President has often encroached on the weak constitutional bodies which are not constitutionally empowered to fight back

It suffices to conclude that the presidency established by the 1995 Constitution poses a challenge to democracy and constitutionalism which the post-1995 constitutional reforms sought to

construct. The Constitution does not provide sufficient safeguards to ensure that the presidency's powers are sufficiently constrained in order to avoid their misuse. Presidential authority has been used to serve the President, his government and their supporters. It is worth recalling that during the constitution-making process, the people of Uganda demanded that the exercise of executive powers in the areas of senior constitutional appointments, the prerogative of mercy and the command of the armed forces should be subject to effective checks and balances to avoid their misuse.¹⁸⁰ From the above analysis of the way the powers and privileges of the presidency have been provided for by the 1995 Constitution and the manner in which they have been exercised and enjoyed, it may be stated that this demand was not met.

As the model of executive president established by the 1995 Constitution is similar to those found in Constitutions of many states in Africa, I will now discuss how Constitutions in Africa generally designate executive presidents. The aims are to illustrate that many states in Africa are trapped in this constitutional model of executive presidential excesses and to also address a common problem that is affecting African states.

4 Unpacking the African model of executive president

There is no ideal model of a constitution that would be suitable for all countries, however, constitutions are often inspired by the need to change the political and social direction of a country, often in the aftermath of conflicts, and they are also frequently aimed at redressing the

¹⁸⁰ Odoki's Report (n 29) 326.

ills and injustices of the past.¹⁸¹ For these reasons, they need to take into account the political history of the country; and most notably in Africa, where political leaders have generally demonstrated lack of the legitimacy needed to rule, constitutions need to effectively negotiate the relationship between governments and the citizenry, to ensure that the state powers exercised by leaders are derived from the latter, who can control or withdraw such powers when they are misused or abused. This would bestow legitimacy on the leaders because they could be perceived as exercising powers granted by the governed. A constitution should also serve as an instrument that ensures that the powers of the leaders are constrained by universally accepted principles of constitutionalism which I have discussed in section 5 of the previous chapter.

The establishment of the ‘Big African President’ with untrammelled constitutional powers stands in opposition to the concept of constitutionalism and it represents the biggest challenge to smooth democratic transition in post-colonial Africa. At least twenty-eight African countries’ Constitutions vest executive powers in a president or a prime minister,¹⁸² yet some of these Constitutions, including that of South Africa, which is widely acclaimed as being one of the most

¹⁸¹ See for example the Constitution of the Republic of South Africa 1996, Preamble.

¹⁸² These are: Constitution of the Federal Islamic Republic of Comoros 2001, art 12; Constitution of the Federal Republic of Nigeria 1999, art 130(2); Constitution of the Gabonese Republic 1991, art 8; Constitution of the Islamic Republic of Mauritania 1991, art 2; Constitution of the Republic of Angola 2010, art 108(1); Constitution of the Republic of Benin 1990, art 54; Constitution of the Republic of Botswana 1996, art 47; Constitution of the Republic of Congo 2001, art 56; Constitution of the Republic of Cote D'Ivoire 2000, art 41; Constitution of the Republic of Djibouti 1992, art 21; Constitution of the Republic of Gambia 1996, art 76; Constitution of the Republic of Ghana 1992, art 58(1); Constitution of the Republic of Guinea 2010, title III; Constitution of the Republic of Kenya, 2010 art 131(1) (b); Constitution of the Republic of Liberia 1984, art 50; Constitution of the Republic of Malawi 1994, art 70; Constitution of the Republic of Mali 1992, art 29; Constitution of Rwanda 2003, art 97; Constitution of the Republic of Seychelles 1993, art 66(1); Constitution of the Republic of Sierra Leone 1991, art 53(1); Constitution of the Republic of South Africa 1996, art 85(1); Constitution of the State of Eritrea 1997, art 39(2); Constitution of the Togolese Republic 1992, title IV; Constitution of the Tunisia Republic 2014, art 71; Constitution of the Republic of Zambia 1991, art 33(2); Constitution of the Republic of Zimbabwe 2013, art 88(1); Constitution of the United Republic of Tanzania 1977, art 34(4).

innovative in Africa, do not subject a president to direct elections by the citizenry.¹⁸³ Thus, the exercise of state power by the presidents of these countries is not directly sanctioned by the popular will of the populace. Nearly three-quarters of Africa's heads of state who left power in the 1960s and 1970s were ousted through a *coup d'état*, violent overthrow or assassination.¹⁸⁴ Arguably, this is because Constitutions in Africa make it impossible for the incumbent president to be removed from power through constitutional processes. Today, the 'Big Men' of Africa continue to tinker with their countries' Constitutions in order to maintain their hold on power. Therefore, it is not surprising that those Presidents who have managed to manipulate Constitutions of their countries in their favour have held power the longest.¹⁸⁵ Another unsurprising fact is that the other category of long-serving Presidents in Africa managed to hold power because their country's Constitution do not impose limits on the re-election of the head of state.¹⁸⁶

¹⁸³ Under the Constitution of the Republic of South Africa 1996, art 86(1) the president is elected by the National Assembly from among its members; also see the Constitution of Mauritius 1968, art 28(2) (a) (i) which provides that a president is elected by the National Assembly.

¹⁸⁴ Dan Posner & Daniel Young, 'The Institutionalisation of Political Power in Africa' [2007] 18 *Journal of Democracy* 127, 131.

¹⁸⁵ Seven Presidents, most of the longest-serving leaders in their countries post-independence history and in Africa, secured constitutional amendments that allowed them to stand for more terms in office and all seven won the subsequent elections. These are Presidents Blaise Compaore of Burkina Faso who was forced to resign in November 2014 as a result of a popular uprising in his country following his second attempt to amend his country's Constitution to allow him to run for a fifth term. He had been in power for 27 years; Idriss Deby of Chad who has held the reigns for 24 years; Omar Bongo of Gabon ruled his country for over 41 years until his death in October 2011, Lansana Conte of Guinea held power from April 1984 until his death in December 2008; Sam Nujoma of Namibia held power from 1990 to 2005; Gnassing Beeyadema of Togo held power from 1967 until his death in 2005; Yoweri Museveni of Uganda has now been in power for 28 years. See Daniel Vencovsky, 'Presidential Term Limits In Africa' (Conflict Trends Issue No. 24, 2007) 4.

¹⁸⁶ These include Emperor King Haile Selassie, who was deposed from power in Ethiopia in 1974 after 44 years; Muammar Gaddafi of Libya, who ruled for almost 42 years; Teodoro Obiang Nguema, Equatorial Guinea seized power in a coup on 3 August 1979. He has been in power since; Robert Mugabe of Zimbabwe the only remaining African leader to have been continuously in power since his country's independence. He became Prime Minister in April 1980 and President in 1987. He has held the office of the President for 27 years. *ibid.* 5

The most significant innovation of post-colonial African leaders is the manner in which they have perpetuated their incumbency through constitutions. Arguably; civil wars, corruption, poverty, ethnic or religious tensions which have afflicted post-colonial Africa are as a result of Constitutions that have entrenched governments in power without the possibility of change through constitutional processes. Since the advent of independence in the 1960's, more than one hundred and eighty presidents have held power in different African countries but less than twenty-percent of that number have relinquished power or retired voluntarily.¹⁸⁷

It is the void of constitutionalism, created as the result of bestowing excessive powers on presidents and their governments, which makes it impossible to transfer power through constitutional processes, the reason why Africans have resorted to waging wars to access political power. The paradox in Africa is that it is almost impossible for a change of government to occur through elections.¹⁸⁸ Yet most African Constitutions provide that elections are the only legitimate way of transferring political power.¹⁸⁹ However, elections serve no democratic

¹⁸⁷ These include Julius Nyerere of Tanzania; Leopold Senghor of Senegal; Nelson Mandela of South Africa and Quitt Masire of Botswana who voluntarily relinquished power and paved the way for smooth transfers of political power.

¹⁸⁸ According to a recent study, from 1990 to 2012 opposition parties in African States were able to take power in only one of every twenty-eight elections. See Giovanni Carbon, *Elections and leadership changes: How do political leaders take (and Leave) power in Africa* (Consultancy Africa Intelligence 2014) 7.

¹⁸⁹ These are: Constitution of Burkina Faso 1991, art 37; Constitution of the Democratic Republic of Congo 2005, art 5; Constitution of the Federal Democratic Republic of Ethiopia 1995, art 8; Constitution of the Federal Islamic Republic of Comoros 2001, art 3; Constitution of Gabonese Republic 1991, arts 3 and 4; Constitution of the Islamic Republic of Mauritania 1991, art 2; Constitution of the New Arab Republic of Egypt 2012, art 136; Constitution of the Republic of Angola 2010, art 4(1); Constitution of the Republic of Benin 1990, arts 3-6; Constitution of the Republic of Burundi 2005, arts 7 and 8 ; Constitution of the Republic of Cameroon 1972, art 2; Constitution of the Republic of Cape Verde 1992, arts 4 and 111; Constitution of the Republic of Congo 2001, art 3; Constitution of the Republic of Djibouti 1992, art 4; Constitution of the Republic of Equatorial Guinea 1991, art 2; Constitution of Guinea-Bissau 1984, art 2; Constitution of the Republic of Kenya 2010, art1(2) read with art 81; Constitution of the Republic of Liberia 1984, art 2; Constitution of the Republic of Malawi 1994, art 6; Constitution of the Togolese Republic 1992, art 5; Constitution of the Tunisian Republic 2012, art 1 (3); Constitution of the Republic of Uganda 1995, art 1.

purpose as they offer no prospect of change governments as the incumbent president is often constitutionally empowered to appoint heads of electoral management bodies.¹⁹⁰ Also, there is usually no envisaged end to the tenure of office of some of the executive presidents whose only constitutional limit to power is age.¹⁹¹ Some Constitutions do not impose age restrictions on the presidency,¹⁹² thereby allowing presidents to govern for life. Constitutions in Africa generally allow the presidency command over the armed forces,¹⁹³ which more often than not they have used as a weapon of coercion against political adversaries and citizenry, and as an instrument to arbitrate political disputes.

¹⁹⁰ See Constitution of Burkina Faso 1991, art 153; Constitution of Ghana 1992, art 43 read with art 70; Constitution of the Federal Republic of Somalia 2012, art 89; Constitution of the Republic of Uganda 1995, art 60; Constitution of the Republic of Zimbabwe 2013, art 91; Constitution of the Togolese Republic 1992, art 59; Constitution of the United Republic of Tanzania 1977, art 74.

¹⁹¹ See Constitution of the Federal Republic of Somalia 2012, art 89; Constitution of the Islamic Republic of Mauritania 1991, art 28 states that the president of the Republic is eligible for re-election; Constitution of the People's Democratic Republic of Algeria 1996, art 74; Constitution of the Republic of Cameroon 1972, art 5(2); Constitution of the Republic of Djibouti 1992, art 23 read with art 24; Constitution of the Republic of Mauritius 1968, art 28(2)(a)(ii); Constitution of the Republic of Uganda 1995, art 105(1) - (2); Constitution of the Republic of Zimbabwe 2013, art 29.

¹⁹² See Constitution of the Republic of Equatorial Guinea 1991, art 34 read with art 35; Constitution of the Republic of Zimbabwe 2013, art 91.

¹⁹³ See Constitution of Burkina Faso 1991, art 52; Constitution of the Democratic Republic of Congo 2005, art 83; Constitution of the Federal Democratic Republic of Ethiopia 1995, art 74(1) allows a prime minister who is vested with executive power, command of the armed forces; Constitution of the Federal Islamic Republic of Comoros 2001, art 12; Constitution of the Federal Republic of Nigeria 1999, art 130(2); Constitution of the Republic of Gabon 1991, art 22; Constitution of the Republic of Angola 2010, art 108(1); Constitution of Burundi 2005, art 110; Constitution of the Republic of Cameroon 1972, art 8(2); Constitution of the Republic of Cape Verde 1980, art 147(1) (a); Constitution of the Republic of Congo 2001, arts 77 and 78; Constitution of the Republic of Cote D'Ivoire 2000, art 47; Constitution of the Republic of Djibouti 1992, art 32; Constitution of the Republic of Equatorial Guinea 1991, art 40; Constitution of the Republic of Gambia 1996, art 188(1); Constitution of the Republic of Ghana 1992, art 57(1); Constitution of the Republic of Guinea 2010, art 47; Constitution of the Republic of Guinea-Bissau 1984, art 65; Constitution of the Republic of Kenya 2010, art 131(1) (c); Constitution of the Republic of Liberia 1984, art 50; Constitution of the Republic of Malawi 1994, art 78; Constitution of the Republic of Mali 1992, art 44; Constitution of the Republic of Rwanda 2003, art 110; Constitution of the Republic of Seychelles 1993, art 50; Constitution of the Republic of South Africa 1996, art 202(1); Constitution of the State of Eritrea 1997, art 39(1); Constitution of the Togolese Republic 1992, art 72; Constitution of the Republic of Zimbabwe 2013, art 89; Constitution of the United Republic of Tanzania 1977, art 33(2).

Presidents are above the law as they are not subjected to legal proceedings during their tenure of office.¹⁹⁴ As a result they can break the law, so can their supporters or allies, to whom a president can extend the powers of pardon and commutation deriving from the constitutionally vested unquestionable power of clemency.¹⁹⁵ Constitutions declare the president as the most important person in the country or the first and most important citizen,¹⁹⁶ which has often allowed presidents to rule their countries as if they are managing their personal property. A president may appoint and dismiss the entire civil service at will.¹⁹⁷ Parliament, which is supposed to be one of the constitutional institutions for checking and balancing presidential authority, is beholden to a

¹⁹⁴ See Constitution of Southern Sudan 2011, art 103; Constitution of the Republic of Angola 2010, art 127; Constitution of the Republic of Congo 2001, art 87 the only exception is high treason; the Constitution of the Republic of Gambia 1996, art 69; Constitution of the Republic of Ghana 1992, art 57 (4)-(6); Constitution of the Republic of Guinea 2010, art 37; Constitution of the Republic of Kenya 2010, art 143(1) the immunity however does not extend to crimes for which the president may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity; Constitution of the Republic Liberia 1984, art 61; Constitution of the Republic of Malawi 1994, art 91; Constitution of the Republic of Namibia 1990, art 31; Constitution of the Republic of Rwanda 2003, art 115; Constitution of the Republic of Sierra Leone 1991, art 48(4); Constitution of the State of Eritrea 1977, art 43 the only exception where a president is faced with impeachment; Constitution of the Republic of Uganda 1995 art 98(5); Constitution of the Republic of Zambia 1991 art 43; Constitution of the Republic of Zimbabwe 2013 art 88; Constitution of the United Republic of Tanzania 1977, art 46.

¹⁹⁵ See Constitution of Islamic Republic of Mauritania 1991, art 37; Constitution of the Republic of Kenya 2010, art 33; Constitution of the Republic of Liberia 1984, art 59; Constitution of the Republic of Malawi 1994, art 89(2); Constitution of the Republic of Mali 1992, art 45; Constitution of the Republic of Mauritius 1991, art 75(2) requires the president to act on the advice of the Commission on the Prerogative of Mercy. Members of the Commission on Prerogative Mercy are appointed by the president; Constitution of the Republic of Rwanda 2003, art 111; Constitution of the Republic of Sierra Leon 1991, art 63; Constitution of the Republic of Zimbabwe 2013, art 121 allows a president to exercise prerogative mercy after consultation with the Cabinet appointed by the president; Constitution of the United Republic of Tanzania 1977, art 45; Constitution of Uganda 1995, art 122 (1) creates an Advisory Committee on the Prerogative Mercy to advice a president on the exercise of pardon. The seven members of the Committee are appointed by the president.

¹⁹⁶ See Constitution of the Republic of Equatorial Guinea 1991, art 32; Constitution of the Republic of Ghana 1992, art 57(2); Constitution of the Republic of Uganda 1995, art 98(2); Constitution of the Republic of Zimbabwe 2013, art 27(2).

¹⁹⁷ See Constitution of the Federal Republic of Somalia 2012, art 117; Constitution of the Republic of Angola 2010, art 119; Constitution of the Republic of Burundi 2005, art 111; Constitution of the Republic of Cameroon 1972, art 8(10); Constitution of the Republic of Cote D'Ivoire 2000, art 46; Constitution of the Republic of Equatorial Guinea 1991, art 39(g); Constitution of the Republic of Kenya 2010, art 134(c); Constitution of the Republic of Liberia 1984, art 56; Constitution of the Republic of Rwanda 2003, art 113; Constitution of Tunisian Republic 2014, art 78; Constitution of the Republic of Zimbabwe 2013, art 74; Constitution of the United Republic of Tanzania 1977, art 56.

president who can disband it at whatever time of his or her choosing.¹⁹⁸ The impeachment provisions are inadequate as a deterrent tool to ensure that a president complies with their constitutional and other legal obligations because of the of number of members of Parliament that is required to trigger the motion to impeach a president,¹⁹⁹ who often enjoys majority support in a partisan Parliament. The presidency has the sole power to issue decrees.²⁰⁰ It may also initiate amendments to the constitution²⁰¹ which could potentially allow a president to

¹⁹⁸ See Constitution of the Islamic Republic of Mauritania 1991, art 31 allows the president to dissolve Parliament and call fresh elections at any time after consultation with the vice president and prime minister who are both appointed by the president; the Constitution of the Republic of Equatorial Guinea 1991, art 66 permits a president to order the dissolution of the National Assembly and organise new elections at any time; Constitution of the Republic of Guinea 2010, art 96 allows the president to dissolve the National Assembly and call elections if there are persistent disagreements. A president is however only allowed to do so in the third year of the National Assembly's four-year tenure; Constitution of the Republic of Mali 1992, art 42 allows the president in consultation with the prime minister appointed by the president to dissolve the National Assembly and call for elections at any time; Constitution of the Republic of Rwanda 2003, art 133 allows the president to dissolve the National Assembly if there national interests, after consultation with the prime minister, both presidents of the Chambers of Parliament and the president of the Supreme Court; Constitution of the Republic of Seychelles 1993, art 110 allows a president to dissolve the National Assembly for any reason which the president considers to be in the national interest after giving seven days' notice to the Speaker; Constitution of the Republic of Togo 1992, art 68 allows the president to dissolve Parliament for any reason after consultation with the prime minister who is appointed by the president.

¹⁹⁹ See Constitution of the Federal Republic of Nigeria 1999, art 143(2) requires half of the members of Parliament to approve a motion to initiate proceedings against the president; Constitution of the Republic of Kenya 2010, art 145 provides that one-third of members of the National Assembly are required to trigger impeachment proceedings against the president; Constitution of the Republic of Malawi 1994, art 86 requires half of the members of the National Assembly to sign a motion initiating impeachment proceedings against a president; Constitution of the Republic of Seychelles 2011, art 54(1) provides that a motion proposing impeachment proceedings against the president must be signed by half of the members of the National Assembly; Constitution of the Republic of Sierra Leone 1991, art 51(1) mandates that not less than one-half of all the Members of Parliament must sign a motion alleging that a president has committed any violation of the Constitution or any gross misconduct in the performance of the functions of his office and specifying the particulars of the allegation, in order to trigger impeachment proceedings against a president.

²⁰⁰ See Constitution of Burkina Faso 1991, art 58; Constitution of the Democratic Republic of Congo 2005, art 218(1); Constitution of the Islamic Republic of Mauritania 1991, art 71; Constitution of the Republic of Angola 2010, arts 125-126; Constitution of the Republic of Cameroon 1972, art 8(8); Constitution of the Republic of Congo 2001, art 81; Constitution of the Republic of Equatorial Guinea 1991, art 41; Constitution of the Republic of Guinea 2010, art 46; Constitution of the Republic of Guinea-Bissau 1984, art 67 (11); Constitution of the Republic of Rwanda 2003, art 63.

²⁰¹ See Constitution of the Federal Islamic Republic of Comoros 2001, art 42; Constitution of the Islamic Republic of Mauritania 1991, art 99; Constitution of the Republic of Angola 2010, art 233; Constitution of the Republic of Cameroon 1972, art 63(1); Constitution of the Republic of Congo 2001, art 185; Constitution of the Republic of Djibouti 1992, art 91; Constitution of the Republic of Guinea 2010, art 152; Constitution of the Republic of Rwanda 2003, art 93; Constitution of the State of Eritrea 1997, art 59(1).

propose and to effect amendments to provisions relating to the presidency²⁰² in order to fortify power. A president may also suspend the Constitution.²⁰³ This design of the presidency suffers from a constitutionalism deficit. It also breeds violent struggles for political power because there is not prospect of replacing the incumbent president and government through constitutional means. It also does not provide sufficient mechanisms for meaningfully tempering a president's actions. Thus, most constitutions in Africa do not provide sufficient checks and balances on the presidency, despite the rhetoric suggesting that the exercise of executive power is subject to checks and balances by the legislature and the judiciary. Presidents and their governments rule under the constitution but not according to the norms of constitutionalism. In practice, the legislature and the judiciary are incapable of moderating presidential and governmental authority. Often, constitutions can be easily amended at the initiative of the president to allow the ruling regime to consolidate and advance its ambitions. Several state positions and the financial benefits that go along with such positions are dependent on the patronage of a president. Most prominent government positions and offices are occupied by persons who owe allegiance to the president who has the constitutional mandate to appoint and to dismiss the entire civil service almost at will.

Civil servants misappropriate foreign aid and state funds without fear of being brought to account because they are only answerable to the president. The armed forces are made up of people of the same tribe as the president, who can be trusted, because a president has to depend

²⁰² See Constitution of the Republic of Equatorial Guinea 1991, art 102-103; Constitution of the Republic of Liberia 1986, art 93 allows for the amendment of the presidential term limits provided the amendment does not become effective during the term of office of the incumbent president.

²⁰³ See Constitution of the Republic of Equatorial Guinea 1991, art 42(d) allows the president to suspend the Constitution in the event of terrorist attacks or mutiny and sentence those involved according to the gravity of the situation.

on them for power. Constitutions in Africa, often, do not make provision that the armed forces must reflect the ethnic diversity of the country. Assets of the state are sold into the private ownership of the president's family and supporters on instructions of the president. Public service jobs and lucrative state businesses opportunities are accessed only by the ruling government's supporters. Presidential constitution excesses may also be responsible for creating two societies in African countries namely, the extremely wealthy who are supporters of the president and the ruling government, and the poor who are not. These are some of the possible effects of the domineering presidential systems found in Constitutions of most African countries. The other notable fact is that in those countries where the domineering executive presidential model exists, Constitutions have either been sponsored by the ruling governments or they have been dubiously amended so as to provide incremental powers to the presidency.²⁰⁴ Thus their popular and legal legitimacy are questionable. It is therefore not surprising that when the International Criminal Court (ICC) declared that it would investigate Presidents Omar al- Bashir and Uhuru Kenyatta of Sudan and Kenya respectively, for committing international crimes against their people, African heads of state have attempted to convince Africans that the ICC is a colonial tool seeking to re-establish colonialism.²⁰⁵ Consequently, they have moved to expand the jurisdiction of the African Court of Justice and Human Rights, to create a regional legal framework for international crimes under which heads of state, ministers and government officials are provided with immunity from prosecution.²⁰⁶ This is because, for many African

²⁰⁴ These include Angola; Botswana; Burkina Faso; Central African Republic; Comoros; Congo; Cote d'Ivoire; Ethiopia; Gabon; Guinea Gambia; Rwanda; Uganda; Zimbabwe.

²⁰⁵ See Joel Kimathi, 'ICC is a racist and imperialist court- UHURU says as he tells Bensouda to respect Kenya's sovereignty' *Daily Post* (Nairobi, 23 October 2013) 2.

²⁰⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2011 (decision of 20-24 June 2014 on the draft legal instruments Doc. EX.CL/846(XXV)), art 46 (a).

leaders, constitutions have not imposed any legal limits to their powers. Therefore, their authority had not been questioned and they had not faced legal scrutiny before the ICC's operations.

Fed up with immovable African presidents and political dynasties, Africans across the continent are joining forces in the hope that they may 'turn the page' on leaders who have consolidated power through constitutions. For example, in Burkina Faso, Blaise Compaore was driven out by his people in October 2014 after twenty seven years of rule; however, President Paul Biya of Cameroon and his Congolese counterpart Denis Sassou Nguesso have each accumulated more than thirty years in power. Zimbabwe's Robert Mugabe has been president for thirty-eight years; Angola's José Eduardo dos Santos for thirty six; Equatorial Guinea's Teodoro Obiang Nguema Mbasogo for thirty three; and Uganda's Yoweri Museveni for twenty nine. At the time of writing, in the Democratic Republic of Congo, President Joseph Kabila is seeking to hang on to power at the end of his second term despite article 70 of the Constitution of the Democratic Republic of Congo 2011 providing that limiting the term of a president to five years renewable once, while President Pierre Nkurunziza's of Burundi has defied a two-term constitutional limits on the re-election of the president imposed by article 96 of the Constitution of Burundi 2005 to run for a third term, although the Constitutional Court has ruled in the case of *Décision de Cour Constitutionnelle du Burundi validant la candidature du Président Pierre Nkurunziza à un troisième mandat présidentiel*²⁰⁷ that the President is eligible for re-election. Also, President Kagame of Rwanda seems to be hinting that he might support a constitutional amendment that would allow him to run for a third term. When asked whether he would support the idea, he is reported to have responded that, 'let's wait and see what happens as we go- whatever will

²⁰⁷ RCCB (4 may 2005).

happen, we'll have an explanation'.²⁰⁸ The election in Nigerian, in March 2015, and the subsequent peaceful power transition from the incumbent President Goodluck Jonathan to his opponent General Muhammadu Buhari should have delighted Africans everywhere as Nigeria marked its first ever democratic change of power. The election highlighted just how unusual it is to vote an incumbent government out of power.

The new wave of constitutional review that is currently sweeping across West Africa deserves a brief mentioning. At least six countries in the sub-region; Benin, Ghana, Liberia, Nigeria, Senegal and Sierra Leone are currently reviewing their constitutions. Does this wave of constitutional reform signal a new era of recognition and acceptance of democratic processes in West Africa? Or does it merely reflect a trend of governments initiating constitutional reviews in order to surreptitiously attempt to subvert the democratic process through 'legitimately-accepted' means?

I will now examine how Benin, which like Uganda has in the past experienced all forms of misrule, has developed constitutional mechanisms to control and moderate the powers of the institution of the presidency. I will also compare the constitutional mechanisms in the Constitution of the Republic of Benin 1990²⁰⁹ to those in the 1995 Constitution of Uganda in order to draw lessons for Uganda and many countries in Africa on creating a limited presidency.

²⁰⁸ All Africa 'Africa: Is African Democracy Hopeful?' *All Africa* (13 April 2015) <http://allafrica.com/stories/201504131420.html> accessed 15 March 2015.

²⁰⁹ Hereafter referred to as the Constitution of Benin 1990.

5 Lessons from Benin

5.1 Background to the constitutional reforms in Benin

Like Uganda, Benin has between the period 1963 to 1989, experienced several *coup d'états*,²¹⁰ constitution abrogation,²¹¹ political instability,²¹² military rule, ethnicisation and personalisation of state power.²¹³ Also similar to the Uganda, every head of state and government that came to power in Benin created a constitutional order that allowed them to consolidate state power.²¹⁴ Towards the end of President Mathieu Kérékou's first regime, the country agreed to the idea of a first national conference as part of the so-called 'third wave' of democratisation.²¹⁵ The renowned *Conférence des Forces Vives de la Nation* was held in February 1990. Liberal

²¹⁰ Between 1963 and 1972 the Benin experienced eight coups. See Monty Marshal and Benjamin Cole, 'Conflicts Trends in Africa' (Center for Systemic Peace Publications 2005) Annex B.

²¹¹ Benin adopted ten fundamental laws which were all sponsored by different regimes that were in power. These are the Constitutions of 28 February 1959; 26 November 1960; 11 January 1964; the Charters of 1 September 1966; 11 April 1968; the Ordinances of 26 December 1969; 7 May 1970; 18 November 1974; the Fundamental Law of 26 August 1977 amended by the Constitutional Act of 6 March 1984 and the Constitutional Act of 13 August 1990, which served as a constitution for the transition to democracy. See Bruce Magnusson, 'Testing Democracy in Benin' in Richard Joseph (ed), *State, Conflict and Democracy in Africa* (Lynne Rienner Publishers 1999) 203, 207.

²¹² Benin had 11 governments between 1963 and 1972 that all come to power after overthrowing the previous governments. The country also had the unusual phenomenon of a collegial presidency with three heads of state, known as 'Presidential Triumvira' experienced between 1970 and 1972. See *ibid* 208.

²¹³ President General Mathieu Kérékou took power on October 1972 and ruled for 17 years. Almost all government positions were held by people of his tribe and he imposed a tight ban on freedoms. The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground. See *ibid* 221.

²¹⁴ *ibid* 204.

²¹⁵ Charles Fombad and Nathaniel Inegbedion, 'Presidential Term Limits and their Impact on Constitutionalism in Africa' in Charles Fombad and Christian Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Publication 2010) 1, 8.

democracy, the rule of law, separation of powers and human rights were at the heart of this new era of democratic revival, which the country sought.²¹⁶

In the pursuit of these objectives, the new constitution that emerged was as a result of a popular endeavour: a referendum.²¹⁷ The debates on the adoption of the Constitution of Benin 1990 focused on democratisation and the protection of fundamental rights due to the grave violations of the past. The new Constitution also addressed the problems of minimising excessive powers exercised by previous heads of state. As John Heilbrunn observes, the Constitution Commission was tasked with drafting a new constitution emphasising a strong rejection of dictatorship, one-man power, and disrespect for the rule of law, which were the main features of the previous governments.²¹⁸

5.2 Checks and balances on the presidency under the Benin Constitution 1990 and the 1995 Constitution of Uganda

The Constitution of Benin 1990 opted for an executive presidential system embodying common features of modern constitutionalism. It is grounded in the doctrine of the separation of powers, the rule of law and liberal democracy which are reflected in many of its provisions. It designates a president as the holder of executive powers.²¹⁹ Parliament may introduce Bills,²²⁰ and the

²¹⁶ Magnusson (n 211) 218.

²¹⁷ Fombad and Inegbedion (n 215) 4.

²¹⁸ John Heilbrunn 'Social Origins of National Conferences in Benin and Togo' [1993] 31 *Journal of Modern African Studies* 277, 281.

²¹⁹ The Constitution of Benin 1990 (n 209), art 54.

presidency is also able to propose Bills.²²¹ A state of siege and of emergency may only be decreed by the presidency, ‘after the advice’ of Parliament.²²² Any extension of the state of siege and that of emergency beyond fifteen days must be approved by Parliament.²²³

The provisions regarding the declaration of a state of emergency differs from those under the 1995 Constitution in two major ways that limit the wanton use of the emergency powers by a president. The 1995 Constitution provides that a president may in consultation with the cabinet, issue a proclamation declaring a state of emergency²²⁴ and this power is closely monitored by Parliament and the Human Rights Commission.²²⁵

Firstly, the cabinet of Uganda consists of ministers who are appointed by a president with the approval of Parliament²²⁶ and who may also be dismissed by the president.²²⁷ The ministers may also be censured by Parliament.²²⁸ As I have demonstrated in section 3.5 of this chapter, the safeguards purporting to ensure scrutiny of the president’s powers of appointments are ineffective and so in practice, Parliament has no meaningful role in approving presidential appointments. The president has therefore, a freehand in appointing members of the cabinet. The

²²⁰ *ibid* art 32.

²²¹ *ibid* art 57.

²²² *ibid* art 101(3).

²²³ *ibid* art 101(4).

²²⁴ The 1995 Constitution (n 2), art 110(1).

²²⁵ See (n 42).

²²⁶ The 1995 Constitution (n 2), art 113(1).

²²⁷ *ibid* art 116(a).

²²⁸ *ibid* art 118(1).

cabinet appointed by a president cannot be relied upon to exercise an independent view from that of the appointing authority to which it owes allegiance. The other institutions established to monitor the declaration of a state of emergency namely, the Human Rights Commission and Parliament are also not insulated from presidential influence in that the Commission's Chairperson and Commissioners are presidential appointees,²²⁹ and at the time of writing, President Museveni's party enjoys the majority in Parliament.²³⁰ In the case of Benin, by mandating that a president can only authorise a state of emergency 'after the advice' of Parliament, although the president is not bound by such advice, the Constitution of Benin requires that the advice of a less partisan body – the Parliament of Benin, must be sought before a state of emergency is declared. This differs to the practice in Uganda where the president authority to declare a state of emergency is supervised by bodies which are indebted to a president.

Second, the use of the term 'after the advice' although it does not dissimilar in literal meaning from the term 'in consultation' which is used in the 1995 Constitution, acts as a constitutional requirement aimed at ensuring that the advice, albeit not the consent, of the National Assembly is sought before such a declaration is made. In the case of Benin, where such advice is not sought, the Constitutional Court of Benin is empowered to step in of its own accord in order to ensure that the presidency conforms to its constitutional obligation.²³¹ The Constitutional Court of Uganda has no such powers.

²²⁹ *ibid* art 5(2).

²³⁰ See (n 52).

²³¹ The Constitution of Benin 1990 (n 209), art 119 provides that all acts, decisions, and actions of the executive and its agencies; the legislature and the judiciary are reviewable by the Constitutional Court.

In an effort to curtail another common practice by African leaders of misappropriating state assets, the Constitution of Benin 1990 provides that the president, whether in person or through an intermediary, is prohibited from purchasing or leasing state assets without the approval of the Constitutional Court under conditions prescribed by law.²³² Similarly, a president is required to declare his personal wealth on commencing, and at the end of their presidency.²³³ The president may be impeached where it is proven that he or she authored, co-authored or was an accomplice in embezzlement, corruption, or illegal enrichment.²³⁴ There are no such constraints on the presidency of Uganda. It has been reported that President Museveni has embezzled state assets.²³⁵ Such a provision in the 1995 Constitution would have indicated, at least on paper, a constitutional intention for a president to adhere to the principles of good governance in order to manage the country's resources responsibly for the benefit of all Ugandans.

In a further expression of a clear demarcation of the powers of the three arms of government, the Constitution of Benin 1990 provides that judicial power is independent of legislative power and of presidential power,²³⁶ and it is exercised by the courts and tribunals established in accordance

²³² *ibid* art 52.

²³³ *ibid*.

²³⁴ *ibid* art 75.

²³⁵ It has been claimed that the government has failed to provide information relating to the award of contracts for oil exploration in Uganda because the President Museveni has allocated himself and his family most of the revenues from the oil. See Ibrahim Kasita, 'Government Discloses Oil Deals' *New Vision*(Kampala, 28 June 2012) 4; also see Oil in Uganda, 'Activists dispute improved transparency claims' (*Oil in Uganda*, 13 July 2012) www.oilnuganda.org/categories/features/civil-society/page/3 accessed 3 March 2015.

²³⁶ The Constitution of Benin 1990 (n 209), art 125(1).

with the Constitution.²³⁷ Members of Parliament, also known as ‘deputies’ are elected by universal suffrage, for a four-year term and may be re-elected.²³⁸ The two main constitutional functions of Parliament, as expressed by the Constitution of Benin, are to make laws²³⁹ and to control government action.²⁴⁰ Parliament may refer the president to the High Court of Justice for impeachment proceedings,²⁴¹ thus allowing controls over the presidency and subjecting that control to judicial scrutiny by the other arms of government. The notable difference from the 1995 Constitution is the clearly stated role of Parliament²⁴² and the judicial examination of the impeachment process by a judiciary that is not indebted to the presidency.²⁴³

Unlike the 1995 Constitution, ²⁴⁴ Benin’s Constitution does not insulate a serving president from legal proceedings. In addition, where the president is indicted for high treason, insult to the National Assembly and any injury to honor and honesty, they may be suspended from duties and if convicted, may forfeit the office.²⁴⁵ Acts and omissions of deputies, including those of the

²³⁷ *ibid* art 125(2).

²³⁸ *ibid* art 80.

²³⁹ *ibid* art 96.

²⁴⁰ *ibid* art 79(2).

²⁴¹ *ibid* art 77.

²⁴² The 1995 Constitution (n 2), art 79 provides that the functions of Parliament are to make laws and to promote good governance.

²⁴³ *ibid* art 142 provides that the Chief Justice and three Justices of the Supreme Court, who preside over presidential impeachment proceeding, are appointed by the president acting on the advice of the Judicial Service Commission with the approval of Parliament, while under the Constitution of Benin 1990 (n 208), art 115, three of the six Constitution Court judges that preside over impeachment proceedings of a president are appointed by the National Assembly and the other three by the president thus providing a level of independence of the judges.

²⁴⁴ See (n 54).

²⁴⁵ The Constitution of Benin 1990 (n 209), art 138.

president carried out in the course of their constitutional duties enjoy ‘Parliamentary Immunity’ and as such they may not be investigated, arrested, detained, or prosecuted for opinions issued in the discharge of their state duties.²⁴⁶

While members of Uganda’s Parliament are not prohibited from acquiring ministerial positions,²⁴⁷ in an added affirmation of separation of powers, the Constitution of Benin prohibits deputies from holding ministerial positions.²⁴⁸ Members of the cabinet may also not hold parliamentary positions.²⁴⁹ A deputy’s right to vote in Parliament is personal and he or she may only once in a term vote in support of their political party.²⁵⁰ These provisions would have been useful to control President Museveni’s flagrant quest for power in two significant ways. First, the President has used cabinet ministers, who are members of Parliament, to carry out his motions in Parliament, including the 2005 amendment to repeal the term limits on the re-election of a president.²⁵¹ Second, the personal right to vote in Parliament would have prevented partisan approaches towards legislative matters and, therefore, would have insulated parliamentarians from being bullied by the President into implementing his wishes.

Another illustration of the constitutional restraints on the exercise of the powers of the presidency may be viewed by the controls on the issuing of decrees. The Constitution of Benin

²⁴⁶ *ibid* art 90. Exceptions are also provided therein.

²⁴⁷ The 1995 Constitution (n 2), art 80.

²⁴⁸ The Constitution of Benin 1990 (n 209), art 92.

²⁴⁹ *ibid* art 54.

²⁵⁰ *ibid* art 93.

²⁵¹ In 2005, Parliament amended art 105(2) of the 1995 Constitution to repeal the term limits on the re-election of a president.

empowers the presidency to issue decrees in exceptional measures required by the circumstances, however constitutional rights may not be suspended.²⁵² In the case of *DCC 27-94*,²⁵³ the Constitutional Court of Benin held that the power to issue decrees in exceptional measures constitutes a discretionary act of a president, an act of government which may not be subject to constitutionality checks except as to the forms in which it is exercised. The Court's decision indicates that the presidency's power to issue decrees may only be exercised within the forms prescribed by the Constitution. To avoid its abuse, two caveats are provided in the Constitution. First, Parliament is empowered to determine the period within which a president may issue decrees.²⁵⁴ Thus, the Court has pronounced in the case of *DCC 96-023*, that such powers may be exercised within the parameters of what Parliament permits.²⁵⁵ Second, the use of such powers must be aimed at quickly providing public and constitutional institutions the means to discharge their duties,²⁵⁶ thus defining the purposes for which a president may issue a decree.

In the case of Uganda, a president is required to lay before Parliament, for approval, a declaration of state of emergency not later than fourteen days after the president has issued such a declaration; Parliament may extend such a declaration for nine days at a time; and Parliament or the president may, revoke such a declaration where the circumstances for which it was issued

²⁵² The Constitution of Benin 1990 (n 209) art 68.

²⁵³ *DCC 27-94* of 24 August 1994.

²⁵⁴ The Constitution of Benin 1990 (n 209), art 69(2).

²⁵⁵ *DCC 96-023* of 26 April 1996.

²⁵⁶ The Constitution of Benin 1990 (n 209), art 69(1).

have seized to exist.²⁵⁷ However, in reality, Parliament's role in supervising these powers is negligible considering its record of subservience to the President Museveni and its ineffectiveness as an organ for checking presidential excesses, as well as the President's contempt for Parliament and the Constitution.²⁵⁸ Also, the purposes for which the powers may be put to use is not defined by the 1995 Constitution, it is left at the discretion of a president and the cabinet²⁵⁹ they have appointed, and as such they are open to abuse. It is also important to note that under article 110 (3) of the 1995 Constitution, a declaration of a state of emergency issued by a president may only be scrutinised by Parliament not later than thirteen days of being issued. Therefore for a period of up to twelve days at most, before Parliament can examine the purpose for which the powers have been put to use, they are open for abuse

The Constitution of Benin 1990 provides Parliament with various tools to bring the presidency to account. These include oral questions with or without debate, written questions, interpellations, and a Parliamentary Commission of Enquiry.²⁶⁰ The interpellation control mechanisms, empowers Parliament to summon a president to appear before it to explain government actions, and a president is compelled to attend or instruct a minister to appear.²⁶¹ In contrast, the 1995 Constitution of Uganda mandates the president to deliver to Parliament an address on the state of

²⁵⁷ The 1995 Constitution (n 2), art 110 (3)-(8).

²⁵⁸ For example see (n 101).

²⁵⁹ The 1995 Constitution (n 2), art 110 (1).

²⁶⁰ The Constitution of Benin 1990 (n 209), art 113.

²⁶¹ *ibid* art 71.

the nation at the beginning of each session of Parliament, and to address Parliament from time to time, on any matter of national importance.²⁶²

5.3 The Constitutional Court's supervision of a president

The Constitution of Benin establishes a powerful Constitutional Court charged with examining the constitutionality of laws, guaranteeing fundamental human rights and public liberties, and also acts as the regulatory body for the functions of institutions and for the activities of public authorities.²⁶³ The Court has played a major role in checking and balancing presidential authority. For example, Bills which may be initiated by the presidency²⁶⁴ must obtain the legal opinion of the Court before they are introduced.²⁶⁵ Also, laws may only be promulgated after the Constitutional Court has declared them consistent with the Constitution.²⁶⁶ The Constitutional Court may on its own initiative carry out a review of any laws that are likely to infringe human rights.²⁶⁷ The Court is also vested with the powers to declare laws enforceable where the president fails to approve a law that has been passed by the National Assembly.²⁶⁸ A provision declared unconstitutional may not be promulgated or enforced.²⁶⁹ Decisions of the Constitutional

²⁶² The 1995 Constitution (n 2), art 101.

²⁶³ The Constitution of Benin 1990 (n 209), art 114.

²⁶⁴ See (n 218).

²⁶⁵ The Constitution of Benin 1990 (n 209), art 105.

²⁶⁶ *ibid* art 117(1).

²⁶⁷ *ibid* art 121(2).

²⁶⁸ *ibid* art 57.

²⁶⁹ *ibid* art 124(1).

Court are not appealable²⁷⁰ and they are binding on public authorities and all civil, military, and jurisdictional authorities.²⁷¹ The Court has pronounced its independence from the executive, for example in the case of *DCC 01-018*; it held that an order by the Minister of Justice to release a detainee constituted an interference with the judiciary and therefore a violation of the Constitution.²⁷² Further illustration of the Court's independence and competence over the executive can be found in the case of *DCC 07-175*.²⁷³ Justice Conceptia D. Ounsou who delivered the Court's judgement quashed a presidential decree suspending the execution of a court order and declared it a violation of the Constitution, as it interfered with the independence of the judiciary. ²⁷⁴

The Constitutional Court's commitment to checking legislative and presidential powers and to protecting the sanctity of the Constitution is also demonstrated through its scrutiny of constitutional amendments. In the case of *DCC 06-074*, the Court dismissed attempts to amend the Constitution on the grounds that the fundamental law had been adopted by the people through a national consensus following the 1990 national conference and, therefore, cannot be altered by a minority.²⁷⁵ The logic is that constitutionalism at minimum requires that national consensus ought to preside over major amendments to the Constitution. As the Constitution was adopted following national consensus, its major provisions can only be amended the same way.

²⁷⁰ *ibid* art 124(2).

²⁷¹ *ibid* art 124(3).

²⁷² *DCC 01-018* of 9 May 2001.

²⁷³ *DCC 07-175* of 27 December 2007.

²⁷⁴ *ibid* [7] (Conceptia D. Ounsou J).

²⁷⁵ *DCC 06-074* of 8 July 2000.

The case concerned an amendment effected by members of Parliament behind closed doors to extend their term of office from four to five years. The Court also rejected the economic arguments in the cases of *DCC 05-139*²⁷⁶ and of *DCC 05-145*²⁷⁷ as it considered them not constitutionally justified, and not a basis for extending the tenure of the presidency. The arguments were advanced to seek an amendment to the Constitution in order to extend the constitutional limits on the presidential terms towards the end of the last term of President Mathieu Kérékou's second regime.

The Constitutional Court also adjudicates all matters relating to the functioning of state organs such as the designation, appointments and dismissal of holders of public office, including the office of the president.²⁷⁸ It determines the constitutionality of laws including proposed laws before promulgation.²⁷⁹ Thus, the constitutionality of the laws may be reviewed *a priori* - before the Bill is enacted, and *a posterior* - when an existing law may be brought before the Court for constitutional scrutiny.²⁸⁰ All acts, decisions and actions of the presidency, the legislature and the judiciary are reviewable by the Constitutional Court.²⁸¹ The Court also has a mandate over all disputes arising from the relationship between branches of the state.²⁸² It may therefore be stated that the Court's powers to review the constitutionality of laws and the actions of the legislature,

²⁷⁶ *DCC 05-139* of 17 November 2005.

²⁷⁷ *DCC 05-145* of 1 December 2005.

²⁷⁸ The Constitution of Benin 1990 (n 209), art 118(2).

²⁷⁹ *ibid* art 118(3).

²⁸⁰ *ibid* art 118(4).

²⁸¹ *ibid* art 118(1).

²⁸² *ibid* art 121(1).

judiciary and the executive are aimed at protecting and promoting the interest of the populace against misuse of state powers who would otherwise have to challenge such acts in the courts perhaps through private litigation.

The mechanism through which Benin's Constitutional Court reviews the exercise of state powers by the other arms of government, particularly the executive is a rare innovation in African constitutional designs. In the case of Uganda, the Constitutional Court's role is limited to interpreting the Constitution.²⁸³ The Court has no mandate to initiate reviews of the constitutionality of proposed and enacted legislation or the 1995 Constitution in the interest of the people. Furthermore, the 1995 Constitution does not compel the presidency or the legislature to seek the approval of the Court on the constitutionality of proposed laws. Such powers in the 1995 Constitution would have allowed the Constitution Court of Uganda to initiate reviews of the constitutionality of laws enacted under the NRM government which are aimed at criminalising and stifling political challenges and are also incompatible with human rights,²⁸⁴ as well as the amendment to the 1995 Constitution to remove limits on the re-election of the president²⁸⁵ before they were passed.

²⁸³ The 1995 Constitution (n 2), art 137(1).

²⁸⁴ These include the Anti-Homosexual Act 2014 which divides homosexual behaviour into two categories: 'aggravated homosexuality', for which an offender would receive life imprisonment and 'the offence of homosexuality' for which a first time offender would receive fourteen years in jail; the Public Order and Management Act, 2013 which was passed during the Walk-to-Work (W2W) -a protest against spiralling food and fuel prices led by then the leader of the opposition KizzaBesigye. The Act fails to establish a presumption in favour of the exercise of the right to freedom of peaceful assembly, or the duty on the state to facilitate peaceful assemblies and it criminalises organisers of assemblies for the unlawful conduct of third parties among others; the Anti-Pornographic Act 2014 which imposes a de facto dress code on women.

²⁸⁵ See (n 251).

The usefulness of granting the Constitutional Court of Uganda similar powers as exercised by the Constitution Court of Benin is highlighted by events that unfolded recently, which are reminiscent of Obote's first government in the case of *Grace Stuart Ibingira and others v Uganda*.²⁸⁶ In this instance, in the case of *Muwanga Kivumbi v Attorney General*,²⁸⁷ the Constitutional Court of Uganda declared section 32 of the Police Act, Chapter 303 unconstitutional. The provision allowed the Inspector General of Police to prohibit the convening of any assembly. However, the NRM government has enacted the Public Order and Management Act 2013 to restore the powers of the inspector general of police. The Act clearly imposes conditions which are inconsistent with the enjoyment of the freedom of assembly.²⁸⁸ Moreover, the 1995 Constitution prohibits Parliament from passing laws in order to alter the decision or judgment of any court.²⁸⁹ Enactment of such a law symbolises the authoritarian use of laws to stifle alternative political activities. It is also indicative the government's disregard of the Constitution. Under the Constitution of Benin 1990, the constitutionality and human rights compliance of the Public Order and Management Act would have been reviewed by the Constitutional Court both *a priori* and *a posteriori*. The constitutional prohibition from passing law for the purposes of defeating a decision of a court would certainly render the enactment of the Public Order and Management Act unconstitutional even before examining the human rights compliance of its provisions.

²⁸⁶ (1966) EALR 306. I have discussed this case in chapter two, section 4.

²⁸⁷ Constitutional Petition No. 9 of 2005.

²⁸⁸ For example the acts fails to establish a presumption in favour of the exercise of the right to freedom of peaceful assembly, it also fails to impose a duty on the state to facilitate peaceful assemblies contrary to the 1995 Constitution (n 2), art 29(1)(d).

²⁸⁹ The 1995 Constitution (n 2), art 92.

The other laudable novelty is the power of Benin's Constitutional Court to enact laws that have been passed by Parliament but not approved by a president.²⁹⁰ It may be argued that the Court's power to enact laws interferes with the legislative role of Parliament; however, as Parliament would have already passed the Bill, its enactment by the Court prevents a president from using the presidential power to veto the Bill unjustly as has sometimes been the case in Uganda.²⁹¹

The supervisory powers of the Constitutional Court also serve as a reminder to the president of Benin that presidential authority is under constant judicial scrutiny. Thus the Court acts as a deterrent to its misuse.

5.4 The president's power of appointment

In relation to the appointments of top civil servants, as provided for by the 1995 Constitution, the Constitution of Benin also allows the presidency to appoint senior civil servants and senior army officers after an 'advisory opinion' from the National Assembly.²⁹² The wording 'after an advisory opinion' indicates that the president may not appoint a civil servant before guidance is

²⁹⁰ See (n 268).

²⁹¹ The 1995 Constitution (n 2), art 91 provides that the Bill of Parliament must be signed by the president within thirty days or be returned to Parliament to be amended or where the Bill is returned to Parliament for the third time and it receives the support of at least two-thirds of the members of Parliament. It shall become law without the president assenting to it. The Marriage and Divorce Bill 2009 was passed by Parliament but for four years President Museveni did not assent to it. After the bill was passed by Parliament and sent to the President, it was neither signed nor returned to Parliament for four years. See The Ugandan Association of Women Lawyers, *Women's Rights in Uganda; Gaps between Policy and Practice* (Uganda Association of Women Lawyers Publication 1 May 2013)11.

²⁹² The Constitution of Benin 1990 (n 209), art 54.

sought and given by the National Assembly.²⁹³ It also suggests that a president is not bound to follow the advice of the National Assembly but may not ignore such advice without a good reason. This may be inferred from the wording in other provisions such as ‘after the advice’²⁹⁴ which suggests that the advice sought by the president is only meant to guide the president in the exercise of appointment powers. Notably, unlike in Uganda, when a president fails to seek the advice on the appointments or where the advisory opinion is ignored without good reason, the Constitutional Court of Benin has the power to intervene.²⁹⁵

A president may also appoint top army officers as well as diplomats.²⁹⁶ He or she may only appoint three of the seven members of the Constitutional Court²⁹⁷ for a five-year term renewable once.²⁹⁸ Apart from the three members of the Constitutional Court, all other presidential appointments must be made ‘after an advisory opinion’ of the National Assembly has been sought.²⁹⁹ The limitation on the number of members of the Constitutional Court that a president is allowed to appoint deserves noting, given the role of the Court in checking and balancing presidential authority. It appears that the *proviso* is intended to ensure that the Constitutional

²⁹³ For example the Constitution of the United State of America 1789, art 11(2)(2) empowers the president to nominate certain public official for appointment after which a president must seek the ‘advice and consent’ of the Senate on the nominees before they are appointed.

²⁹⁴ For example the president may appoint three of the seven members of the Constitutional Court after the advice from the president of the National Assembly. See The Constitution of Benin 1990 (n 209), art 56.

²⁹⁵ See (n 231).

²⁹⁶ See (n 292).

²⁹⁷ The other four members of the Constitutional Court are appointed by the National Assembly; while the president of the Constitutional Court is appointed by his peers from magistrates and the jurist members of the Court for a term of five years. See the Constitution of Benin 1990 (n 209), arts 116 and 115 (1) respectively.

²⁹⁸ *ibid* art 54.

²⁹⁹ *ibid*.

Court is not beholden to the presidency whose functions it is intended to supervise, amongst its other duties. This is symbolic of a constitution that embodies principles of constitutionalism in order to deter abuse of power.

The independence of the judiciary is guaranteed by article 126 which provides that judges, in the discharge of their duties, are subject only to the authority of the law and that a sitting judge may not be moved without following procedures provided by law.³⁰⁰ The procedure for removing judges and further safeguards are found in domestic legislation governing the recruitment, tenures, training, appointment and career management of the judiciary.³⁰¹ In the case of *DCC 06-063*, the Court declared that the posting of a judge without his consent was unconstitutional.³⁰²

At the same time, the Court has protected the presidency's role in the appointment of judges. It declared in the case of *DCC 00-054*, that an expressed account by a president is required to confirm the appointment of a judge.³⁰³ Under the Constitution of Benin, the presidential powers of appointment are moderated by constitutional restraints that ensure the constitutionality of appointments. In relation to judicial appointments, the inclusion of the provisions found in the Constitution of Benin 1990 in the 1995 Constitution of Uganda would have protected the

³⁰⁰ *ibid* art 126.

³⁰¹ See Loi No 2001-37 du 27 août 2002, Portant Organisation Judiciaire en République du Bénin and Loi No 2001-35 du 21 Février 2003, Portant Statut de la Magistrature en République du Bénin.

³⁰² *DCC 06-063* of 20 June 2006.

³⁰³ *DCC 00-054* of 2 October 2000.

integrity of the judiciary which has been questioned from within the judiciary.³⁰⁴ Furthermore, they would have ensured that the president exercises appointment powers for the purposes they were granted and as envisioned by the Constitution.

5.5 Managing the army

Given the military's historical role in meddling in the country's politics and in competing for political power illegally, the Constitution of Benin prohibits any attempt to overthrow a constitutional government by the personnel of the armed forces or of the public security and defines the act as a breach of duty and a crime against the nation and the state, punishable in accordance with the law.³⁰⁵ It also prohibits members of the armed forces from standing for public office³⁰⁶ and from serving in the cabinet.³⁰⁷ Only retired members of the armed forces may participate in the elections for public office.³⁰⁸ In the case of *EL 07-001*,³⁰⁹ the Constitutional Court ruled that the intervention of the military to support election management by transporting ballot papers compromised the integrity of the electoral process, it declared the

³⁰⁴ Justice Kanyeimba questioned the independence of the judges from the President Museveni following an electoral petition that sought to annul the presidential elections of 2006 from which the President emerged victorious. See *Rtd. Col. Dr. Kizza Besigye v Electoral Commission & Yoweri Kaguta Museveni* [2006] UGSC 24.

³⁰⁵ The Constitution of Benin 1990 (n 209), art 65.

³⁰⁶ *ibid* art 64.

³⁰⁷ *ibid* art 54(4).

³⁰⁸ *ibid* art 64(1).

³⁰⁹ *EL 07-001* of 22 January 2007.

army's participation in the electoral process unlawful and it affirmed the independence of the National Autonomous Electoral Commission.³¹⁰

Although the president is the commander-in-chief of the armed forces,³¹¹ the Constitution of Benin provides that the composition, organisation and the operation of the Superior Council of the armed forces shall be established by law.³¹² Also, the declaration of war in which the army can be deployed is authorised by the National Assembly.³¹³ In subjecting the army's operation, composition and organisation to the law, the Constitution of Benin puts its responsibilities and structure in the arms of the legislature and thereby insulates it from the overall influence of the executive. In a clear expression of the rejection of illegal acquisition of power, a president who acquires power through unconstitutional means is prohibited from accessing the presidential pension.³¹⁴

5.6 What Uganda and other African countries can learn from Benin

Pre-colonial traditions and cultures have been blamed for the bad governance systems in Africa.³¹⁵ Some post-colonial despotic rulers have justified dictatorship and violations of their

³¹⁰ Also see the case of *DCC 10-116* of 8 September 2010 in which the Court declared that any intervention of the Army in any public function must remain within constitutional parameters.

³¹¹ The Constitution of Benin 1990 (n 209), art 62.

³¹² *ibid.*

³¹³ *ibid* art 101.

³¹⁴ *ibid* art 48(3).

³¹⁵ Sabelo Ndlovu-Gatsheni, 'Who ruled by the spear? Rethinking the form of governance in the Ndebele State' [2008] 2 (3) *African Studies Quarterly* 71, 73.

people's rights on the basis of pre-colonial African traditions, cultures and histories because human rights and democracy were not organically built into pre-colonial African systems of governance.³¹⁶ On the other hand, some scholars have argued that governance systems in post-colonial African societies are a result of the colonial policies of divide and rule and the integration of diverse ethnic groups into a single nation.³¹⁷ In the case of Uganda, the dictatorial constitutional structures for exercising state powers indicate that post-colonial leaders have styled themselves in the images of the institutions of the kabaka³¹⁸ and that of the colonial governor.³¹⁹ The synthesis of these two systems of governance has given rise to the authoritarian presidential system found in fundamental laws.

This means that leaders have hardly enjoyed the necessary legitimacy gained through plural democratic laws but have depended on authoritarian legalism³²⁰ as well as the gun for their power. In others words, they have ruled according to the laws that they have dictated and their military might but not by the rule of law. This mode of governance has been instrumental in

³¹⁶ *ibid* 79.

³¹⁷ Gardener Thompson, *Governing Uganda: British Colonial Rule and its Legacy* (Fountain Publishers 2003) 27-31; also see Samwiri Karugire, *Roots of Instability in Uganda* (2nd edition, Fountain Publishers 2003) 38-44.

³¹⁸For example, in non-segmentary societies like the Buganda of Uganda, power and the right to use violence were vested in the king who could take any action he wished. The king's subjects had no choice between ruling and being ruled; they were ruled. See Abdu Kasozi, *The Social Origins of Violence in Uganda 1962-1985* (McGill Queens University Press 1994) 123.

³¹⁹ This is illustrated by the use of repressive in a similar manner like the colonial law governor. For example, whenever his authority has been challenged, President Museveni has invoked The Penal Code Act 1950 Chapter 120 to fend of criticisms about his governance. S 39 (1) defines seditious intention as bringing into hatred or contempt or to exciting disaffection against the person of the President and the Government, as by law established, or the Constitution. Under s 40 (1) of the Act, a person acts with seditious intentions if s/he utters, prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication.

³²⁰ In a legal authoritarian state, laws serve the purpose of the political elite. The main purpose of the law is to protect and preserve political power. For a detailed discussion on legal authoritarianism see Tom Ginsburg and Alberto Simper, *Constitution in Authoritarian Regimes* (Cambridge University Press 2014) 14-21.

keeping heads of state in power because it allows them to subjugate and terrorise the citizenry. As Ben Nwabueze aptly notes, in a number of African countries, Constitutions contain to a large extent, nothing but lofty declarations of objectives and descriptions of organs of government in terms that impart no enforceable restraint upon person that exercise state power.³²¹

Benin marks an exception. The model of presidency provided for by the Constitution of Benin is designed to be a ‘strong presidentialism.’ This is evidenced by the provisions of the Constitution that afford the presidency strong prerogatives to initiate laws³²² and to appoint top public civil servants.³²³ A president is also allowed command of the armed forces³²⁴ and to appoint some of the top judicial officers.³²⁵ However, the strong presidency was constitutionally shackled to create a limited presidency. The Constitution of Benin illustrates that it is possible for a constitution to designate an accountable and constrainable executive president. It has, therefore, facilitated smooth transfers of political power³²⁶ and it has also brought stability to the country because its foundations were constructed on constitutionalism and the view of the populace. A purposefully empowered Constitutional Court has played a major role in supervising the

³²¹ Ben Nwabueze, *Constitutionalism in the Emergent States* (Fairleigh Dickinson University Press 1973) 182.

³²² See (n 219).

³²³ See (n 292).

³²⁴ See (n 312).

³²⁵ See (n 294).

³²⁶ Since the Constitution of Benin was adopted in 1990 the position of the head of state has been transferred three times following elections and three political parties have come to power. These are : Nicephore Soglo of the Union of the Triumph of Democratic Renew (UTRD) in 1991; Nicephore Soglo also emerged victorious in the 1996 presidential elections under the umbrella of his newly formed political party the Renaissance Party of Benin (RB); Mathieu Kerekou the leader of Action Front for the Renewal of Development (FARD-Alafia) was the winner of the 2001 presidential election ; Yayi Boni was elected as an independent candidate in the 2006 presidential elections and was re-elected in 2011. See African Elections Database <http://africanelections.tripod.com/bj.html> accessed 24 April 2015.

functions of the presidency. The Court has both strengthened and protected constitutionalism and positioned the country as a democratic model. The plague of authoritarian presidents, which has afflicted African Constitutions, was overcome by developing constitutional mechanisms for checking and balancing the presidential authority and which limit executive influence over state organs.

An analysis of the designation of the office of the president as provided for in the Constitution of Benin reveals that the Constitution balances the distribution of powers by moderating executive presidentialism thereby avoiding a 'presidential monarchy' or 'monocracy'. One of its many praiseworthy features of constitutionalism is the creative use of the '*principes à valeur constitutionnelle*' which has prevented the legislators and the executive from extending their tenures without the approval of the citizenry.³²⁷

It is fitting to conclude this section with a brief discussion of the events that made it possible to minimise the influence of the dominant actors during the constitution-making process in Benin and, therefore, insulated the process from the overriding influence of any person or group. The Constitution of Benin was promulgated following a genuine inclusive and participatory constitution-making exercise born out of a national desire to establish a new democratic order.³²⁸ The citizenry initiated democratic awakening in February 1990, when they convened the first sovereign national conference that led to the reclaiming of constitutionalism and democracy in the country. Long-serving President Mathieu Kérékou's seventeen-year tenure was ended

³²⁷ See (n 275) - (n 277).

³²⁸ Magnusson (n 211) 221.

following political protests in 1989.³²⁹ Although Kérékou unsuccessfully contested the first presidential elections following the adoption of the Constitution in 1991 and he was elected as president in the third elections in 2001, before the first elections, he and his ruling Parti de la révolution populaire du Bénin (PRPB) were stripped of power in order to prevent the possibility of influencing the new rules for political competition prior to the elections and the debates on the new constitution.³³⁰ This way, Kérékou and his government were unable to exert their influence during the making of the Constitution of Benin 1990.

Benin's constitutional democracy has successfully endured for a quarter-century. Something which Uganda and many African states should aspire to.

6. Reflections on the model of executive president in the 1995 Constitution

The designation of the president established by the 1995 Constitution makes it practically impossible to meaningfully limit the powers of the presidency. This is because all instruments of power and organs of the state are entrusted and subservient to the presidency, which is due to a Constitution that entrenches an authoritarian government through legal means.³³¹

A constitution is supposed to provide for differing mechanisms of exercising power through the operating cord of constitutionalism, founded on principles that are commonly agreed to, as discussed in chapter three, section 5 of this study. In measuring the model of the executive

³²⁹ *ibid.*

³³⁰ *ibid* 222.

³³¹ For a definition of legal authoritarianism, see Ginsburg and Simper (n 320).

president, as established by the 1995 Constitution, against universally accepted norms of constitutionalism, it can rightly be stated that it does not abide with the tenets of constitutionalism. This is because there are no effective constitutional constraints on the presidency. The presidency is also allowed domination of instruments of power. Thus, while the presidency's powers are sanctioned by the Constitution, it cannot be claimed that they are certified by the norms of constitutionalism because it does not operate or rule within the normative framework of constitutionalism. It is exactly this model of presidency that defines presidents and governments that rule by law and not according to the rule of law.³³² It is also under this model of executive president that previous heads of state used state powers to ravage Uganda before 1995. Constitutionalism mandates limitations on public officers that exercise state power. Norms of constitutionalism allow for limited power. It is quite conspicuous that the powers granted to the presidency by the 1995 Constitution are unlimited, serve to promote legal authoritarianism and they are incompatible with the intention of establishing a constitutional democracy. In this regard, it can be stated that the framers of the 1995 Constitution achieved their aim of creating an unlimited presidency, a president-for-life and a consolidated regime. The office of the president is thus, lacking in 'constitutional reform validity'. The concept of constitutional reform validity that I refer to concerns the relationship between validity and 'efficacy' of the constitutional reforms. The efficacy of a constitutional reform is determined by its capability to remedy Uganda's history of one-man rule regimes, self-grants of unlimited state

³³² Drawing on empirical and theoretical insights from every major region of the world, Tom Ginsburg and Tamir Moustafa have argued that laws and courts alike in authoritarian states are pawns of their regimes. They serve to uphold the interests of governing elites and to frustrate the efforts of their opponents. In such states, leaders and governments rule by law and not according to the rule of law which denotes norms of law. See generally Tom Ginsburg and Tamir Moustafa, *Rule by Law; the Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 34.

powers and misuse of such powers, manipulation of state institutions and disregard of constitutions. Thus a constitutional reform is not valid if it is not efficacious in this regard.

The model of presidency provided for by the 1995 Constitution also appears to offend the fundamental principles underlying the allocation of powers in the 1995 Constitution which I have endeavoured to set out at the beginning of this chapter, in that it invests state powers that belong to the people³³³ in the presidency, without any efficient mechanisms for limiting or recalling those powers. As power belongs to the people, the people must be able to limit or recall it where it is misused or abused. However, they cannot do so under the kind of presidential system that dominates all institutions that are meant to ensure checks and balances on the presidency on behalf of the people. Constitutional institutions that masquerade to provide checks and balances on executive excesses are inept in their functions because they are not sufficiently empowered.³³⁴ This has led the President to treat these institutions with contempt. Therefore, it cannot be claimed that the powers granted to the presidency can be withdrawn or limited through constitutional processes, including elections, as this study will argue in the next chapter. Reginald Dias provides an insight into what the failure by a legal system to build effective controls that prevent the abuse or misuse of state power tells us about governments, and how state power is exercised in states, which I find very fitting for Uganda. He writes that:

Social justice in relation to power has to be considered in relation to the exercise of authority in a State. This is manifested largely through laws. A legal system represents the linkage between law and the State among other things, and an important link is their validity.³³⁵

³³³ See (n 6).

³³⁴ For example, the impeachment process entrusted to Parliament is ineffectual because of the majority the President enjoys in Parliament.

³³⁵ Reginald Dias, *Jurisprudence* (Butterworth and Co. 1976) 102.

Thus, Dias propounds two ways to prevent the abuse of power. One is to insert control into the criterion of validity and the other is to curb the liberty to use power abusively.³³⁶ In other words, according to Dias, a legal system reflects the legitimacy of those that exercise state power. A sham legal system will buttress a sham government. One way of identifying such a legal system and, by implication, a sham government is to assess the validity of the laws and controls within the legal system designed to stem the abuse of power. The absence of effective controls for preventing abuse of state power is an indicator not only of a sham government, but also of the misuse of authority in a state.

7. Mini-conclusion

Presidential authority under the 1995 has remained almost the same as it was before 1995. Indeed, the powers and privileges of the head of state are almost as they were exercised and enjoyed by the kings of Buganda and since the creation of the Uganda Protectorate in 1894, so has the ineptness of the various constitutional bodies to provide sufficient checks and balances on the head of state. The design of the presidency under the 1995 Constitution also emerged out of efforts to design a fundamental law which would provide President Museveni and his NRM government permanent ownership of power.

³³⁶ *ibid.*

Also, the culture of constitution disparaging that led past heads of state to disregard and to abrogate provisions of the Republic Constitution that limited their powers has re-emerged in post-1995 Uganda. It is manifested in the way President Museveni has disregard provision of the constitution that attempt to limit presidential authority. The ascription of excessive powers to the presidency represents a failure to circumscribe the previously uncircumscribed presidential authority. While it may be necessary in some cases to grant a president sufficient powers to be able to act immediately in order to address urgent problems and to provide effective leadership, given the political culture, institutional traditions, perception by the population and the leadership styles in Uganda, the allocation of such powers to the presidency is unjustified.

The 1995 Constitution establishes a presidency that embodies the power of the state. The entitlement to state powers power by the presidency has allowed the incumbent President to become a permanent holder of power through subsequent constitutional amendments,³³⁷ and he has progressively become less accountable to the legislature, the judiciary and the people. The Constitution failed in its challenge of managing the tension between creating an empowered presidency, capable of taking decisive decisions and a limited one whose powers and privileges are effectively circumscribed in order to avoid their abuse and misuse. The outcome of such a travesty of constitutional reforms is that an armed group that came to power through violence and unconstitutional means was constitutionally legitimised, granted unlimited state powers and imbedded in power without the possibility of being removed from it through constitutional processes. The Constitution falters in the task of striking a balance between the two dangers; that of the presidency becoming an autocracy, and of making presidential authority become so

³³⁷ See (n 250).

limited as to lead to immobility and ineffectiveness. The dominant nature of the presidency over institutions of government in Uganda refutes the impression created by President Museveni's interim government that it was on a steady path to strengthen democratic institutions in the country.³³⁸ The institutions have ended up being exploited for propaganda purposes; without being able to perform their duties independently of the executive. Therefore, the NRM's motive for adopting a constitution that would maintain them in power in a 'facade democratic dispensation' has significant implications for Uganda's political future. The personalisation of power has led to authoritarianism, patronage, corruption and has reversed Uganda's projected democratic gains.

The presidency's dominance over state organs clearly deviates from the principles of constitutionalism and undermines any democratic tone in the Constitution. In Uganda, all government institutions and personnel are beholden to one person- President Museveni, who wields unfettered authority. Also, the slowness and the resistance of the process of democratisation are attributable to the constitutional presidential patrimonial logic.

In the following chapter, I investigate the post-1995 constitutional and domestic legal framework that was established for electing the president of Uganda.

³³⁸ On seizing power, President Museveni promised Ugandans that his NRM government would oversee the adoption a new constitution based on popular will as part of laying the ground work for returning Uganda to democratic governance. See National Resistance Movement Secretariat, 'Mission to Freedom Uganda Resistance News 1981-1985' (National Resistance Movement Publications 1990) 20-21.

Chapter Five

Presidential Elections in Post-1995 Uganda

1. Introduction

One of the post-1995 constitutional reforms in Uganda is the introduction of direct presidential elections. The significance of this is that since the 1995 Constitution came into force, and for the first time in the country's history, the majority of Ugandans can directly elect a president and more Ugandans are also eligible to contest for the presidency. In this regard, the post-1995 constitutional and domestic legal framework for electing a president is important for assessing how the office of the president, which since 1894 the majority of Ugandans could not contest, is now decided and it also provides an understanding of how the president of Uganda is legally elected

Throughout this chapter, focusing on the challenges emerging from presidential elections, I analyse the constitutional and legal framework under which the president of Uganda has been elected since 1995. The main objective is to determine the efficacy of the post-1995 constitutional and domestic legal framework in facilitating fair and transparent contestation for the presidency in order to avert the old violent struggles of political power.

This chapter is made up of six sections inclusive of this introductory section. Section 2 explores the development of electoral laws under which the president of Uganda is elected. The aim is to

provide a comprehensive background to the laws that govern presidential elections. Section 3 sets out the constitutional and domestic legal framework under which a president of Uganda is elected. In section 4, a summary of the presidential elections since 1995 is provided. Section 5 starts with a general discussion of the complaints about electoral laws in Uganda. The section also identifies and critically analyses the two main challenges to presidential elections which are a source of the most animated complaints by politicians, civil society and the general public in Uganda. Section 6 is the conclusion to this chapter.

2. Presidential elections laws in post-1995 Uganda

2.1 The constitutional order for electing the president of Uganda

The Constitution Commission which was created for the purposes of consulting Ugandans on the 1995 Constitution and for drawing-up a draft Constitution, reported that there was an overwhelming desire among Ugandans to develop a new constitution containing fair and transparent electoral laws that would allow for the smooth transfer of political power and protect the sanctity of the constitution.¹ It noted that:

The people are demanding an end to sudden and violent changes of government and the consequent political, social and economic destabilisation that has caused so much suffering. They castigate the “fashion” “of going to the bush” to resolve political and constitutional conflicts which has resulted in terrible consequences to the ordinary people who get caught up in the conflicts. They demand an effective mechanism to be put in place to ensure orderly transfer of power so that the people’s lives are not unduly disturbed. The people have noted that one of the principal causes of instability is that past Constitutions have not been honoured; that “power

¹ Republic of Uganda, *The Report of the Uganda Constitution Commission: Analysis and Recommendations* (Ministry of Justice and Constitutional Affairs 1992) (Odoki’s Report and the draft Constitution) Odoki’s Report 385.

hungry politicians” faced with constitutional arrangements that did not fit or which limited their designs or interest simply suspended or totally abrogated them. The people are demanding safeguards to ensure that those who wield power recognize, respect and uphold the supremacy of the new Constitution.²

The Constitution Commission observed that the major problem in Uganda has been that those in power have been reluctant to subject themselves to the electoral process.³ Therefore it endorsed the demands of the people namely, for leaders at all levels to be elected at known and regular intervals and for the electoral process to be designed and implemented in a way that minimises abuse so as to guard against electoral results being challenged by violent means on the basis that they are rigged.⁴

In relation to the election of a president, who was not subject to direct elections under the Independence and the Republic Constitutions, the Constitution Commission noted that there was overwhelming support for the concept of a democratically elected president which emanated from the people’s experience of both colonial and independent Uganda.⁵ It observed that:

The people want direct participation in the elections of their leader and also prefer to have a president who commands a national following and not one whose support is based on a particular region, group, or force.⁶

The Commission reported that:

There has been concern about the lack of orderly succession of government. Even though past constitutions have made provisions for the tenure of office of government and the democratic mechanisms for handing power to a newly elected government, these have never been observed. Where leaders did not appear to be prepared to hand over power after free and fair elections, they have been violently resisted. The culture of

² ibid 87.

³ ibid 94.

⁴ ibid.

⁵ ibid 319.

⁶ ibid.

clinging on to political office was criticized in the many of the submissions we received. Even the extension of the term of office of the NRM by the NRC was condemned by some as undemocratic.⁷

Thus, the Constitution Commission's draft Constitution recommended that a president should be elected directly by universal suffrage.⁸ The minimum age of a president should be forty years but not more than seventy-five.⁹ The president should have attained a qualification of secondary education.¹⁰ She or he should be a citizen of Uganda by birth and should have been resident for 12 months prior to the elections.¹¹ In order to qualify as a presidential candidate, a person should have the support of one thousand qualified voters from each of the two-thirds of the districts of Uganda.¹² A candidate in presidential election should be declared a winner if he or she has won the majority of votes cast.¹³ Where no candidate obtains the absolute majority, then a second run-off election should be held in thirty days after the previous election.¹⁴ The candidates for the second run-off elections should be the two candidates who obtained the two highest results at the previous election.¹⁵ The Electoral Commission should declare the winner of the presidential elections within twenty-four hours of ascertaining the results.¹⁶ A person who challenges the

⁷ *ibid* 320.

⁸ The draft Constitution (n 1), art 105(a).

⁹ *ibid* art 107(a).

¹⁰ *ibid* art 106.

¹¹ *ibid* art 107(b).

¹² *ibid* art 108(a).

¹³ *ibid* art 108(b).

¹⁴ *ibid* art 108(c).

¹⁵ *ibid* art 108(d).

¹⁶ *ibid* art 109.

validity of presidential elections should be required to show that he or she has the support of at least five hundred voters.¹⁷

In October 1995 when the new constitution was promulgated,¹⁸ rules for managing political competition and for transferring political power were instituted therein in an effort to ensure that future leaders are elected through the popular will of Ugandans, to replace the system of indirectly elected presidents found erstwhile fundamental laws. Under article 59(1) of the 1995 Constitution; every citizen of Uganda of eighteen years of age and above has the right to vote; while article 59(3) provides that the state shall take all necessary steps to ensure that all citizens qualified to vote register and exercise the right to vote. The 1995 Constitution introduced presidential elections to be conducted through universal adult suffrage.¹⁹ In this regard, for the first time in Uganda, the Constitution established direct political contestation for the presidency by ensuring that the occupant is independently subjected to the electorate's choice. This is as a result of the people of Uganda demanding direct participation in the elections of their president during the constitution-consulting exercise.²⁰ Judging by the provisions of the 1995 Constitution that outline the criteria for presidential elections, which will be discussed in this chapter, most of the recommendations of the Constitution Committee were passed without modification by the Constituent Assembly.

¹⁷ *ibid* art 110.

¹⁸ Constitution of the Republic of Uganda 1995 (The 1995 Constitution).

¹⁹ *ibid* art 103(1).

²⁰ See (n 6).

2.2 The 2005 amendment to the constitutional order for electing a president

On 30 September 2005, the second Parliament of post-1995 Uganda repealed article 105(2) of the 1995 Constitution which afforded any person serving as the president a maximum of two five-year terms. The amendment was significant as it created unlimited terms for the office of the president and in doing so, paved the way for President Yoweri Museveni to run for more terms in office thus creating the possibility of a president-for-life. In order to enact the amendment, Parliament passed the Constitutional Amendment Act 2005 and the Constitutional Amendment Act No.2 2005. It has been reported that there were several petitions presented to Parliament, and submissions written by civil society organisations opposing the removal of presidential term limits from the 1995 Constitution.²¹ Members of the ruling government in the legislature and executive branches dominated the group that favoured repealing the term limits, while opposition groups in Parliament and civil society organisations were in the opposite camp.²² Both sides of the political divide traded opinions about the legality of the amendment.²³ Surprisingly, questions about the legality of the amendment were not put before the Constitutional Court which is vested with the constitutional authority to interpret the provisions of the Constitution under Art 137(1) of the 1995 Constitution. The small number of NRM members of the second Parliament who opposed the amendment, are reported to have been threatened with denial of the party

²¹ Godfrey Asimwe and Christopher Muhozi, *The State of Constitutional Development in Uganda for the Year 2005* (East African Centre for Constitutional Development 2005) 8.

²² *ibid.*

²³ *ibid* 9.

nomination and or well-financed campaigns for their opponents should they seek re-election.²⁴ For President Museveni, his comments accentuate his argument for repealing the term limits; he is quoted as saying, ‘Why should I sentence Uganda to suicide by handing over to (the) people we fought and defeated? It is dangerous, despite the fact that the Constitution allows them to run against me.’²⁵

Speculations about repealing the presidential term limits began as early as 2002, a year after President Museveni started his second and last term in office under the then existing constitutional provision. At his party’s national conference, the President called for an amendment of article 105(2) that restricted an incumbent’s presidency to two terms.²⁶

Before the constitutional amendments of 2005 were passed, Parliament remarkably stood up to the President, using its new constitutional powers to become the most independent in Ugandan history.²⁷ It not only modified Bills proposed by the government but also censured several of the President’s ministers for misuse of public funds.²⁸ It may be argued that the second Parliament’s efforts to limit governmental excesses prompted efforts to amend the 1995 Constitution so an already domineering presidency could increase its powers.

²⁴ Joel Barkan, ‘Uganda: An African Success Past Its Prime?’(Challenges and Change in Uganda Conference, Wilson International Centre for Scholars Washington, 2 June 2005).

²⁵ Beatrice Ngozi, *The State of Constitutionalism in Uganda in 2003* (East African Centre for Constitutional Development 2003) 12.

²⁶ United States Agency for International Development, *Democracy and Governance Assessment: Republic of Uganda* (United States Agency for International Development 2005) para 1.34.

²⁷ Asiimwe and Muhoozi (n 21) 11.

²⁸ *ibid* 12.

Six years after the adoption of the 1995 Constitution; President Museveni's government appointed the Constitution Review Commission, which was established by the Commission of Inquiry (Constitutional Review) Legal Notice No. 1 2001 under the Commission of Inquiry Act Chapter 166, to review the fundamental features of the 1995 Constitution. The Constitution Review Commission received over one hundred proposals for amending the 1995 Constitution from the cabinet and the National Executive Committee (NEC) - the decision making body of the NRM.²⁹ The NEC argued that the amendments were necessary to allow the smooth running of government because the President had routinely encountered difficulties, contradictions and inadequacies in implementing the provisions of the 1995 Constitution.³⁰ In this regard, the proposals assumed significant importance since they were from political practitioners and in addition, it was reasoned that the proposals were necessary to address matters of national importance that had not been previously addressed when the 1995 Constitution was being debated and then adopted.³¹

In relation to the presidency, the proposals included amendments to allow a president, not Parliament, to censure ministers; to restrict Parliament's powers to only withholding the approval of presidential appointees on the grounds of past criminal acts only; and in cases where the president and Parliament failed to agree; the presidency should be given powers to dissolve Parliament; and to repeal the provision allowing proposed legislation passed by Parliament to

²⁹ Republic of Uganda, *The Report of the Commission of Inquiry (Constitutional Review): Findings and Recommendations* (Ministry of Justice and Constitutional Affairs 2003) (Sempebwa's Report) para 33.5.

³⁰ Ngozi (n 25) 23.

³¹ Semakula Kiwanuka, 'Strong Presidency Will Move Country Forward' *Monitor* (Kampala, 6 November 2003) 3.

automatically become law if the presidency does not assent.³² The amendments were deemed necessary to ensure that legislature does not override the powers of the presidency.³³ Repealing the two-term presidential limit was justified as removing a restriction on democratic choice³⁴ and, therefore, Ugandans should be allowed to exercise the democratic choice of electing the same person as many times as they wanted to. In their overall, the proposed amendments were aimed at granting more powers to the presidency and the government.

The Constitution Review Commission recommended that the question of repealing the presidential term limits should be decided by a referendum.³⁵ It noted that fifty-nine percent of the respondents were against the lifting of the term limits.³⁶ Two of the Commissioners, including the Commission's Chair wrote a minority report opposing the repealing of the provision limiting the presidential tenure to two terms.³⁷ The media reported that the NRM government obtained an injunction that prevented a newspaper from publishing an article, detailing opposition to the government's proposal of lifting term limits among members of the Constitution Review Commission.³⁸

³² Anne Mugisha and Richard Mutumba 'Cabinet Presents Proposals' *New Vision* (Kampala, 24 September 2003) 5.

³³ *ibid.*

³⁴ Kiwanuka (n 31).

³⁵ Sempebwa's Report (n 29), para7.95.

³⁶ *ibid.*

³⁷ *ibid.*, Minority Position on the Issue of Orderly Succession to Government Annex I; Constitutional Review Commission Report Minority Position Annex II pp 262-266.

³⁸ Alex Atuhaire and Lominda Afedraru, 'Court Blocks anti-3rd Term Review Report' *Monitor* (Kampala, 9 December 2003) 2.

In July 2005, a referendum was held on the government's proposals.³⁹ It was boycotted by opposition parties because the contentious issue of repealing the presidential term limits was not included.⁴⁰ This may be because the 1995 Constitution states that the provision on the two-term limits can be amended provided it obtains the support of two-thirds of all members of Parliament.⁴¹ Therefore, the final decision was left to Parliament. Most of the proposed changes to the 1995 Constitution, including repealing of the two term limits on the tenure of the presidency, were passed by Parliament after the third reading of the Bill on 18 August 2005.⁴²

It is important to state here that when recommending that a person elected as a president should not hold office for more than two-terms of five years each, the Constitution Commission noted that:

We have also reflected the view almost unanimously advocated for by the people that the tenure of office of the President should be constitutionally limited to put an end to the phenomenon of self-styled life presidents. We have recommended a limit of two terms of five years each for any President.⁴³

Thus, upon adopting the 1995 Constitution, article 105(2) provided that a person shall not be elected to hold office as president for more than two terms.

The Constitution Review Commission's report also observed that the majority of respondents wished for the preservation of the two-term limits on the re-election of a president.⁴⁴ It found that

³⁹ Asiimwe and Muhoozi (n 21)13.

⁴⁰ *ibid.*

⁴¹ The 1995 Constitution (n 18), art 262.

⁴² Asiimwe and Muhoozi (n 21) 28.

⁴³ Odoki's Report (n 1) 332.

after seventeen years of NRM rule, changes in the circumstances have not brought a divergence of opinion on the matter.⁴⁵ The Constitution Review Commission, however, reasoned that to critically examine the issue of the term limits, it could not merely recommend the retention or lifting of the term limits in the 1995 Constitution. Therefore, it proposed that the matter should be subjected to an exhaustive and comprehensive debate that would provide for a nationally acceptable solution.⁴⁶ The recommendation was ignored by the government. With this analysis in mind, it may be said that the amendment was achieved against the wishes of the majority of Ugandans.

In addition to the amendment being shrouded in the absence of popular legitimacy, it was also plagued by allegations of bribery. Several members of the second Parliament are reported to have admitted to receiving money to vote in favour of the amendment to repeal the presidential terms limits as the NRM government did not have the required majority⁴⁷ to implement the amendment.⁴⁸

⁴⁴ Sempebwa's Report (n 29) para 7.96.

⁴⁵ *ibid* para 7.94.

⁴⁶ *ibid*.

⁴⁷ See Charles Mpagi 'and others', 'I got Shs 5 Million for Kisanja – Buturo' *The Monitor* (Kampala, 31 October 2006) 2; also see Daniel Posner and Daniel Young, 'The Institutionalization of Political Power in Africa' [2007] 18 *Journal of Democracy* 126, 130; Civil Society Coalition for the Restoration of the Presidential Term Limits, 'Together We Must' (Civil Society Coalition for the Restoration of the Presidential Term Limits Publication No. 2, 2012) 3.

⁴⁸ The 1995 Constitution (n 18), art 261(1) (a) requires two-thirds of all members of Parliament to support an Act of Parliament amending art 105(2).

2.3 Domestic presidential election laws, international and regional legal electoral obligations and political commitments in the conduct of elections

Domestic laws have been appended to the 1995 Constitution for the purpose of administering presidential elections. These are further supplemented by Uganda's willingness to be bound by regional and international treaties, and political commitments that are aimed at promoting free and fair elections. Domestic presidential electoral laws in Uganda have arisen out the Parliament's powers to make laws.⁴⁹At the time of writing, the domestic legal framework for conducting presidential elections is provided under the Electoral Commission Act 1997, as amended in 2010; the Political Parties and Organisations Act 2005 and the Presidential Elections Act 2000, as amended in 2010.

With regard to international and regional obligations, and political commitments relating to elections, since the NRM seized power in 1986, Uganda has ratified, signed or acceded to fifteen international and regional treaties, twelve non-treaty standards and nine political commitments⁵⁰ which provide for the legal protection and promotion of democratic electoral processes. These documents form standards that articulate legal obligations for conducting free and fair elections and for developing democratic institutions. The standards that emerge from these documents have brought extra international and regional legal obligations and commitments for democratic elections in an effort to supplement the constitutional and domestic electoral framework under

⁴⁹ The 1995 Constitution (n 18), art 79(1) empowers Parliament to make laws, while under art 104(9) Parliament is authorised to pass law for challenging presidential elections.

⁵⁰ European Union, *Compendium of International Standards for Elections: Status of Ratification* (2nd edition, European Commission 2012) 53-55.

which presidential elections are conducted in Uganda. Examples of these include the International Covenant on Civil and Political Rights (ICCPR) 1966⁵¹ the African Charter on Democracy, Elections and Governance (ACDEG) 2007.⁵² The legal implications of some of these treaties on presidential elections in Uganda will be discussed in this chapter.

3. Constitutional and domestic legal framework for electing the president of Uganda

The main constitutional and statutory provisions governing the election of the president of Uganda provide as follows:

Article 103(1) of the 1995 Constitution stipulates that the election of a president shall be by universal adult suffrage through a secret ballot. The Constitution also provides that to be elected president, a presidential candidate requires more than fifty percent of the total valid votes cast in the presidential election.⁵³ Where no candidate obtains the votes specified under article 103(4), a second election must be held within thirty days and the two candidates who obtained the highest number of votes shall be the only candidates.⁵⁴ Following the amendment to the 1995 Constitution in 2005 to repeal the two-term limits on the re-election of the president, a person may be elected president for more than two terms.⁵⁵ A person is qualified to become president if

⁵¹ Uganda acceded to the ICCPR on 21 June 1995. See United Nations, 'Treaty Collections' https://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/NV/Page1_en.xml accessed 27 March 2015.

⁵² Uganda signed the ACDEG on 16 December 2012. See African Union, 'OAU/AU Treaties Conventions, Protocols and Charters' <http://www.au.int/en/treaties> accessed 5 May 2015.

⁵³ The 1995 Constitution (n 18), art 103(4).

⁵⁴ *ibid* art 103(5).

he or she is a citizen of Uganda of not less than thirty-five years of age and not more than seventy five and qualified to be a member of Parliament.⁵⁶ Furthermore, a person is qualified to be a member of Parliament if he or she is a citizen of Uganda, a registered voter and has completed a minimum formal education of Advance Level Standard or equivalent.⁵⁷

The 1995 Constitution also creates an Electoral Commission entrusted with the responsibility of managing elections.⁵⁸ Members of the Electoral Commission are appointed by a president with the approval of Parliament.⁵⁹ Presidential, parliamentary and local government elections must be held within the first thirty days of the last ninety days before the expiration of the term of the president.⁶⁰

The Electoral Commission may declare that a presidential candidate has been elected unopposed where in a presidential election, only one candidate is nominated after the close of nomination.⁶¹ To become a presidential candidate, a person must submit to the Electoral Commission a document confirming that the nomination has been supported by one hundred voters in each of at least two-thirds of the districts in Uganda.⁶²

⁵⁵ *ibid* art 105(2).

⁵⁶ *ibid* art 102.

⁵⁷ *ibid* art 80(1).

⁵⁸ *ibid* art 61.

⁵⁹ *ibid* art 60(1).

⁶⁰ *ibid* art 61(2).

⁶¹ *ibid* art 103(6)(a).

⁶² *ibid* art 103(2).

Article 103(9) of the 1995 Constitution empowers Parliament to prescribe a procedure for the elections and the assumption of office of the president, while article 104 sets out the procedure under which presidential elections may be challenged. An aggrieved presidential candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission was not validly elected.⁶³ Under article 104(9) of the 1995 Constitution, Parliament is authorised to pass laws for challenging the conduct of presidential elections, including the grounds for annulment and the rules of procedure. To give effect to articles 103(9) and 104(9), Parliament enacted the Presidential Elections Act 2000, as amended in 2005 and in 2010 and the Electoral Commission Act 1997, as amended in 2010. Section 59 of the Presidential Elections Act 2005 provides grounds for challenging presidential elections.

Under section 59(5) of the Presidential Elections Act, the Supreme Court may dismiss a petition challenging presidential elections, declare which candidate was validly elected or annul an election. Section 59(6) of the Act provides that the Supreme Court may issue a declaration annulling elections on three grounds: under section 59(6)(a), where it is satisfied that there has been noncompliance with the provisions contained in the same Act and the noncompliance affected the outcome of the election in a substantial manner; under Section 59(6)(b), where it is satisfied that the candidate was not qualified for the post of the president or was disqualified; or under section 59(6)(c), where it is satisfied that an offence was committed under the Act by the candidate in person or by the candidate's agents with the knowledge or approval of the candidate. The said offences are listed under Parts IX and X of the Presidential Elections Act 2010. The

⁶³ *ibid* art 104(1).

main ones include bribery, getting a prohibited person to vote, obstructing voters and publication of false statement as to illness, death or the withdrawal of another candidate.

On hearing a petition challenging a presidential election and before coming to a decision, the Supreme Court has the discretion to order a recount of the votes cast if it deems it necessary and practical.⁶⁴ The Chief Justice in consultation with the Attorney General is statutorily authorised to make rules for the conduct of petitions seeking to annul presidential elections.⁶⁵ The rules are contained in the Presidential Elections Petitions Rules 2001 (SI No.13 2000).

4. Presidential elections since 1995

After the general elections in 1980, there were no direct national elections in Uganda until 1994 when the Constituent Assembly elections were held for the purposes of adopting the 1995 Constitution.⁶⁶ The 1980 general elections were conducted under the Republic Constitution and the National Assembly Elections Act of 1957.

Upon its adoption, the 1995 Constitution introduced a one-party Movement System. Political parties were allowed to exist but not to engage into political activities.⁶⁷ In doing so, this provision imported into the new constitution section 4.1 of Legal Notice No.1 of 1986 established

⁶⁴ Presidential Elections Act 2005, s 59(8).

⁶⁵ *ibid* s 59(11).

⁶⁶ Electoral Commission of Uganda, *A Brief History of Elections Uganda* (Uganda Electoral Commission 2007) 2.

⁶⁷ The 1995 Constitution (n 18), art 71 before the 2005 amendments.

by the NRM on seizing power, which outlawed and criminalised political parties while the Movement System of the NRM was allowed to operate. The Constitution also provided that a referendum on the choice of a political system in which the continuity of the Movement System would be decided every five years.⁶⁸ The NRM interim government, under the leadership of President Museveni held power from 1986 and surrendered to elections in 1996, the year after the 1995 Constitution was adopted. The first presidential and parliamentary elections took place under the one-party Movement System. President Museveni was elected president for the first time. In 2000, the first referendum was held and the Movement System was retained. After the confirmation of the Movement System, Museveni was elected again as president in 2001. In the same year, Museveni's government appointed the Constitution Review Commission. In its report, the Constitution Review Commission recommended the return of the multi-party political system, which meant the abolition of the one-party Movement System.⁶⁹ A second referendum in 2005 brought about the removal of the one-party Movement System. Ugandans overwhelmingly voted for a multi-party politics.⁷⁰ For the purposes of effecting the amendments to repeal the one-party Movement System and the two term limits on the re-election of a president, among other provisions of the 1995 Constitution, the government passed the Constitutional Amendment Act 2005 and the Constitutional Amendment Act No.2 2005. In the following years, opposition parties developed. President Museveni was elected again in 2006 and in 2011. At the time of writing President Museveni and his NRM government have been in power for more than twenty nine years of which ten years, from 1986 to 1996, they served as an interim government.

⁶⁸ *ibid* art 74.

⁶⁹ Sempebwa's Report (n 29) para 7.93.

⁷⁰ The Electoral Commission of Uganda (n 66) 4.

5. Complaints about electoral laws

Post-independence Uganda has not witnessed a single transfer of power from one elected head of state to another or from one elected government to another. As democracy involves the possibility of a change of government, it was hoped that under the new democratic dispensation, Ugandans would elect their leaders through credible electoral processes. The expectation was that the post-1995 constitutional reforms would, among other things, facilitate fair and transparent political contestation, prevent leaders from undermining constitutional orders to hang on to power and bring to an end to violent struggles for political power. However, twenty nine years after the end of the armed conflict which brought the NRM to power, Uganda has been ruled by one President and his party who have emerged triumphant in four successive elections amidst widespread discontent with electoral laws. While President Museveni presents Uganda as a democracy, or at least as democratising, his opponents denounce his regime as 'electoral authoritarian'.⁷¹ Democracy means much more than engaging in regular elections and as vital as they are, what happens before, during and after elections is equally important, as is the capacity of electoral laws to translate the will of the citizenry into genuine democratic choice.

The main grievance is that the occurrence of elections in Uganda cannot deliver a change of government. This is because electoral laws are deficient in safeguarding fair political

⁷¹ The term electoral authoritarianism is borrowed from Andreas Schedler. He describes an electoral authoritarian regime a regime that holds regular elections for the chief executive and a national legislative assembly, yet they violate the liberal-democratic principles of freedom and fairness so profoundly and systematically as to render elections instruments of authoritarian rule rather than instruments of democracy. See Andreas Schedler, 'Electoral Authoritarianism' in Todd Landman and Neil Robinson (eds), *The SAGE Handbook of Comparative Politics* (Sage Publications 2009) 393.

contestation. According to a recent study, Africans now use the quality of elections as the main indicator of the development of democracy in their countries.⁷² In the case of Uganda, only fifty two percent of Ugandans surveyed in 2012, after the presidential and parliamentary elections, believed that their country is either a full democracy or a democracy with minor problems; compared to seventy-one percent of the people surveyed prior to the elections in 2011.⁷³ The quality of the 2011 presidential and parliamentary elections is cited as having adversely affected the citizenry's perception of the country's democratic development.⁷⁴

Critics argue that the post-1995 constitutional and domestic legal framework has not yielded electoral laws and institutions capable of protecting the 'will of the people'.⁷⁵ The contention is that electoral laws are not free from executive manipulation and they are incapable of promoting and safeguarding fair electoral contestation. Following an appraisal of the 2011 presidential and parliamentary elections, prominent scholars have concluded that a change of government in Uganda is unlikely to occur under the current constitutional and domestic legal framework.⁷⁶ Edwin Abuya has argued that electoral lawlessness continues to undermine the credibility of

⁷² Michael Bratton, 'Formal Versus Informal Institutions in Africa' in Larry Diamond and Marc Plattner (eds), *Democratization in Africa: Progress and Retreat* (2nd edition, John Hopkins University Press 2010) 117.

⁷³ Jeremy Liebowitz, Robert Sentamu and Francis Kibirige, 'Citizen Perceptions of Democracy in Uganda: The Growing Gap between Expectations and Realities' (Afrobarometer Briefing Paper No.111, 2013) 9.

⁷⁴ *ibid*10.

⁷⁵ The term 'the will of the people' is used to define the obligation which was first established in article 21 of the Universal Declaration of Human Rights (UDHR) 1948. The obligation is fulfilled through genuine periodic elections, by universal and equal suffrage, held by secret ballot. It also requires that an array of other prerequisite political rights such as freedom of assembly and association are fulfilled.

⁷⁶ John Njoroge, 'Regime Cannot Change Through Polls' *Daily Monitor* (Kampala, 28 June 2012) 3.

elections in Uganda.⁷⁷ Commenting on the 2006 presidential and parliamentary elections, he concludes that the institutional and legal structures corroded the elections and he calls for specific reforms to be implemented in keeping with international legal standards on democracy.⁷⁸ Other critics have asserted that the constitutional and domestic legal framework has been structured by the incumbent to hinder rather than promote smooth transfer of political power and, consequently, it is deficient in its capacity to fairly manage political competition.⁷⁹ It has also been claimed that one of the main factors behind President Museveni's unchallenged dominance, is that electoral laws have been manipulated in the President's favour and as such, elections just confirm the basic status quo which exists in Uganda, not only as regards to President Museveni's government grip on power but with a view to the general state of democracy.⁸⁰ It has also been argued that President Museveni has managed to tighten his grip on power by manipulating electoral laws.⁸¹

According to a study by Afrobarometer; an independent, non-partisan research project that measures the social, political, and economic atmosphere in Africa; eighty-nine per cent of Ugandans consider elections as the only acceptable way of selecting leaders.⁸² Yet the complaints

⁷⁷ Edwin Abuya, 'Can African States Conduct Free and Fair Presidential Election?'[2010] 82 *Northwestern Journal of International Human Rights* 124, 137.

⁷⁸ *ibid.*

⁷⁹ Peter Girke and Mathias Kamp have suggested that constitutional and domestic legal framework has been structured by the incumbent to hinder rather than promote smooth transfer of political power. See Peter Girke and Mathias Kamp, *Museveni's Uganda: Eternal Subscription for Power?* (Kas International Report No.70, 2010).

⁸⁰ *ibid.*

⁸¹ Svein-Erik Helle and LiseRakner, 'The Interplay between Poverty and Electoral Authoritarianism: Poverty and Political Mobilization in Zambia and Uganda' (CHR Michelsen Institute Working Paper No.2, 2012) 5.

⁸² See (n 73) 8.

which have risen in post-1995 Uganda suggest that elections as a way of transferring political power have been put on trial and they have been condemned. At the end of his current tenure in 2016, President Museveni government would have ruled Uganda for thirty years, which is longer than the terms of office of all Uganda's post-independence heads of state put together. He would also be the seventh longest-serving leader ever in Africa's post-colonial history.⁸³ It should be noted that since 1986, there have been more than twenty groups seeking to overthrow President Museveni's government.⁸⁴ Violent struggles for political power may well be as a result of flawed electoral laws and constitutional structures that are designed to impede democratic transfers of power and, therefore, the old ways of accessing political power have been deemed the only means to deposed the President and his government. The discontent with electoral laws suggest that it is not through popular preference that President Museveni has to emerged victorious in all the four presidential elections following the adoption of the 1995 Constitution, but it is because of his manipulation of electoral laws.

Two main factors seem to be the focus of discontent with presidential electoral laws. They form the basis of disgruntlement that electoral laws have been corroded to allow President Museveni to maintain his grip on power. They are: (1) the laws applied by the Supreme Court in adjudicating presidential electoral challenges following the 2001 and 2006 elections, and (2) the 2005

⁸³ The six longest-serving leaders of post-colonial Africa are; Emperor King Haile Selassie of Ethiopia (44years); Muammar Gaddafi of Libya (42 years); Omar Bongo Ondimba of Gabon (41 years); Teodoro Obiang Nguema of Equatorial Guinea (33 years); Jose Eduardo dos Santos of Angola (33 years); Robert Mugabe of Zimbabwe (32 years).

⁸⁴ These include, Action to Restore Peace; Allied Democratic Forces; Apac Rebellion; Citizen Army for Multiparty Politics; Force Obote Back; Former Uganda National Army; Holy Spirit Movement; Lord's Army; Lord's Resistance Army; National Federal Army; National Union for the Liberation of Uganda; Ninth October Movement; People's Redemption Army; Uganda Christian Democratic Army; Uganda Federal Democratic Front; Uganda Freedom Movement; Ugandan National Democratic Army; Uganda National Federal Army; Ugandan National Liberation Front; Ugandan National Rescue Fronts I and II; Ugandan People's Army; Ugandan People's Democratic Army; Uganda Salvation Army; the West Nile Bank Front.

amendment of the 1995 Constitution to repeal the two term limits on the re-election of the president. These major and interrelated challenges relating to presidential electoral laws have been identified based on the complaints by politicians, civil society, lawyers, academia and the general public in Uganda as posing a challenge to a fair and transparent presidential electoral process in post-1995 Uganda. The concern is that these two significant factors, among others, have impeded the transfer of the office of the president. I will now critically analyse how these factors relating to presidential electoral laws pose a challenge to the fair and transparent contestation for the office of the president.

5.1 Adjudication of presidential electoral challenges

Electoral laws for resolving presidential electoral complaints in Uganda have been the cause of disgruntlements among politicians, dissatisfaction in the general public, and disagreement among judges in Uganda. Following the outcomes of the 2001 and 2006 presidential elections in which President Museveni emerged victorious, Mr Kiiza Besigye, who was then the leader of the main opposition party, Forum for Democratic Change (FDC) and a presidential candidate in both elections, sought declarations from the Supreme Court that President Museveni was not duly elected and, therefore, the elections should be annulled.⁸⁵ President Museveni was declared by the Electoral Commission as the winner of the 2001 elections with sixty nine percent of the total valid votes cast.⁸⁶ In the 2006 presidential election, he gained fifty nine percent of the total valid

⁸⁵ See *Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission*, Election Petition No.1 of 2001 [2001] UGSC3 (Presidential Election Petition No.1 of 2001); *Rtd Col Kiiza Besigye v the Electoral Commission and Yoweri Kaguta Museveni*, Presidential Petition No.1 of 2006 [2006] UGSC 24 (Presidential Election Petition No.1 of 2006).

⁸⁶ Uganda Electoral Commission, Report of the Presidential Elections 2001 (Uganda Electoral Commission Presidential Election Report 2001) (Presidential Election Report 2001) 3.

votes cast.⁸⁷ The petitioner, Besigye, was the runner-up in both presidential elections with thirty-seven percent of the vote in the 2001⁸⁸ and twenty seven percent in 2006.⁸⁹ The 2001 and 2006 presidential electoral petitions sought to annul the outcome of the elections on almost identical grounds.

In the 2001 presidential electoral petition, in the case of *Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission*,⁹⁰ the petitioner made many complaints against the two respondents and their agents and employees, for acts and omissions which he contended amounted to non-compliance with provisions of the Presidential Elections Act 2000 and the Electoral Commission Act 1997, and illegal practices and offences under the Acts. The main complaints against the second respondent, the Ugandan Electoral Commission, were that it failed to efficiently compile, maintain and up-date the national voters' register, and voters' roll for each constituency and for each polling station; and it failed to display copies of the voters' roll for each parish or ward for the prescribed period of not less than 21 days.⁹¹ It allowed multiple voting and vote stuffing in many electoral districts in favour of President Museveni.⁹² It disenfranchised the petitioner's voters by deleting their names from the voters register.⁹³ It

⁸⁷ In its obligation Uganda Electoral Commission, *Report of the Presidential Elections 2006* (Uganda Electoral Commission, Presidential Election Report 2006) (Presidential Election Report 2006) 2.

⁸⁸ Presidential Election Report 2001 (n 86) 4.

⁸⁹ Presidential Election Report 2006 (n 87) 3.

⁹⁰ Election Petition No1 of 2001 [2001] UGSC3 (Presidential Election Petition No.1 of 2001).

⁹¹ *ibid*7; contrary to Presidential Elections Act 2000, s 19 and s 20.

⁹² *ibid* 8; contrary to Presidential Elections Act 2000, s 32(1).

⁹³ *ibid*; contrary Presidential Elections Act 2000, ss 19(3) and 50.

increased the numbers of polling stations on the eve of polling day without sufficient notice to candidates except the President.⁹⁴ It allowed or failed to prevent stuffing of ballot boxes and under-age voting.⁹⁵ It chased away the petitioner's polling agents or failed to ensure that they were not chased away from polling stations, and counting and tallying centers.⁹⁶ It allowed or failed to prevent agents of the first respondent, to or from interfering with electioneering activities of the petitioner and his agents.⁹⁷ It allowed armed people to be present at polling stations, falsified results, and failed to ensure that the election was conducted under conditions of freedom and fairness.⁹⁸

Against the first respondent, President Museveni, the petitioner alleged that the President personally or by his agents with his knowledge and consent or approval committed illegal practices and offences. These included publications of a false statement that the petitioner was suffering from AIDS,⁹⁹ offering gifts to voters,¹⁰⁰ appointing partisan senior military officers and partisan sections of the army to take charge of security during the elections,¹⁰¹ organising groups under the Presidential Protection Unit to use violence against persons not supporting the

⁹⁴ *ibid* 9; contrary to Presidential Elections Act 2000, ss12 (e) and (f) amounting to failing to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

⁹⁵ *ibid* 10; contrary to Presidential Elections Act 2000, s 32(1).

⁹⁶ *ibid* 10; amounting to attempting and interfering with the free exercise of the franchise of voters contrary to Presidential Elections Act 2000, s 26(c).

⁹⁷ *ibid* 11, contrary to Presidential Elections Act 2000, ss12 (e) and (f) amounting to failing to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

⁹⁸ *ibid*.

⁹⁹ *ibid* 13; amounting to using words or making statements that were malicious contrary to Presidential Elections Act 2000, s 24(5)(b) ; amounting to defamatory and or insulting words contrary to Electoral Commission Act 1997, s 23(3)(b).

¹⁰⁰ *ibid* 15, contrary to to Electoral Commission Act 1997.s 64.

¹⁰¹ *ibid* 17, contrary to Presidential Elections Act 2000, s 43(2)(a).

President and threatening to cause death to the petitioner.¹⁰² The Supreme Court found unanimously that there were widespread violations of the Presidential Elections Act, and the Electoral Commission Act as a result of intimidation, voter buying and mismanagement of voters' registers, publication of false statements and irregular voting.¹⁰³ It also held that the second respondent did not comply with provisions of sections 28¹⁰⁴ and 32(5)¹⁰⁵ of the Presidential Elections Act.¹⁰⁶ The Supreme Court also found that in many areas of the country, the principle of free and fair election was compromised.¹⁰⁷ The Court uncovered evidence that in a significant number of polling stations there was cheating.¹⁰⁸ However, by a majority of three to two, the Court concluded that the irregularities did not '*substantially affect the outcome of the election*'.¹⁰⁹ Therefore, it could not annul the election under section 59(6)(a) of the Presidential Elections Act 2000.¹¹⁰ Also, by a majority of three to two, the Court held that no illegal practice or other offence under the Presidential Elections Act was proved to its satisfaction to have been committed in connection with the said election, by the first respondent personally or with his

¹⁰² *ibid.*

¹⁰³ *ibid* [99] (Odoki C J).

¹⁰⁴ *ibid* [88] (Odoki C J); the section requires the Electoral Commission to publish in the Gazette 14 days prior to nomination of presidential candidates, a complete list of polling stations that will be used in the election.

¹⁰⁵ *ibid* [86] (Odoki C J); the subsection requires the Electoral Commission to provide every presidential candidate in the elections with an official copy of the voters register for use by his or her agents on polling day.

¹⁰⁶ *ibid* [110] (Odoki C J).

¹⁰⁷ *ibid* [129] (Odoki C J).

¹⁰⁸ *ibid* [101] (Odoki C J).

¹⁰⁹ *ibid* [156] (Odoki CJ).

¹¹⁰ Under the Presidential Elections Act 2000, s 59(6)(a) the Supreme Court may issue a declaration annulling elections where it is satisfied that there has been noncompliance with the provisions contained in the same Act and the noncompliance affected the outcome of the election in a substantial manner.

knowledge and consent or approval by his agent.¹¹¹ Thus, it could not invalidate the elections under section 59(6)(c) of the Presidential Elections Act 2000.¹¹² The number of Supreme Court Judges that ruled in favour and those against annulling the election not only suggest that it was a ‘close call’, but also indicates disagreements among the judges.

Among the main complaints made by the petitioner, following the 2006 presidential elections in the case of *Rtd Col Kizza Besigye v the Electoral Commission and Yoweri Kaguta Museveni*,¹¹³ were that the elections were characterised by acts of intimidation, voter buying, lack of transparency, unfairness and violence and the commission of numerous offences and illegal practices by the incumbent contrary to the Presidential Elections Act and the Electoral Commissions Act. The petitioner’s allegations against the second respondent included illegal practices and offences committed by the President personally.¹¹⁴ It was alleged that President Museveni personally committed acts of bribery of the electorate personally or by his agents with his knowledge and consent or approval, before and during the elections, which interfered with the free exercise of the voters’ franchise.¹¹⁵ The petitioner also argued that section 59(6) of the Presidential Elections Act¹¹⁶ conflicts with article 104(1) of the Constitution.¹¹⁷ With regards to

¹¹¹ Presidential Election Petition No.1 2001 (n 90) [149] (Odoki CJ).

¹¹² Under the Presidential Elections Act 2000, s 59(6)(c) the Supreme Court may issue a declaration annulling elections where it is satisfied that an offence was committed under the Act by the candidate personally or with the candidate’s knowledge or approval by the candidate’s agent.

¹¹³ Presidential Petition No.1 of 2006 [2006] UGSC 24(Presidential Election Petition No.1 of 2006).

¹¹⁴ *ibid* 9-12.

¹¹⁵ *ibid* 11; contrary to Presidential Elections Act 2005, s 64.

¹¹⁶ *ibid* 13; the section provides grounds under which a presidential election may be annulled.

the first respondent, the petitioner alleged breaches of the electoral laws in the disenfranchisement of voters due to their deletion from the voters' register¹¹⁸ and failure to cancel the results of polling stations where gross electoral malpractices had occurred.¹¹⁹

The petitioner complained of further malpractices allowed in the election by the first respondent such as multiple voting, vote stuffing, and failure to declare results in accordance with the law as well as the absence of freedom and fairness in the whole electoral process.¹²⁰ Besigye therefore contended that because of the electoral malpractices that occurred before, during and after the elections, President Museveni was not duly elected as president. He sought a declaration annulling the election.

With regards to the allegations against the 1st respondent, the Supreme Court found unanimously that there was lack of compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act in the conduct of the 2006 presidential elections.¹²¹ The Court held that the Electoral Commission disenfranchised voters by removing their names from the voters' register, thus denying them the right to vote.¹²² The Court also unanimously found that the principle of free and fair elections was compromised by widespread bribery, intimidation and violence in some areas of the country and the principles of equal

¹¹⁷ The provision allows an aggrieved presidential candidate to petition the Supreme Court for an order that the candidate declared by the Electoral Commission was not validly elected.

¹¹⁸ Presidential Election Petition No. 1 of 2006 (n 113) 13; contrary to Electoral Commission Act 1997, s 19.

¹¹⁹ *ibid* 15; contrary to Electoral Commission Act 1997 s 15 (1).

¹²⁰ *ibid* 17; amounting to attempting and to interfering with the free exercise of the franchise of voters contrary to Presidential Elections Act 2005, s 26(c).

¹²¹ *ibid* [98] (Odoki CJ).

¹²² *ibid* [61] (Odoki CJ).

suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing and incorrect methods of ascertaining the results.¹²³ By a majority decision of five to two, the Court found that no illegal practice or offence was proved to the satisfaction of the Court to have been committed in connection with the said election either by President Museveni personally or by his agents with his knowledge or approval. Consequently, the Court declared that it could not annul the election on the basis of the violation of alleged violation of s 59 (6) (c) of the Presidential Elections Act.¹²⁴

With regard to whether or not the contraventions to the electoral law affected the outcome of the election in a substantial way, the Court held that the noncompliance with electoral laws did not ‘*substantially affect the outcome of the election*’.¹²⁵ On this issue, the Supreme Court ruled against the petitioner on a majority of four to three, suggesting again that there were disagreements among the judges.

In a dissenting opinion, Justice Kanyeihamba found that there was sufficient evidence presented in the 2006 presidential electoral petition that could enable the Court to decide that the presidential election was so badly conducted, and that it was fatally affected by irregularities, malpractices and illegalities as to affect the final results in a substantive manner, and, therefore the result of the election ought not to be upheld by the Court.¹²⁶ He decried that the Court, having

¹²³ *ibid* [122] (Odoki C J).

¹²⁴ *ibid* [129] (Odoki CJ).

¹²⁵ *ibid* [144] (Odoki CJ).

¹²⁶ *ibid*, Reasons for the findings and decision of Kanyeihamba J.

unanimously found that the alleged contraventions of the electoral laws occurred, they were bound to annul the election, and to find otherwise would be based purely on the conjecture and personal inclination of the judges.¹²⁷ He contended that:

Such an opinion would be grossly unfair to Ugandans because the 1st Respondent refused adamantly to produce the only evidence which could have helped the Petitioner, Respondents and this Court to prove and be satisfied that the allegations that were irregularities, malpractices and illegalities were justified or unjustified.¹²⁸

In other words, for Justice Kanyeihamba, where the Court finds that there were unjustified widespread contraventions of electoral laws that affect the quality of the election, the Court should annul the election.

5.1.1 Commentaries on the Supreme Court's decisions

The decisions of the Supreme Court have undermined confidence in electoral laws for adjudicating presidential electoral disputes. In the light of Justice Kanyeihamba's dissenting opinion,¹²⁹ the judgments have also raised concerns about the independence of Justices of the Supreme Court from the President.¹³⁰ According to Timothy Kalyegira, regardless of efforts by the judiciary to maintain its independence from the executive, the Court was used as a very important tool of the NRM to maintain its control of the presidency.¹³¹ The Supreme Court's

¹²⁷ *ibid* [19] (Kanyeihamba J).

¹²⁸ *ibid* [20] (Kanyeihamba J).

¹²⁹ See (n 126).

¹³⁰ The 1995 Constitution (n 18), art 142(1) provides that Justices of the Supreme Court are appointed by the president acting on the advice of the Judicial Services Commission and with the approval of Parliament.

¹³¹ Timothy Kalyegira, 'Besigye vs. Museveni-Part II' *Daily Monitor* (Kampala, 21 February 2006) 1.

rulings have also exposed Uganda's propensity towards returning to violent struggles for political power. Besigye has been reported as saying that he will no longer challenge the outcome of elections through the courts, and that President Museveni should be ousted from power by the use of force.¹³²

With regard to the 2006 presidential election petition, Arthur George Kamyia suggested that the Court barked a little but nevertheless let the sleeping dogs lie in terms of the big decision; the annulment.¹³³ He remarked that while this may have been controversial to some, it is the mark of a legally wise Court that understands the importance, extent and fragility of its institutional role.¹³⁴ A legislator and a member of the opposition party lamented that the Court made that ruling under fear of persecution from the state.¹³⁵ He declared that the Judges insinuated that Besigye won but feared repercussions.¹³⁶

In a recent interview, Chief Justice Odoki who delivered the leading judgments in both presidential electoral petitions was asked if the Court made a political decision. He was quoted as saying, 'Elections are a political decision, they are not legal decisions, and therefore the decision

¹³² Ismail Musa Ladu and Frederic Musisi, 'Museveni must be Removed Forcefully-Besigye' *Daily Monitor* (Kampala, 7 October 2011) 2.

¹³³ Arthur George Kamyia, 'Supreme Court Generally Got it Right on the Election Petition' *Daily Monitor* (Kampala, 13 April 2006) 3.

¹³⁴ *ibid.*

¹³⁵ Emma Mutaizibwa, 'Political Implication of Supreme Court Ruling' *Monitor* (Kampala, 12 April 2006) 3.

¹³⁶ *ibid.*

has political implications based on law.¹³⁷ They are not about law; they are about choice of leaders and the governance of the country'.¹³⁸ Chief Justice Odoki declined to comment on Justice Kanyeihamba's dissenting opinion but admitted that President Museveni escaped narrowly.¹³⁹ He also averred that ordering that the elections should be repeated, would not have guaranteed that future elections would be free and fair.¹⁴⁰

There was no legal challenge to the presidential election of 2011. It may well be that confidence in electoral laws for adjudicating presidential complaints was eroded following the Supreme Court's decisions. The stances of the Supreme Court that even where it is finds that there were widespread violations of electoral laws, it will only annul presidential elections when the petitioner proves to the Court that the violation of electoral laws affected the outcome of the elections in a substantial way, or where violations of electoral laws were committed by the victorious candidate personally or with his or her approval or consent by the candidate's agent, have been condemned as hindrances to democratic change and to the prospects of replacing President Museveni. These form some of the main reasons of discontent that electoral laws have obstructed rather than promoted smooth transfer of the office of the president. Judging on the basis of the commentaries on the Supreme Court's decisions, there is little understanding, in Uganda, of the legal principles on which the Court's decisions are based.

¹³⁷ Suleiman Kakaire, 'Besigye Petitions: Museveni Got Narrowly- Odoki' *The Observer* (Kampala, 31 March 2013) 2.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

I will now investigate these legal principles not only to provide an understanding of them but also to offer an alternative interpretation of the principles, and to highlight the deficiencies in the law. The overall aim is to assess the efficacy of presidential electoral laws in facilitating fair contestation for the smooth transfer of political power.

5.1.2 Legal principles for annulling elections under Section 59(6) of the Presidential Elections Act 2010

The Court's competence to inquire into any aspects of presidential elections in Uganda is an initiative of the 1995 Constitution¹⁴¹ as direct presidential elections in Uganda were introduced by it.¹⁴² The legislative intent of section 59(6)(c) of the Presidential Elections Act 2010¹⁴³ appears to address a need to prevent presidential candidates from committing electoral offences similar to those witnessed during the 1980 elections. As previously discussed in chapter two, sections 4 and 7, President Obote committed acts such as intimidation of voters and threatening to cause death to his political opponents. By so doing, he disenfranchised voters and disadvantaged his opponents in the 1980 elections, which worked out in his favour. Under the post-1995 presidential electoral legal framework, similar acts are recognised as electoral offences and they have been statutorily prohibited by the Presidential Elections Act and the Electoral Commission Act as I noted earlier in this chapter.¹⁴⁴

¹⁴¹ The 1995 Constitution (n 18), art 104.

¹⁴² *ibid* art 103.

¹⁴³ The section allows the Supreme Court to annul presidential elections where it is satisfied that the candidate declared the winner personally committed offences under the Act, or where offences under the Act were committed with his or her knowledge and consent.

¹⁴⁴ See section 3 of this chapter.

Regarding the 2001¹⁴⁵ and 2006¹⁴⁶ presidential election petitions, although the Supreme Court found violations of electoral laws, it held that the violations were not committed by President Museveni, or with his knowledge or approval by his agent and thus it could not invalidate the elections on the basis of section 59(6)(c) of the Presidential Elections Act. This suggests that this provision imposes an obligation on presidential candidates to conduct themselves in a manner that does not defeat or violate electoral laws. Sub-section (c) also implies personal liability. Violations of electoral laws, even those from which a presidential candidate gains unfair electoral advantages do not engage the presidential candidate's liability if they are not committed by the candidate or by his or her agent with the candidate's knowledge or approval. Therefore, under section 59(6)(c), the Supreme Court may only invalidate elections where a presidential candidate personally fails in his or her obligation in electoral conduct.

With regard to section 59(6)(b), which allows the Supreme Court to invalidate an election where the candidate declared as president following the outcome of an election was at the time of the election not qualified or was disqualified as a president candidate,¹⁴⁷ the mischief that the provision is designed to remedy is to exclude presidential candidates who do not meet the constitutional criteria for the presidency.¹⁴⁸ The purpose of this provision is to preserve the caliber of presidential candidates from which the electorate can choose, based on a constitutional imposed criterion.

¹⁴⁵ Presidential Election Petition No.1 of 2001 (n 90).

¹⁴⁶ Presidential Election Petition No.1 of 2006 (n 113).

¹⁴⁷ The Presidential Elections Act 2005, art 59(6)(b).

¹⁴⁸ See (n 56); (n 57).

The most contentious ground under subsection 59(6)(a) of the Presidential Elections Act has its origin in international human rights law. At the international level, article 21(3) of the Universal Declaration of Human Rights (UDHR) 1948¹⁴⁹ and article 25 of the International Covenant on Civil and Political Rights (ICCPR) 1966¹⁵⁰ are the fountain treaties from which the legal principle that authority to govern shall be based on the will of the people as expressed in periodic and genuine elections flows. The concept of a popular government that emerges out of genuine elections is also common to regional treaties. In Africa, it is found under article 13(1) of the African Charter on Human and Peoples' Rights (ACHPR) 1981.¹⁵¹ In the Americas, it is provided for under article 23 of the American Convention on Human Rights (ACHR) 1969¹⁵² and in Europe the concept is found under article 3 of the First Protocol to the European Convention on Human Rights (ECHR) 1950.¹⁵³ Together, international and regional treaties

¹⁴⁹ Art 21(3) provides that 'The will of the people shall be the basis of the authority of government. This will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'.

¹⁵⁰ Art 25 states that 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country'.

¹⁵¹ Art 13(1) provides that 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of his country'.

¹⁵² Art 23 provides for right to participate in government: (1) Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country. (2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

¹⁵³ Art 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature.

provide the sources of principles that capture the human aspiration to be governed through the genuine will of the people and underpin it as a legal obligation that states must observe. This concept that the authority to govern must be based on the genuine will of the people has been transported into the Constitutions of many states¹⁵⁴ which have been negotiated between the people and their governments. The 1995 Constitution of Uganda also expresses that regular, free and fair elections constitute the basis of the authority of governments and the only legal way of transferring political power.¹⁵⁵ Therefore, the concept that the authority to govern must be founded on the free will of the people has international, regional and domestic popular appeal. State conduct in relation to this human aspiration is also open to legal scrutiny. International, regional and domestic rules cumulate into universal legal principles which provide a basis for measuring if a state's actions give effect to this human aspiration.

These universal legal principles seek to promote and protect humanity's yearning to be governed through consent. Starting with the UDHR and the ICCPR, and ending with domestic laws, there are well established universal legal principles for protecting and promoting the will of people which provide rules for conducting elections with integrity, protecting the political environment and citizen participation and the adjudicating electoral complaints. These principles act as a basis for measuring if domestic electoral laws,¹⁵⁶ violates the accepted principles.¹⁵⁷ They also form

¹⁵⁴ African examples of these include Constitution of Angola 2010, art 4 (1); Constitution of Benin 1990, arts 3-6; Constitution of Burkina Faso 1991, art 37; Constitution of Burundi 2005, art s 7 and 8.

¹⁵⁵ The 1995 Constitution (n 18), art 1(4) provides that the people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representative or through a referenda.

¹⁵⁶ In the case of *Luis Felipe Bravo Mena v Mexico* (10/7/93), Case 10.956 the Inter-American Commission of Human Rights held that international standards are applicable in any case in which the rights of individuals, political

the legal principles which are applied by the courts to protect the will of the people in the adjudication of electoral complaints. The danger, however, is regardless of how undemocratic or unfair electoral laws and systems in a country or jurisdiction are, legal norms for adjudicating electoral complaints are founded on the notion that outcomes of elections are pure and uncorrupted and should only be invalidated in exceptional circumstances.

In many states, electoral laws indicate that where the validity of the election's validity is challenged on the basis that irregularities, to succeed, the complainant must prove that the irregularities changed the outcome of the election in a substantial manner.¹⁵⁸ This is because elections are meant to give voice to the will of the people and to give authority to governments to exercise power. Therefore, technical irregularities during elections should not affect the declared results unless they distort the will of the people and result in changing the outcome of elections. It thus follows that courts all over the world have frequently held that election outcomes should only be overturned in extraordinary circumstances; where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clear and most importantly; where such improper behaviour has distorted the will of the people.¹⁵⁹ This ideology, which is intended to protect the

or otherwise, are being infringed. The case related to various allegations of electoral irregularities which the government of Mexico argued were solely within the purview of domestic remedial organs.

¹⁵⁷ In the case of *Zdanoka v Latvia*, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, the European Court of Human Rights held that although a State will be afforded a margin of appreciation in implementing electoral laws, electoral laws must not depart from the accepted principles which give effect to the will of the people; also see *D.H. and others v. the Czech Republic*, No. 57325/00.

¹⁵⁸ See Elections Act No. 24 of 2011, s 83 of Kenya; Law on the Election of Members of Parliament 2002, art 100 (2) of Macedonia; Presidential and Vice-President Election Act No.31, 1952 art 18 (b) of India.

¹⁵⁹ See *Alhaji Mohamed D. Yusuf v Chief Olusegun A. Obasanjo & 56 ORS SC.122/2003*, 2003(10) LEDLR 1, [2003] - Supreme Court of Nigeria; *Anderson Kambela Mazoka and 3 Others v Levy Patrick Mwanawasa and 3 Others*, Presidential Petition No. SCZ/01/02/03/2002 - Supreme Court of Zambia; *Andrews v Blackman*, 59 So.769 (La.1912) - Louisiana Supreme Court of USA; *Mbowe v Eliufoo* (1967) EA 240- Court of Appeal of Tanzania;

genuine will of the people, forms the basis for annulling elections under subsection 59(6)(a) of the Presidential Elections Act. It is therefore trite international law that absent electoral irregularities affecting the outcome of elections in a substantial manner, candidates, parties and the electorate that lose elections should accept electoral outcomes rather than routinely claim that the elections and the governments they produce are illegitimate.

Aided by the Supreme Court's decisions in the 2001¹⁶⁰ and 2006¹⁶¹ presidential electoral petitions, we can conclude that they are three reasons that could form the basis of annulling presidential elections in Uganda. Ground one: under section 59(6)(c) of the Presidential Elections Act, that the victorious presidential candidate personally or through his agent with his knowledge or approval acted in a manner that defeated or violated electoral laws and thus failed in his or her obligation in electoral conduct. Ground two: under section 59(6)(b) of the Presidential Elections Act, where the person who has been declared president did not meet the eligibility conditions for the presidency. Ground three: under section 59(6)(a) of the Presidential Elections Act, that during the election, there were wide violations of electoral laws which affected the outcome of the election in a substantial manner. There are, however, several reasons that form the basis of criticising these principles for adjudicating presidential complaints and the decisions of the Supreme Court. I will now turn to those reasons.

Morgan & Others v Simpsons [1974] 3 ALL E.R. 722, [1975] QB 151- High Court of England; *Solomon v Turquoise Ltd* (2008), VUSC 64 - High Court of the Republic of Vanuatu.

¹⁶⁰ Presidential Election Petition No.1 of 2001 (n 90).

¹⁶¹ Presidential Election Petition No.1 of 2006 (n 113).

5.1.3 Deficiencies in section 59(6)(c) of the Presidential Elections Act 2010

In the 2001¹⁶² and 2006¹⁶³ presidential electoral petitions, despite the Supreme Court's findings of widespread violations of electoral laws, it held that the violations were not personally committed by President Museveni or his knowledge or approval by his agent. It is however reasonable to conclude that the President acquired advantages in the elections as the result of the electoral offences which also disadvantaged his competitors. The overall effect of such electoral offences was that they distorted the will of the people. I have argued in the section above that legislative intent on the grounds of section 59(6)(c) of the Presidential Elections Act appears to be the need to prevent presidential candidates from committing electoral offences similar to those witnessed during the 1980 elections and to benefit from them. The fact is that President Museveni acquired electoral gains as a result of the violation of electoral laws. The law should allow for elections to be annulled, where a candidate gains advantage over his or her competitors as a result of widespread violations of electoral laws regardless of whether the electoral violations were committed by the candidate declared as president personally or with the knowledge or approval of the candidate by his or her agent.

The reason for annulling the election should be that there were widespread electoral offences committed during the election, and owing to the offences, the victorious candidate gained unfair advantage over other competitors. This is because any unfair advantage gained as a result of

¹⁶² Presidential Election Petition No.1 of 2001 (n 90).

¹⁶³ Presidential Election Petition No.1 of 2006 (n 113).

electoral offences such as voter bribe and intimidation distorts the will of the people and affects the outcome of elections. The will of the people cannot be said to be protected where widespread evidence of electoral violations that distort it are acknowledged but ignored by the Court simply because the violations were not committed by the victorious candidate or by his or her agents with the candidate's knowledge or approval. Although perfect compliance with electoral laws in every instance is unlikely, and the Court should avoid nullifying an election based on minor violations of technical requirements, it should determine whether provisions of electoral laws are mandatory or directory. In the alternative, the Presidential Elections Act should expressly declare an offence to be mandatory if its violation is essential to the validity of an election. Mandatory provisions would include those that prohibit voter disenfranchisement, such as voter bribe and voter intimidation. Widespread violations of such provisions distort the will of the people and should form the basis of annulling an election regardless of whether or not they are committed by the victorious candidate, by his or her agent with the candidate's knowledge or approval. Directory provisions would be those that require candidates to conduct themselves in a respectful manner towards each other, such as prohibit defamatory remarks among candidates.

It is also impossible to imagine how the incumbent presidential candidate in whom all the powers of the state are vested, as discussed in the last chapter, can fail to hide evidence of electoral offences that he or she committed or those committed by his or her agent with his or her knowledge or approval, in order for the Court to annul the elections on this ground. Moreover, in civil proceedings, such as electoral challenges, the burden of proof should lie with the petitioner to prove the allegations made against the respondent 'on the balance of probabilities'.¹⁶⁴

¹⁶⁴ See *F.H. v McDougall* (2008) S.C.J. No. 54.

However, the Supreme Court's decisions indicate that the petitioner has to prove the allegations made against the respondent on a higher threshold that is 'beyond reasonable doubt' to the satisfaction of the Court,¹⁶⁵ which is the standard of evidence required to validate a criminal conviction.¹⁶⁶ In this regard, subsection 59(6)(c) is deficient in preserving the will of the people and in facilitating fair competition for the presidency in that it allows the outcome of elections to stand, even where there is clear evidence that the candidate declared as president benefited from electoral violations, simply because the petitioner cannot prove beyond reasonable doubt that the candidate declared as president committed violations of electoral laws personally or that they were committed by his or her agent with the candidate's knowledge or approval.

5.1.4 Interpretation of section 59(6)(a) of the Presidential Elections Act 2010

In interpreting the phrase 'affected the results of the election in a substantial manner' under section 59(6)(a) of the Presidential Elections Act, the Supreme Court in the 2001 presidential election petition was guided by two authorities, namely, the cases of *Mbowe v Eliufoo*¹⁶⁷ and *Re Kensington North Parliamentary Election*.¹⁶⁸ In the former case Georges CJ defined the phrase 'affected the result' in the following words:

¹⁶⁵ In the 2001 and 2006 presidential election petitions, the Supreme Court cited *Mbowe v Eliufoo* (1967) EA 240 as one of the leading authorities that the burden of proof lies with the petitioner in electoral petitions who must prove the allegation against the Respondent at standard required to validate a criminal conviction.

¹⁶⁶ Kristoffel Grechenig, Andreas Nicklisch and Christian Thoeni, 'Punishment Despite Reasonable Doubt - A Public Goods Experiment with Sanctions under Uncertainty' [2010] 7(4) *Journal of Empirical Legal Studies* 847, 862.

¹⁶⁷ (1967) EA 240.

¹⁶⁸ [1960] 1 W.L.R 762, [1960] 2 ALL E.R 150.

In my view the phrase “affected the result” the word “result” means not only the result in the sense that a certain candidate won and the other lost. The result may be said to be affected after making adjustment, the effect of proved irregularities the contest seems much clearer than it appears to be when first determined. But when the winning majority is so large that even a substantial deduction still leaves the successful candidate a wide margin, then it cannot be affected by any noncompliance of the rules.¹⁶⁹

In the latter case, Justice Boyce reasoned that:

Out of the total voting electorate of persons who recorded their votes, three or possibly four were shown by the evidence to have voted without having a mark placed against their names in the register and each of them voted only once. Even if one was to assume in favour of the Petitioner that some proportion of the remainder of 111 persons, who we have not seen were in somewhat similar case, there does not seem to be a thread of evidence that there is any substantial noncompliance with the provision requiring a mark to be placed against the voters names in the register; and when the only evidence before the court is that three or possibly four people who are affected in that they recorded their votes without a mark placed against their names, each voted only once, one cannot possibly come to the conclusion that although there was a breach of statutory rules, the breach could have had any effect on the result of the election. Even if all the 117 persons were similarly affected, it could not possibly have affected the result of the election; therefore, although there was a breach in regard to the matter set out in para 3(1) of the petition, I should be prepared to say that there was a substantial compliance with the law in this respect governing elections and that omission to place a mark against the names did not affect the result.¹⁷⁰

In order to determine that the electoral malpractices did not affect the outcome of the elections in a substantial manner, the Courts in *Mbowe*¹⁷¹ and in *Re Kensington*¹⁷² took a similar approach. They quantified the number of votes which the petitioners alleged they were deprived of as the result of the electoral malpractices and deducted that number from the total votes cast in favour of the respondents in order to determine if ‘but for’ the malpractices, the petitioners would have won the election. Where the majority margin between the respondent and the petitioner was so wide

¹⁶⁹ See (n 165) [242] (Georges CJ).

¹⁷⁰ See (n 166) [115] (Boyce J).

¹⁷¹ See (n 165).

¹⁷² See (n 166).

that even allowing for the votes deprived of the petitioner as a result of the malpractices, the respondents would still have won the election; the Courts could not invalidate the election. Before I proceed, it is important to record here that the analysis of the elections in this section has been written numerically as opposed to the manner of writing found elsewhere in this study, so as to give the reader a quicker assessment of the crucial facts. In *Mbowe*¹⁷³ there were 30,889 voters on the register, of which 6,393 voted for the petitioner and the respondent was declared the winner with 20,213 votes. The majority margin between the respondent and the petitioner was 13,820. 4,238 people did not vote. In these circumstances, even though the petitioner alleged intimidation of his voters by the respondent to the satisfaction of the Court, it could not invalidate the election because the majority margin between the respondent and the petitioner was so wide. Assuming that 4,238 did not vote because of intimidation and would all have cast their votes for the petitioner, the petitioner would still not have won the election.

There is, however, a problem when it is not possible for the court to determine by quantification the number of voters that may have been affected by electoral malpractices such as voter bribe or intimidation. In the 2001¹⁷⁴ and 2006¹⁷⁵ presidential election petitions in Uganda, the Supreme Court found evidence of widespread voter bribing and intimidation. However, it was not possible for the Court to determine through quantification how many voters were bribed to vote for President Museveni, neither was it possible to quantify how many people did not vote because they were intimidated by the President's supporters. However, the facts tell a different story.

¹⁷³ See (n 165).

¹⁷⁴ Presidential Election Petition No.1 of 2001 (n 90).

¹⁷⁵ Presidential Election Petition No.1 of 2006 (n 113).

According to the Uganda Electoral Commission report on the 2001 presidential elections, President Museveni acquired 5,123,360 votes; Kizza Besigye polled 2,055,795.¹⁷⁶ The other presidential candidates polled as follows: Awori Aggrey - 103, 915; Bwengye Francis - 22,751; Karuhanga Chappa - 10,080; and Kibirige Mayanja Muhammad - 7,379.¹⁷⁷ The total number of votes cast in the election was 7,389,691,¹⁷⁸ and there were 10,775,836 on the voter register.¹⁷⁹

The majority margin between the President and the petitioner was 3,067,565. According to the evidence submitted to the Supreme Court by the Uganda Electoral Commission, the total number of invalid votes cast was 186,453.¹⁸⁰ 3,386,145 people did not vote and may have been prevented from doing so by the intimidation meted out by President Museveni's supporters. The number of eligible voters that did not vote (3,386,145), even though their reasons for not voting could not be ascertained was more than the majority margin between President Museveni and the petitioner (3,067,565) without considering the invalid votes cast (186,453). It is also not known how many people were bribed to vote for the President. Do these facts suggest that the Supreme Court got it wrong? Although it is not possible to accurately ascertain the reasons why 3,386,145 people did not vote, on analysis, the facts damage the credibility of the elections and the legitimacy of President Museveni's presidency. It should be noted that in a country with an unviable record of electoral malpractices, if in doubt, the Supreme Court had the option of ordering a new election under 59(5) of the Presidential Elections Act 2010.

¹⁷⁶ Presidential Election Report 2001 (n 86) 7.

¹⁷⁷ *ibid* 8.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

¹⁸⁰ Presidential Election Petition No.1 of 2001 (n 90) 115.

5.1.5 ‘Results of elections’ as a question of quality but not quantity

The legitimacy of a democratic government is established, in large measure, by credible elections. Credible elections occur in an electoral environment in which the citizenry can participate without fear or obstruction; political parties, candidates and the media can operate freely; an independent judiciary functions fairly and expeditiously; electoral authorities operate impartially; and where electoral laws are adhered to and they do favour a particular candidate.

It is therefore, important that the law should seek to protect these factors in order to preserve the elections’ credibility or quality. In some jurisdictions, electoral laws seek to achieve this aim.¹⁸¹

Courts have also sought to do the same. In the case of *Valance v Rosier*¹⁸² the Supreme Court of Louisiana held that:

If the court finds that the proven frauds and irregularities were of such serious nature as to deprive the voters of the free expression of their will or as to make it impossible to determine the outcome of the election, it will decree the nullity of the entire election even though the contestant cannot prove that he would have been elected but for such fraud or irregularities.¹⁸³

This case stands for the proposition that where there are widespread violations of electoral laws which distort the will of people, and thereby affect the quality of the elections, the elections should be annulled.¹⁸⁴

¹⁸¹ Electoral Act 73 1998, s 56 (a) of South Africa allows the Electoral Commission or the Electoral Court to declare elections invalid where a serious irregularity has occurred concerning any aspect of an election; Electoral Act 2010, s 138 (b) of Nigeria provides that elections may be annulled by reason of corrupt practices or non-compliance with the provisions of the same Act; also see General Elections Law No. 27 1996, s 101 of Yemen; the Law of Ukraine on the Election of the People’s Deputies of Ukraine 2011, art 92 (1).

¹⁸² 675 So. 2d 11389 (La Ct App 1996).

¹⁸³ *ibid* [32] (William J).

¹⁸⁴ Also see *Deffebach v Chapel Hill Independent School District* No. 12-82-1024-CV March 10, 1983.

Another example of where the Court invalidated an election because it was conducted so badly and, therefore, the credibility of the election could not be assured is in the *Hackney Case, Gill v Reed and Holms*.¹⁸⁵ In this case, only two of the nineteen polling stations were closed and five thousand voters could not vote. The Court did not engage in the impossible exercise of determining which candidate would have benefited from the five thousand votes had they been cast but annulled the election on the basis that it was badly conducted in noncompliance with electoral laws.

In this context, the ‘result of an election’ is conceptualised as a question of quality that informs an election’s outcome. The result is perceived as the entire electoral process and is not limited to voting—the outcome of the elections, which cannot be guaranteed where the processes that deliver the outcome are corroded.

I previously discussed in chapter two, section 4 of this study how Uganda’s only post-independence attempt at conducting elections in 1980 was marred by electoral illegalities. I also discussed how historically political power was held at all costs by unelected leaders before 1995. These factors, including the need to reverse the country’s history of political and constitutional instability, as indicated in the Preamble of the 1995 Constitution motivated the country’s desire to hold free and fair elections in order to be ruled by consent. These values are contained in principles of allocating and exercising the powers contained in article 1 of the 1995 Constitution

¹⁸⁵ [1874] 2 O M & H 77 E.L.R. 263.

and the National Objective and Directive Principles of State Policy therein.¹⁸⁶ In the 2006 presidential electoral petition,¹⁸⁷ the Supreme Court found instances of ballot paper stuffing in at least twenty-two out of the sixty-nine districts, and over two thousand ballot papers were stuffed at one polling station and more than six hundred people voted at a sham polling station.¹⁸⁸ It also found evidence of falsification of results by the Ugandan Electoral Commission, voter intimidation and voter bribe by persons associated with the President.¹⁸⁹ These widespread electoral malpractices violated core constitutional values of allocating and exercising power in a substantial manner in the sense that they undermined the core constitutional principles on which the new democratic dispensation in Uganda was founded, and, in doing so, they affected the quality of elections as envisioned by the citizenry of Uganda and as provided for under the 1995 Constitution.

It may be stated that where elections are conducted in noncompliance with electoral laws or in disregard of the core constitutional and democratic values, the quality of the elections is affected and so is the result of the elections affected in a substantial manner in the terms of section 59(6)(a) of the Presidential Elections Act. Therefore, the elections should be annulled. In this regard, the interpretation of the results of the elections as meaning number of votes cast but not quality of the electoral process, which was employed by the Supreme Court fails to protect the

¹⁸⁶ During the constitution-making process, the Constitution Committee noted that Ugandans wished to see the end of manipulated elections and unelected leaders. There was consensus that fair electoral laws should be built into the new constitution in order for elections to be the mechanism for the smooth transfer of power from one administration to another. See Odoki's Report (n 1) 262.

¹⁸⁷ Presidential Election Petition No.1 of 2006 (n 113).

¹⁸⁸ *ibid* [54] (Odoki CJ).

¹⁸⁹ *ibid* [124] (Odoki CJ).

quality of elections. In doing so, it does not facilitate fair contestation for the presidency and protect the will of the people.

5.2 Amendment to the 1995 Constitution to repeal the two-term limits on the re-election of a president

Following the 2011 presidential and parliamentary elections, civil society groups in Uganda identified the amendment of the Constitution of 1995 to repeal the two-term limits on the re-election of the president as one of the outstanding controversial governance issues in post-1995 Uganda.¹⁹⁰ The Citizens' Coalition for Electoral Democracy in Uganda, a broad alliance that claims to bring together over six hundred like-minded civil society organisations and over eight thousand individuals to advocate electoral democracy in the country, identified the restoration of the presidential term limits in the Constitution, as the number one issue in its post-2011 citizens' elections reform agenda.¹⁹¹ In April 2013, Foundation for Human Rights Initiative Uganda, a non-governmental human rights advocacy organisation, reported that members of the fourth post-1995 Parliament served the Speaker of the Parliament of Uganda with a notice of intention to introduce a Private Member's Bill, which sought to restore the presidential re-election limits in the Constitution.¹⁹² Johnnie Carson has argued that Uganda's march toward full democracy has

¹⁹⁰ Civil Society Coalition for the Restoration of the Presidential Term Limits, 'Together We Must' (Civil Society Coalition for the Restoration of the Presidential Term Limit, 15 November 2012) www.ccedu.org.ug/index.php/.../other.../26-term-limits-justification accessed 13 April 2015.

¹⁹¹ See Citizens' Coalition for Electoral Democracy in Uganda, 'Beyond 2011: The Citizens Electoral Reform Agenda' (Citizens' Coalition for Electoral Democracy in Uganda, 20 December 2011) www.ccedu.or.ug/downloads/CERA%20Handbook%20-%20pdf.pdf accessed 19 March 2015.

¹⁹² Foundation for Human Rights Initiative, 'Private Member's Bill on the Restoration of Presidential Term Limits' (Foundation for Human Rights Initiative Uganda 2013).

been declared unglued by efforts to alter the country's Constitution to allow President Museveni to run for more presidential terms.¹⁹³ According to study carried out by Afrobarometer, sixty-seven percent of Ugandans surveyed in 2010 strongly felt that the 1995 Constitution should be re-amended to limit a president to serving a maximum of two terms in office.¹⁹⁴

President Museveni's quest to amend the 1995 Constitution is an illustration of a common plague that has characterised the rule of previous heads of state in Uganda, as well as other African leaders,¹⁹⁵- an unwillingness to follow constitutional norms and to give up political power. The motivations behind such moves are wide-ranging. Several Presidents in resource-reliant developing countries have attempted to remold their country's Constitutions for their own benefit, by removing presidential term limits on re-election, in order to have access to state resources.¹⁹⁶ Given the discovery of oil in Uganda, it may be argued that President Museveni has followed the same trend so he can to access the revenue from the oil. For the purposes of this study, the amendment to repeal the presidential term limits is conceptualised as a challenge to the fair contestation for the presidency in that while elections envisage the possibility of the

¹⁹³ Johnnie Carson, 'Legacy in Danger' (Challenges and Change in Uganda Conference, Wilson International Centre for Scholars Washington, 2 June 2005).

¹⁹⁴ Afrobarometer, *Uganda 2011 Elections: Campaign Issues, Voter Perceptions and Early Voter Intentions* (Afrobarometer Survey 2010).

¹⁹⁵ The trend begun with Sam Nujoma of Namibia in 1999; was followed by Abdou Diouf of Senegal; Lasans Conte of Guinea; the late Gnassingbé Eyadéma of Togo and the late Omar Bongo of Gabon; Blaise Compaore of Burkina Faso; Idriss Deby of Chad; Zine el-Abidine Ben Ali of Tunisia, Yoweri Museveni of Uganda; Paul Biya of Cameroon; Abdelaziz Bouteflika of Algeria, Mamadou Tandja of Niger. It has now engulfed twelve African States. Some African heavyweights including Rawlings (Ghana), Kaunda (Zambia), Mandela (South Africa), Moi (Kenya) and Chissano (Mozambique) were barred from competing for another term by constitution imposed term limits and they left at the end of their terms.

¹⁹⁶ Farid Guliyev has pointed to the late Hugo Chavez of Venezuelan; Kazakhstan's Nursultan Azarbayev, and Azerbaijan's Ilham Aliyev as some of the Presidents that have lifted presidential term limits in their countries' Constitutions to allow them to control their countries' gas and petroleum revenues. See Farid Guliyev, 'End of Term Limits: Monarchical Presidencies on the Rise' [2009] 18 Harvard International Law Review 23, 33.

alteration of power, repealing the Constitution to remove the presidential term limits has allowed President Museveni to compete in presidential elections from which he has emerged victorious without the possibility of defeat. In this regard, the amendment is perceived as one of the provisions of the presidential electoral laws that poses a challenge to the transfer of power, and which has sustained the President's grip on power.

5.2.1 The effects of repealing the term limits on the re-election of the president of Uganda

A cleric, who is one of Uganda's leading critics of the removal of 1995 Constitution's presidential term limits, has contended that the amendment has created regime longevity which has undermined and patronised democratic institutions.¹⁹⁷ Other opponents have argued that the amendment sets a bad precedent for future leaders who will always amend laws to suit their narrow and selfish interests.¹⁹⁸ It has also been claimed that constitutional presidential term limits are necessary to ensure that the presidency does not become a lifetime position which could resemble a monarch, resulting in the realisation of one of the greatest fears of the current generation where a president would serve four or five times and after, bequeath the presidency to his or her child.¹⁹⁹ Furthermore, it has been claimed, that an unlimited presidency hinders the grooming of new generations of potential presidential candidates. Faced with a strong president

¹⁹⁷ Zac Niringiye quoted by Edward Ssekika, 'Term Limits Campaign Launched' *The Observer* (Kampala, 14 June 2012) 6.

¹⁹⁸ Felix Osike and Grace Matsiko, 'NEC Okays Third Term' *Sunday Vision* (Kampala, 30 March 2003) 4.

¹⁹⁹ Jack Beermann, 'A Skeptical View of a Skeptical View of Presidential Term Limits' [2011] 43(4) *Connecticut Law Review* 1105, 1156.

who wants to continue to serve indefinitely, potential leaders may focus their energies elsewhere.²⁰⁰

Indeed, the meteoric rise of President Museveni's son, Muhoozi Kainerugaba, through the military ranks to the rank of Brigadier has been one of the fastest in the country's armed forces, and to observers, it is symbolic of the President's intention to groom his son to succeed him.²⁰¹

In a study of constitutional systems in Latin American states, Scot Mainwaring and Mathew Shugart have concluded that electoral laws which allow for unlimited tenures for the presidency, where the surrounding institutions such as Parliament and the judiciary are weak, create an atmosphere of disrespect for the rule of law by a president.²⁰²

The amendment of the 1995 Constitution to repeal the presidential two-term limits has created a sitting President without limit to his tenure and by extension an entrenched regime in Uganda. In developing democracies, such as Uganda, constitutional limits on presidential re-election are essential to encourage fair competition and access to political power and to mitigate excessive use of executive powers. To encourage fair political competition, several countries in Africa limited presidential terms through Constitutions.²⁰³ Some countries have resisted attempts by

²⁰⁰ *ibid.*

²⁰¹ Emmanuel Gyezaho, 'The Rise and Rise of the President's Son' *African Review* (May 2012) www.africareview.com/News/-/979180/1489284/-/g0gcecz/-/index.html accessed 28 March 2015; also see Godfrey Madanga and Prince Ofori-Atta, Museveni's Speedy Promotion of Son and a New African Trend (The African Report Issue No.3, 2012) 3.

²⁰² Scott Mainwaring and Mathew Shuggart (eds), *Presidentialism and Democracy in Latin America* (Cambridge University Press 1977) 53.

²⁰³ These include Angola; Benin; Burundi; Cape Verde; Central African Republic; Congo; Djibouti, Democratic Republic of Congo; Ghana; Kenya; Liberia; Madagascar; Malawi; Mali; Niger; Nigeria; Rwanda; Senegal; Seychelles; Sierra Leone; South Africa; Tanzania; Zambia; Mozambique.

their leaders to repeal the presidential term limits for the same reason.²⁰⁴ Ideally, electoral laws should impose limits on the tenure of the executive to improve participatory politics and to provide a clear mechanism of transferring state powers, especially in Uganda, where heads of state have tried to hold power permanently.

The removal of the two-term presidential limit has also exposed the flaws in the 1995 Constitution and its susceptibility to executive manipulation, intended to entrench political power. In this context, it has undermined any tone of constitutionalism in the Constitution. As I have argued in chapter three, section 5 of this study, the absence of sound safeguards on the amendments of a constitution makes it extremely difficult for a constitution to promote constitutionalism. According to a survey conducted by Research World International Limited, almost fifty-six percent of Ugandans want President Museveni to leave power by the end of his current mandate in 2016.²⁰⁵ However, there are no signs yet that the incumbent wishes to loosen his grip on power after twenty-nine years and it has been reported that the President will contest the 2016 presidential elections.²⁰⁶

Once in power, following the amendment, electoral laws in Uganda establish a presidency that has no limit on how long it can access power. The 1995 Constitution also provides the presidency with a monopoly over the organs for transferring and maintaining power such as the

²⁰⁴ These are Malawi; Nigeria; Zambia.

²⁰⁵ Research World International, *Ugandans Tired of Museveni* (Research World International Publications 2012) 3.

²⁰⁶ Emanuel Biryabarema, 'Uganda's Ruling Party Urges Museveni to Run Again in 2016' Reuters (12 February 2014) <http://www.reuters.com/article/2014/02/12/us-uganda-politics-idUSBREA1B1W120140212> accessed 20 March 2014.

electoral management body²⁰⁷ and the armed forces.²⁰⁸ Furthermore, as I have argued above in this chapter, electoral laws have been structured and construed in a way that makes it impossible to vote out the incumbent out of office. It may therefore be stated the presidency depends on its constitutional dominance and not the electorate's mandate to stay in power.

Every five years, elections are conducted as provided for under the 1995 Constitution.²⁰⁹ However, the electoral process does not determine the popularity of incumbent; it simply confirms the presidency's control over the organs of power that has been granted by the Constitution. The will of the people in choosing whether to elect a politician provides one of the key forms of accountability in democracies. It is elections and the wish to be elected that encourages politicians to work for and to be accountable to the electorate. However, elections in Uganda do not provide an incentive for a president to work for the people. They are a façade for democracy. They pose no threat or prospects of taking away political power from the incumbent president.

Limitless presidential term limits have resulted in the conception of state power as personal possession of the President who has no limit to it. It therefore comes as no surprise that President Museveni has sought to guard state power at all costs and to transfer it according to the person of his choice.²¹⁰ It may also be argued that it has led him to disregard constitutional constraints on

²⁰⁷ See (n 102).

²⁰⁸ See (n 85).

²⁰⁹ The 1995 Constitution (n 18), art 61(2) provides that the Electoral Commission shall hold presidential, parliamentary and local government elections within the first thirty days of the last ninety day of the expiration of the term of a president. Under art 105(1) the president holds office for the term of five years.

the presidency and the wishes of the people of Uganda, as there is no threat that power could be withdrawn through constitutional processes. Consequently, the absence of this threat has created a dictatorship, disregard of the Constitution and a president-for-life. Elections have simply become a ritual intended to confirm the status quo that is the President and his government's ownership of state power. The President's ownership of power is further buttressed by colonial laws which outlaw criticism of the person that is a president²¹¹ thereby also creating an unaccountable presidency. One of the ways of moderating the dominance of the executive is by casting the design of the presidency in principles of constitutionalism. Also, seeking methods to encourage accountability to the people would improve confidence in democracy.

Repealing the two-term presidential limit has also undermined the powers and the competence of Parliament as an arm of government for holding the executive accountable for its actions. By repealing the presidential term limits, the second Parliament of post-1995 Uganda succumbed to the President Museveni's demand of granting him the presidency for life, and sent a message to the President and the people of Uganda that the President has no constitutional constraints and that he can alter the fundamental law to suit his ambitions. In this regard, like heads of state before him, President Museveni has exhibited his superiority over the 1995 Constitution.

Semakula Kiwanuka, one of the main proponents of repealing the presidential term limits, wrote in 2003 that presidential term limits are undemocratic in the sense that they prevent the

²¹⁰ It has been reported that President Museveni intends to transfer the presidency to his son Brigadier Muhoozi Kainerugaba, see (n 199).

²¹¹ Penal Code Act 1950 Chapter 120, s 39(1) defines seditious intention as bring into hatred or contempt or to excite disaffection against the person of the president and the government as by law established or the Constitution. Under s 40(1) of the same Act, a person acts with seditious intentions if s/he utters prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication.

development of durable and democratic institutions, limit the right of the people to choose leaders who may have served for more than the stipulated term limits, and are an unnecessary legal technicality which serves no purpose since a president could still be removed via the mechanism of periodic elections.²¹² Another adherent of unlimited presidential terms and an NRM Minister Amana Mushega, writing much later, asserted that it is important that President Museveni continues with his development programs for the country as without him, they would not be achievable.²¹³ He pointed to the fact that the President has been re-elected four times as symbolic of the peoples' will for him to remain in power.²¹⁴ According to this perception, President Museveni and his presidency are seen as indispensable for Uganda's development and its well-being.

It was also argued by the Prime Minister at the time of the amendment- Apollo Nsibambi, that constitutional restrictions on the re-election of a president cannot prevent a dictatorship from emerging and, therefore, it was up to the people to decide.²¹⁵ As long as a president renews his term of office in elections every five years, presidential term limits are irrelevant.²¹⁶ The fact that several established democracies such as the United Kingdom, France and Germany do not impose term limits on the head of state was also cited as a justification for repealing article 105(2) from the 1995 Constitution thus strengthening the argument that Ugandans should not foolishly make leaders ineligible for continued service, after completing two terms, if they would

²¹² Semakula Kiwanuka, 'Term limits are not democratic' *The New Vision* (Kampala, 5 December 2003) 4.

²¹³ Amana Mushega, 'Term Limit agitators are enemies of democracy' *The New Vision* (Kampala, 25 May 2012) 5.

²¹⁴ *ibid.*

²¹⁵ Apollo Nsibambi, quoted by Jane Namutebi, and Christopher Musoke in 'To Lift or Not to Lift Term Limits' *Sunday Vision* (Kampala, 26 June 2005) 2.

²¹⁶ *ibid.*

still be the best choice for president.²¹⁷ These countries, however, even in the absence of term limits, have developed solid systems that not only check their leaders' excesses but also ensure a periodic change of leadership, even if it is within the same ruling party. The position in Uganda is different. Having spent twenty-nine years in power, President Museveni's personality and dominance of state power through the 1995 Constitution overshadows all state institutions such as the armed forces, electoral management body, judiciary, police and the legislature. With his full access to the state resources and state machinery, President Museveni domination makes it impossible to challenge him.

For proponents of limitless presidential terms, term limits are undemocratic because they restrict democratic choice. There are is no justifiable reason why the electorate should not continue to elect the same leader as many times as they would like to. When the electorate have had enough of their leader, they can announce their rejection of the leader through elections. This view perceives elections in Uganda as a trusted and uncorrupted way of transferring the political power. However, as this study has demonstrated, elections in Uganda are not enough to ensure that people have a choice and the Constitution makes provision for a president to whom all organs of power are beholden. Furthermore, limitless terms make it easier for incumbent candidates to corrupt and rig elections. Therefore, elections in Uganda do not provide a genuine and fair mechanism for the change of power. They also do not generate an accurate measure of a leader's popularity. Overall this means that the country needs to develop a mechanism of guaranteeing stability and continuity by ensuring smooth transition of power. Restoring presidential term limits in the 1995 Constitution can be a starting point.

²¹⁷ Kiwanuka (n 210).

To conclude, it should be emphasised that in recommending that a president should serve a maximum of two terms, the Constitution Commission noted that Ugandans expressed a desire to put an end to the phenomenon of self-styled life presidents.²¹⁸ The Constitution Review Commission found that eleven years after the report of the Constitution Commission, and most significantly at the time of the amendment, this desire had not changed among Ugandans.²¹⁹

5.2.2 The constitutionality of the constitutional amendment to repeal the term limits on the re-election of the president

I have argued in chapter three, section 5 of this study that constitutionalism as a tool for ensuring limitations on government rests on defined control mechanisms, of which prohibition of arbitrary amendments of a constitution is one. It has widely been reported that repealing the presidential term limits from the Constitution was achieved through bribing legislators, as the government did not have the required majority to effect the constitutional amendment.²²⁰ Consequently, there is a dark stain on the integrity of Parliament as an institution whose constitutional role, among other duties, is to check presidential excesses. The traditional concept of separation of powers conceives division of powers in terms of the executive, the legislature and the judiciary. Whichever of the three arms of government is given power to exercise; there must be constitutional limits to such powers. The arm of government to which power is granted must

²¹⁸ See (n 43).

²¹⁹ See (n 45).

²²⁰ See (n 48).

exercise the power responsibly for the common good of the citizenry and within constitutional limits.²²¹ The constitutional role of Parliament as an arm of government includes checking and balancing executive excesses and it achieved by protecting 1995 Constitution in order to promote the democratic governance of Uganda.²²² I have also discussed in the previous chapter that the powers granted by a constitution may only be exercised for the purposes which they are granted and as envisioned by the Constitution.²²³

Therefore, the constitutional role of Parliament is to act as the bastion of the Constitution and democratic rule, and to check and balance executive excess. In this regard, the powers granted to Parliament to amend the provision on the presidential term limits²²⁴ must only be exercised for the protection of constitutional values and democratic governance, which include preventing the misuse of presidential authority. One of the constitutional values as expressed by the people of Uganda during the constitution-making process is to put an end to the phenomenon of self-styled life presidents.²²⁵ With regard to its constitutional role to promote democratic governance, Parliament must ensure that it only endorses constitutional amendments that are democratic or those which are supported by the citizenry. Parliament's constitutional role in checking and balancing executive excess is achieved through constraining presidential authority in order to prevent the presidency from degenerating into autocracy. However, by accepting financial

²²¹ See chapter 3, section 5.2.2.

²²² The 1995 Constitution (n 18), art 79(3).

²²³ See chapter four, section 3.

²²⁴ The 1995 Constitution (n 18), art 260(2)(f) authorises parliament to amend the provision on presidential term limits.

²²⁵ See (n 43).

inducements in order to repeal the presidential term limits, the legislators disregarded their constitutional roles for financial gain.²²⁶ The constitutional mandate granted to Parliament to amend the provision on the term limits was not used for any of the purposes it was granted but it was utilised for consolidating powers of the executive and his government. As Dante Gatmaytan observes, constitutionalism cannot allow a constitution to be treated lightly through suspension, circumvention, or to be ignored by politicians.²²⁷ He also contends that a constitution can only be amended by procedures which are constitutional.²²⁸ There was no constitutionalism tone to the manner through which the limitless presidential terms were achieved. The amendment was also achieved through Parliament's negligence of its constitutional roles. Furthermore, it was aimed at advancing the political ambitions of an individual and his government,²²⁹ and not through the approval and consent of the majority of Ugandans.

The amendment to repeal the presidential term limits also undermined the sanctity of the 1995 Constitution. Historically, as discussed in chapter two, section 3 Parliaments like other institutions of the state and fundamental laws, alike were hijacked by overbearing leaders who showed no respect for democratic institutions. This allowed successive heads of state to create fundamental laws that served to maintain their hold on power. In demanding to limit a president to two five year terms, the people of Uganda wished to create a presidency that is subordinate to the 1995 Constitution and not that which would commandeer the Constitution. An executive

²²⁶ See (n 47)

²²⁷ Dante Gatmaytan, 'Can Constitutionalism Constrain Constitutional Change?' [2010] 3 Northwest Interdisciplinary Law Review 22, 27.

²²⁸ *ibid.*

²²⁹ See (n 25).

constrained by the Constitution is a principal guarantee of constitutionalism. However, despite a history of heads of state bullying Parliaments into submission, the Constitution Commission recommended that one of the provisions underlying the values on which the new democratic dispensation in Uganda was to be built would be amended by Parliament.²³⁰ The Proceedings of the Constituent Assembly note that no modification was proposed to the provision as recommended by the Constitutional Committee.²³¹

In this regard, the framers of the 1995 Constitution negligently or purposely failed to build sufficient safeguards into the Constitution to fend off arbitrary amendments. The 1995 Constitution should have provided for such a core constitutional value could only be amended through a popular referendum. In allowing a Parliament that has historically been subservient to the executive to amend such a core constitutional value, the framers of the Constitution vested the authority of the citizenry, and the democratic and stability prospects of the country and in the hands of Parliament. Could it be claimed that the framers of the Constitution purposely unfastened the provision knowing that it will be easily amended to allow the President and the NRM permanent ownership of power? Would Ugandans have rejected the 1995 Constitution if such a fundamental constitutional provision was not provided for by the Constitution when it was adopted? Judging from the issues and occurrences that this study has explored which shaped the design of the presidency in the 1995 Constitution. These include the motivation of the framers of the Constitution, the apparent disregard of the views expressed by Ugandans who commented on

²³⁰ The draft Constitution (n 1), art 191(3)(b).

²³¹ Republic of Uganda, *Proceedings of the Constituent Assembly* (Minister of Constitutional Affairs 1995) (The Constituent Assembly Proceedings) 178.

the presidency during the constitution-making and review processes, and the citizenry's discontent with the removal of the term limits, the answer seems to be yes to both questions.

The *proviso* that provides for Parliament to amend the presidential term limits²³² also appears to violate and conflict with the most fundamental principles for allocating and exercising power as discussed in last chapter.²³³ The two most important principles provide that power belongs to the people²³⁴ and all authority in the state emanates from the people who shall express their will and consent on how they are governed.²³⁵ As such, any unlimited exercise of power must be authorised by the people. Moreover, as I have argued in chapter three²³⁶ any unlimited exercise of state power is unconstitutional because one of the aims constitutionalism is to limit the exercise of state powers in order to avert dictatorship. It is for the people as a whole, and not Parliament to determine if a president may be re-elected indefinitely. While it may be argued that parliamentarians are representative of the people because they have been elected by the people, judging by the citizenry's discontent with the amendment, and the financial inducement reportedly given by the NRM government to the legislators, it cannot be claimed that the amendment was approved by Parliament because it had the support of the majority of Ugandans. In principle, an amendment of a constitution is only justified to advance the broadly shared interests of the citizenry or in response to the nation's exigencies at hand. It is even more suitable when the amendment is steered by the citizenry. As I have argued in chapter three, the absence

²³² See (n 223).

²³³ See chapter four, section 2.

²³⁴ The 1995 Constitution (n 18), art 1(1).

²³⁵ *ibid* art 1(2).

²³⁶ See chapter three, sections 5.

of sound safeguards against arbitrary constitutional amendments is symbolic of a constitution without constitutionalism.²³⁷ It may be argued that apart from the provisions that guarantee fundamental rights, no generation may bind future generations by making some provisions in a constitution unamendable. However, a constitution may only be altered for the benefit of the people and not to advance the political ambitions of any individual or any group. In a democracy, such crucial constitutional amendments should be effected through legal and transparent procedures where the free will of the people prevails. Thus any unilateral amendment without the involvement of the people is unconstitutional.

The constitution-making process that yielded the 1995 Constitution, may be perceived as an attempt by Uganda to develop a truly home-grown fundamental law through a consultative and participatory constitution-making process. Therefore, the 1995 Constitution belongs to the people as expressed therein.²³⁸ This implies that the people alone have the final say on such significant matters. It is within the citizenry's right to seek the continuation of any leadership. However, as I have discussed above, the amendment was executed solely to advance the interest of a single person and his party.²³⁹ Amending or altering a constitution is not unconstitutional *per se*; it is the manner in which it is done, who demands it and for what purpose which confers or creates lack of constitutionalism validity on an amendment or alteration. In this regard, the validity of a constitutional amendment or alteration depends on if it is approved by constitutionalism but not as a constitution provides and it can only be approved

²³⁷ *ibid.*

²³⁸ The 1995 Constitution (n 18), Preamble.

²³⁹ See (n 25).

by constitutionalism if it achieved in a manner authorised by the citizenry through, for the benefit of the majority of the citizenry and in some cases for the protection or promotion of the rights of minority rights.²⁴⁰

To recapitulate, the provision in the 1995 Constitution that authorises Parliament to amend the term limits on the re-election of the president ²⁴¹ is deficient in two major ways. Firstly, it is not secured enough as to safeguard constitutionalism as it allows Parliament to amend such a core constitutional value and in doing so, makes it vulnerable to arbitrary amendment. As I have argued in this study, the absence of sound safeguards against arbitrary constitutional amendments is symbolic of a constitution without constitutionalism.²⁴² Second, it violates and conflicts with the principles of allocating and exercising power which form part of the ‘spirit’ of the 1995 Constitution,²⁴³ by allowing a limited and easily manipulated Parliament, which has historically been subservient to the executive, to amend a core constitutional value. As I have contended in this study, provisions of the 1995 Constitution must be read to give effect to the ‘spirit’ of the Constitution²⁴⁴ and, therefore, any amendment to the Constitution that violates or conflicts with its ‘spirit’ is unconstitutional.

²⁴⁰ For example the fifteenth amendment to the Constitution of the United States of America 1789 was aimed at prohibiting the denial of the right to vote based on race, colour or previous condition of servitude. See Johnny Killian and George Costello (eds), *The Constitution of the United States of America: Analysis and Interpretation* (Washington, D.C.: U.S. Government Printing Office, 1992) 18.

²⁴¹ See (n 223).

²⁴² See chapter three, section 5.

²⁴³ See chapter four, section 2.

²⁴⁴ *ibid.*

The constitutionality of the amendment to repeal the constitutional limits on the re-election of president from the 1995 Constitution may also be measured against the objectives and provisions of the African Charter on Democracy, Elections and Governance (ACDEG) 2007. The ACDEG may be perceived as an effort by the African Union to address arbitrary constitutional amendments to repeal presidential term limits which have afflicted the continent²⁴⁵ by delegitimising and outlawing such amendments. The Charter's objectives include promoting adherence by each State Party to the universal values and principles of democracy and respect for human rights;²⁴⁶ enhancing adherence to the principle of the rule of law premised upon the respect for, and the supremacy of Constitutions and constitutional order in the political arrangements of the state parties;²⁴⁷ and prohibiting, rejecting and condemning unconstitutional change of government in any member state as a serious threat to stability, peace, security and development.²⁴⁸ The ACDEG recognises any amendment or revision of a constitution or legal instrument, which is an infringement on the principles of democratic change of government, as an unconstitutional change of government.²⁴⁹ Principles of democratic change require the people to be consulted in any proposed change and to authorise any change. Indeed, one of the principles the ACDEG encourages member states to observe is the effective participation of the citizens in democratic and development processes, and in governance of public affairs.²⁵⁰ Therefore, the malpractice that the ACDEG defines as an unconstitutional change of government

²⁴⁵ See (n 192).

²⁴⁶ African Charter on Democracy, Elections and Governance (adopted 30 January 2007 Assembly/AU/Dec.147 (VIII)), art 2(1).

²⁴⁷ *ibid* art 2(2).

²⁴⁸ *ibid* art 2 (4).

²⁴⁹ *ibid* art 23 (5).

²⁵⁰ *ibid* art 3 (7).

is the practice of amending a constitution through undemocratic, obscured and manipulative processes without the popular involvement and approval of the people. The amendment to the 1995 Constitution to repeal the term limits on the re-election of a president was achieved through undermining principles of democratic change not only because the people of Uganda demanded term limits on the re-election of the president in order to ensure orderly succession of power²⁵¹ and the end of self-styled president,²⁵² but also because the change was aimed at advancing the interests of President Museveni and his government.²⁵³ Although ACDEG came into force²⁵⁴ after the amendment to repeal the presidential term limits from the 1995 Constitution was achieved, it provides guidance on the constitutionality of the amendment as it pronounces such an amendment which is achieved through undemocratic processes as an unconstitutional change of government.

Therefore it may be stated that an amendment to a constitution in a manner that infringes on the principles of democratic change of government, as was achieved to repeal the presidential term limits from the 1995 Constitution, constitutes an illegal means of accessing or maintaining power. Also, the manner in which the amendment was achieved, not only violates the basic tenets of constitutionalism, but it also violates and conflicts with the principles of allocating and exercising power which form the ‘spirit’ of the Constitution. For these reasons, the amendment of the 1995 Constitution to repeal the term limits on the re-election of the president is unconstitutional.

²⁵¹ See (n 7).

²⁵² See (n 43); (n 45).

²⁵³ See (n 25).

²⁵⁴ The ACDEG was adopted on 30 January 2007; it came in Force on 15 February 2012. See AU Treaties, Conventions, Protocols & Charters <http://www.au.int/en/treaties> accessed 5 May 2015.

5.2.3 Flexibility versus rigidity in constitutional amendments

The challenge of creating a constitution that strikes a balance between flexibility and rigidity was the task of the framers of the 1995 Constitution. A constitution may be rigid and at the same time flexible in the way it provides for the amendments of its provisions and it may also prohibit amendments to some of its provisions. The Constitution of India 1949 is one such example. It provides that some of its core provisions are unamendable²⁵⁵ and it is rigid in its protection of some of its constitutional values to in order to ensure that there not easily amended by providing that strict requirements must be observed for their amendment.²⁵⁶ It is also flexible by allowing some its provisions to be amended through simple requirements.²⁵⁷ While constitutions are made for the people and they should be amended as and when people desire so as to fit the changing situations and aspirations, frequent or unpopular amendments undermine the sacredness of a constitution and often distort the ‘people’s contract’ with the state. A constitution viewed as a contract between the state and the people may therefore not be altered by the state without the input of the other party to the contract, the people.

²⁵⁵ For example the Constitution of India 1949, art 368 (3) provides that its provision that requires all laws to be consistent with fundamental right and which prohibits derogation of fundamental rights is not amendable.

²⁵⁶ *ibid* art 368 (2) provides that an amendment to some the provisions such as those relating to the election of the president, the extent of executive power and that of the power of the state, the powers to amend the constitution, and the representation of the citizenry in parliament, to mention some, maybe be initiated only by the introduction of a Bill in either house of parliament; and when the Bill is passed in each house by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of that house present and voting. The amendment must also be ratified by the legislatures of not less than one half of the states by resolutions to that effect passed by those legislatures before being presented to the president to give his or her assent.

²⁵⁷ *ibid* art 368. These include provisions relating to the administration of the tribal areas, the powers and functions of administrative tribunals and the powers of the public service commission, to mention a few, which can be amended by a simple majority in both houses of parliament.

Any unilateral amendment of such contract becomes unconstitutional. I have argued in chapter two, section 3 of this study that Obote's government had valid reasons for abrogating the Independence Constitution because it created inequalities among different tribes that formed the new Uganda. The Independence Constitution was also very rigid in that it did not allow for amendment of those provisions that nurtured inequalities.²⁵⁸ It was also negotiated between the local agitators for power and the British government, and in addition the involvement of the majority of Ugandans in determining how they were to be governed was ignored. Therefore, Independence Constitution was not a suitable for the purpose of governing over the many tribes that new independent Uganda was made of. However, the main discontent with the methods employed by Obote in abrogating the Independence Constitution and in replacing it with the Republic Constitution is that similar to the unenviable process of 'constitution-bargaining' between the African agitator for power and the British government from which the Independence Constitution emerged, the involvement of the majority of Ugandans was ignored. On this premise, the framers of the 1995 Constitution should have been strived to build into the new constitution provisions that allow for its flexible amendment while also ensuring that it is rigid enough to prevent it from being manipulated against the will of the people. Also, they must have been guided to build into the Constitution principles that would allow the involvement of the majority of Ugandans on proposed alterations to core constitutional values in order to ensure that such alterations are authorised by the people, who could determine how they are governed. One of the most important of these core constitutional values as expressed by Ugandans during the

²⁵⁸ Uganda (Independence) Order-in-Council 1962 (The Independence Constitution), art 5 prohibited amendment of any provisions relating to its supremacy, federal states and districts. Therefore the provisions of the Independence Constitution that favoured the federal state of Buganda which I have discussed in chapter two section 3 could not be repealed.

making of the 1995 Constitution is the elimination of self-styled leaders.²⁵⁹ The other as provided under the Constitution is the peoples' ownership of power.²⁶⁰ In this regard, any alteration to the 1995 Constitution intended to create permanent exercise of power must be authorised by the people.

Before its tenth anniversary, disparity and cracks began to show in the durability of the 1995 Constitution. Some of these could be attributed to the fact that the constitution-making process was commandeered by the NRM who were intent on creating a fundamental law to maintain their hold on power. Also they may be as result of the framers of the Constitution deliberately unfastening some of its core constitutional provision so that they can be easily amended to allow the NRM entrench power. This can be deduced from their disregard of the views that were expressed by Ugandans during the constitution-making process on core constitutional values that should be implemented through the provisions of the 1995 Constitution. Since independence, Uganda's leaders have exhibited a culture of constitutional disdain, which has led to the disregard of provisions in the defunct Constitutions that limited their powers and in turn, the creation of fundamental laws that were used to consolidate power. Heads of state have also often bullied legislators into submission in order to tighten their grip on power. Moreover, as I have previously discussed in this study, there has been a tendency for heads of state in Uganda to extend their tenures beyond the periods initially mandated, and sometimes for life.²⁶¹

²⁵⁹ See (n 43); (n 45).

²⁶⁰ See (n 231).

²⁶¹ As I have discussed in chapter two section 4, during Obote's first tenure, he extended the term of his government for 5 years also Amin abolished provisions relating to elections in the Republic Constitution and declared himself President for life; also see discussion in chapter three section 2 on how Museveni extended the tenure of his interim government for 5 years.

In the draft Constitution, the Constitution Commission proposed that a president should hold office for a maximum of two five-year terms subject to amendments by Parliament.²⁶² This proposal appears to be rigid and not overly stringent in that it restricts a president to serving two terms of five years each whereas the Constitutions of some countries provide up to seven²⁶³ or six²⁶⁴ years a term. While no constitutional commitment is ever perfectly protected from future modification, the history of self-grants of power by heads of state and of undermining constitutional provisions that limit their power should have persuaded the framers of the 1995 Constitution to fasten core constitutional values with adequate procedures in order to avoid arbitrary amendments. The failure to secure the provisions of 1995 Constitution that provide for amendments to core constitutional values suggest an intention by the framers of the Constitution to create a fundamental law whose provisions are easily amendable by ruling government in order to allow it to hold on to power permanently, thus fueling the contention that they were intent on entrenching President Museveni and his NRM in power permanently.

There should be no way, save for armed usurpation or through the popular involvement of Ugandans, should the tenure of a president be extended. The unfastened *provisos* of the Constitution have provided a basis for consolidating dictatorship and electoral authoritarianism. They are also illustrative of the negligent extent to which the 1995 Constitution seeks to moderate executive power and to promote electoral democracy. In sum, the framers of the

²⁶² The draft Constitution (n 1), art 191 (1).

²⁶³ For example see the Constitution of the Republic of Cameroon 1972, art 6(2).

²⁶⁴ See the Constitution of the Federal Democratic Republic of Ethiopia 1994, art 70(4).

Constitution had to build a flexible constitution that allows for amendments to its provisions in order to reflect society's changing values but also ensure its rigidity on alterations on core constitutional values by mandating the involvement of the majority of Ugandans in their amendments. However, they failed in this task.

6. Mini-conclusion

An analysis of the post-1995 constitutional and domestic legal framework under which the president of Uganda is elected reveals one main conclusion; that is the legal framework is deficient in its ability to facilitate fair and transparent political contestation for the presidency. In part, this is because the 1995 Constitution is a fundamental law established for the purpose of permanently entrench President Museveni and his NRM in power and therefore it allows the presidency to dominate the instruments of power. Also, the constitutional and domestic legal framework under which a president of Uganda is elected has been constructed and construed to favour the incumbent and to disadvantage the competitors to the incumbent and the electorate. Moreover, presidential electoral laws have been construed without judicial activism which is necessary to address issues of electoral lawlessness pertaining to Uganda. In disregard of the majority wishes of the people of Uganda, the 1995 Constitution has been altered to consolidate President Museveni's power and to hinder access to the presidency for any other person. The challenges of conducting credible elections as witnessed in 1980 have likewise reemerged and are manifested in the way elections are conducted. Presidential elections in Uganda have failed to display the procedural fairness and substantive uncertainty that makes democratic elections normatively acceptable, and as such they have been unsuccessful in offering the prospects of

hope of transferring power. Consequently, presidential elections in Uganda may be perceived as an institutional facade of democracy, aimed at concealing the harsh realities of authoritarian exercise of state powers. They are without a choice and not a symbol of President Museveni's popularity or legitimacy, and they are unable to redeem democracy. They have become a ritual acclamation that affirms President Museveni's grip on power.

In sum, presidential electoral laws have obstructed rather than promoted smooth transfer and fair contestation of state power. This is the result of a constitutional and domestic legal framework designed to entrench President Museveni and the NRM in power without the possibility of change. Under the current constitutional and domestic legal framework it is not possible for President Museveni to be relieved of power through constitutional processes. Therefore, access to the office of the head of state continues to be denied to the majority of Ugandans by the post-1995 constitutional and domestic legal framework, as it was by fundamental laws before 1995.

Before discussing the findings of this study and making recommendations, it is necessary to make some concluding remarks in order to make an abridgement of the constitutional reforms which are taking place in Uganda at the time of writing this study.

On 14 November 2014, the government of Uganda called for proposals for amending the 1995 Constitution to be submitted to the Uganda Law Reform Commission for consideration.²⁶⁵ On the 30th of April 2015, the government tabled the Constitution (Amendment) Bill No.11 2015 providing a series of amendments to the Constitution ahead of the next general elections in 2016.

²⁶⁵ See <http://www.justice.go.ug/> accessed 20 May 2015.

The government's proposals include inserting article 247(a) in the 1995 Constitution in order to establish a Salaries and Remuneration Board (SRB); that will be charged with determining and harmonising the salaries, allowances and gratuity of state officers in the context of fairness across the board.²⁶⁶ Members of the SRB would be appointed by the president,²⁶⁷ thereby increasing the presidency's domination of the appointment of top public servants. Clause 6 of the Bill seeks to amend article 144 in order to increase the retirement age of judges from seventy to seventy-five years in the case of justices of the Supreme Court, and from sixty to sixty-five for judges of the Court of Appeal.²⁶⁸ Clause 8 seeks to introduce article 148 (a), to provide the Judicial Services Commission with powers to appoint and remove certain members of the judiciary as may be prescribed by Parliament.²⁶⁹ Currently, the staff of the judiciary who are not judicial officers, are appointed by the Public Service Commission under article 172 (1) (b). The government is also proposing to amend article 60 (1) to change the name of the Electoral Commission to the Independent Electoral Commission, in order to recognise its independence and to enable Parliament to prescribe by law its composition.²⁷⁰ The Bill also provides for the amendment of article 60 (8) in order to specify grounds for the removal of members of the Electoral Commission. At the moment, a president may dismiss a member of the Electoral Commission under article 60(8) but no procedure is prescribed for the removal. This proposal is laudable as it appears to build constitutionalism in the presidency's power to appoint and dismiss of members

²⁶⁶ Constitution (Amendment) Bill No.11 2015, clause 9.

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ *ibid* clause 1.

of the Electoral Commission, as prevents arbitrary removals of the commissioners by providing grounds for which they may be dismissed. However, a commissioner would be referred to a tribunal appointed by the president before his or her dismissal, to determine if he or she should be dismissed.²⁷¹ Also a president may dismiss a member of the Electoral Commission for inability to perform his or her duties, misconduct or incompetence or if a commissioner is sentenced to death or imprisonment for more than nine months.²⁷² Therefore, commissioners will still be indebted to the presidency for their positions. Finally, it should be noted the government's proposals are silent on the restoration of the presidential two-term limits and the reforms to presidential electoral laws, long clamoured by civil society

²⁷¹ *ibid.*

²⁷² *ibid.*

Chapter Six

Concluding Remarks, Summary of Findings and Recommendations

1. Concluding remarks

Uganda's post-1995 constitutional order, which is now celebrating its twentieth anniversary, is characterised by an abiding tension between President Museveni's and his NRM government's permanent ownership of power and a constitutional promise of democracy. The questions of political transition, democracy, exercise of state power and accountability are best answered through understanding the patrimonial logic and the structural constitutionalism deficit in the 1995 Constitution. In Uganda, the head of state exercises inordinate powers. This is because fundamental laws have been established to entrench in power governments under whose leadership they are written. .

2. Summary of finding

The main findings of this study are centered on the research questions that I posed in chapter one. With respect to the main question whether the presidency as provided under the 1995 Constitution is as a result of another fundamental law this time created under leadership of President Museveni and the NRM for the purpose of entrenching their power. The study found that the conceptual problem of constitutionalism in post-1995 Uganda is that the country is experiencing its reconstructed past when it was supposed to create a future better than its past. This is because exclusive constitution-making, incumbency perpetuation and misallocation of

state powers remerged in the manner that the 1995 Constitution. Starting with the constitutional arrangements established under the colonial epoch up to the present, presidential authority in Uganda have emerged out of fundamental laws created for the purpose of entrenching the power of the head of state and government under whose influence or leadership they were created. The meaningful involvement of the majority of Ugandans in adopting the laws that rule over them was ignored. Therefore, because of the reasons why they were established, fundamental laws did not provide sufficient constraints on heads of state and governments. This study finds that the 1995 Constitution is such another fundamental law.

The study illustrated in chapter three that the 1995 Constitution was debated for close to seven years in order to determine a democratic system of governance and policies that would ensure smooth transfer of power and to circumscribe the exercise of state power, among other aims. The implementation of these aims would then be provided for under the Constitution in the interest of the citizenry who are the source of state power. The study demonstrated that it was the aspiration of the majority of Ugandans to who commented on the presidency to build into the 1995 Constitution mechanisms for ensuring that presidential authority is carefully monitored in order to avoid their misuse or abuse, and that future president are accountable to the people. Ugandans also sought to ensure that future presidents are elected through free and fair elections that would translate into democratic choice. The 1995 Constitution was meant to emerge out of the popular authority of the people of Uganda and to be cast in the principles of constitutionalism in order to achieve these aims. However, the constitution-making process was commandeered by President Museveni and his NRM party who were intent on creating a fundamental law that would enable them exercise unfettered state powers, and to entrench themselves in power

without the possibility of being removed through constitutional processes. Consequently, the constitution-making process did not yield the model of the presidency that Ugandans wished for. Efforts by citizenry to construct a new model of the presidency cast in constitutionalism were ignored by the framers of the 1995 Constitution. Therefore, this study found that the presidency as established by the 1995 Constitution lacks popular legitimacy because it was not founded on the wishes of the majority of Ugandans and it is devoid of legal legitimacy because it was not built on the basic tenets of constitutionalism. Indeed, this study found that there has been no actual shift from the designs of the presidency found in fundamental laws before 1995, under which the presidency exercised unfettered state powers.¹

In chapter four, this study established that the systems of checks and balances contained in the 1995 Constitution are either just masquerades that pretend to limit the powers of the presidency or they are inept because they were negligently or deliberately not fastened effectively, and in some cases they have failed to function because of the leadership style of the President. The study also illustrated that the design of the presidency provided for by the 1995 Constitution creates a presidency whose powers cannot be limited.

In chapter four this study found that reconstructing presidential authority in order to avoid its misuse would have produced a limited presidential system grounded in constitutionalism and which is based on the legitimate wishes of the people of Uganda. It would also have facilitated smooth transfer of power; minimised corruption and tribalism; ensured democratic governance;

¹ For example most powers and privileges vested in the kings, colonial governors and the past heads of state by fundamental laws such as the command of the army, the appointment of top civil servants and the immunity from legal proceeding are bestowed on the presidency by the 1995 Constitution of Uganda.

facilitated political stability and fair political competition; and allowed all Ugandans equal access to the country's resources, careers and economic prospects, among other things. This study also established that although constitutions in many African states designate the presidency in a similar manner, the powers and privileges of the presidency as provide for in these constitutions are not always based on valid reasons, neither are they founded on law or rooted in constitutionalism and they are often inspired by a desire to entrench power. In this regard, the affliction of poverty, corruption, civil wars and violent struggles for political power and patronage which are rampant on the African continent could be explained through understanding how Constitutions in Africa allocate powers to presidents and governments without the possibility of change through constitutional processes. Therefore, this study seeks to contribute to rethinking how Constitutions in Africa designate presidents. Furthermore, the study demonstrated that while President Museveni has exercised powers of the presidency almost without any actual restraint, courts in various countries have defined the scope of the powers of the presidency. Also, various countries have developed constitutional mechanisms to determine the parameters of the presidential authority. Therefore, a president may not exercise powers of the presidency for reasons other than those granted by a constitution, and without legal limits or irrationally.

The study found in chapter four that the powers and privileges of presidency as established by the 1995 Constitution have been used to encourage patronage and corruption, and to excluded the people of Uganda who are not aligned to the President and his party from accessing state jobs, among other things. They have also been used to impede democratic change and, therefore, there is a risk that Ugandans may turn to violent struggles for political power in order to remove

President Museveni and his NRM from power. Using the Constitution of the Republic of Benin 1990 as an example; this study demonstrated that it is possible to establish an effective presidency for the smooth running of the country, while at the same time ensuring that the exercise of presidential authority is subject to continuous supervision so as to avoid its abuse.

This study established in chapter five, that the unbounded provisions of the 1995 Constitution have made it possible for the NRM government to repeal the term limits on the re-election of a president, in disregard of the principles of constitutionalism and the wishes of the majority of Ugandans. The amendment of the 1995 Constitution to repeal the presidential term limits is also another example of President Museveni's disregard of provisions of the Constitution that attempt to limit his access to power. Therefore, President Museveni, like heads of state in Uganda before him, has not submitted to provisions of the Constitution that seek to limit his power. Although the amendment to repeal the term limits was effected in a manner authorised by the Constitution, this study found that it conflicts with the principles of transferring and allocating power which underlie the 1995 Constitution, and the basic tenets of constitutionalism. It was also not supported by the majority of Ugandans and it amounts to an unconstitutional change of government under the African Charter on Democracy, Elections and Governance (ACDEG) 2007.

Despite the rhetoric in the 1995 Constitution which suggests that power belongs to the people,² this study established that the 'real power' actually rests with President Museveni and his ruling government whose actions cannot be sufficiently be constrained, and who cannot be removed from power through constitutional processes. For example, in chapters four and five, this study

² See (n 3).

demonstrated that the President cannot be removed from power for violation of the Constitution because of the feeble impeachment process, or through elections because presidential electoral laws are deficient in their ability to facilitate fair political contestation and the electoral process is incapable of translating the people's votes into democratic choice.

Following a detailed analysis of the constitutional and domestic legal framework under which the president of Uganda is elected in chapter five, this study found that presidential electoral laws have been constructed to favour the incumbent, and to disadvantage other presidential candidates. It also demonstrated that electoral laws have been construed without specific attention to issues pertaining to the way elections are conducted and occurrences during elections in Uganda, and in disregard of the principles underpinning the 1995 Constitution. Moreover, this study found that presidential electoral laws fail to mitigate the dominance which the incumbent president and government have over the electoral process. Electoral laws also stipulate conditions that are impossible for a challenger to the incumbent to satisfy. For example, the requirement that the challenger to the outcome of presidential elections must prove the allegations of electoral malpractice on the highest threshold that is 'beyond reasonable doubt to the satisfaction of the Court',³ which is the standard of evidence required to validate a criminal conviction, has made it impossible to challenge fraudulent elections. In this regard this study established that presidential elections do not offer a credible forum for determining President Museveni's legitimacy. Therefore, the constitutional and domestic legal framework has hindered rather than facilitated

³ In the cases of *Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission*, Election Petition No.1 of 2001 [2001] UGSC3 (Presidential Election Petition No1 of 2001); *Rtd Col Kizza Besigye v the Electoral Commission and Yoweri Kaguta Museveni*, Presidential Petition No.1 of 2006 [2006] UGSC 24 (Presidential Election Petition No. 1 of 2006), the Supreme Court cited *Mbowe v Eliufoo*(1967) EA 240 as one of the leading authorities that the burden of proof lies with the petitioner in electoral petitions who must prove his allegation against the respondent at standard required to validate a criminal conviction.

fair competition for the presidency. The danger, however, is that Ugandans may revert to the old violent and unconstitutional ways of accessing power to depose President Museveni and his NRM government.

The overall finding of this study is that the presidency established by the 1995 Constitution is as a result of a fundamental law written under the auspices of President Museveni and his NRM government with the aim of entrenching themselves in power. Therefore, the Constitution does not make any genuine attempt to circumscribe the powers of the presidency. The out of the 1995 constitutional reforms travesty is that for the seventh time since independence in 1962, another government that came to power through violence and unconstitutional means has been legitimised by a fundamental law created to serve it. It may therefore be stated that since the boundaries of Uganda were drawn by the British in 1894, Uganda has not been able to promulgate a fundamental law and designated a presidency therein, which are founded on the basic principles of constitutionalism, and that have emerged out of the popular wishes of the people. Also, in the same period, Uganda has not been governed by a head of state and government that has been elected through electoral laws that translate will of the people into democratic choice.

The powers and the privileges of the presidency lie at that the heart of effective government, yet the control of presidential authority in Uganda and many other countries in Africa remains one of the most difficult problems in constitutional frameworks. In the case of Uganda, the 1995 Constitution represents the first attempt by the citizenry in Uganda by to reconstruct the institution of the president. However, the Constitution failed to take up the challenge of

providing sufficient constraints on the presidency. Also, an opportunity to rethink the reasons for granting powers and privileges that have been assigned by erstwhile fundamental laws to the presidency was missed. The recommendations that follow in the concluding section of this study are aimed at addressing these issues. They have also been submitted to the Uganda Law Reform Commission for consideration.

3. Recommendations

3.1 Promulgate a new constitution or review the provisions relating to the presidency in the 1995 Constitution and amend the Constitution

Uganda needs to promulgate a new constitution emerging out of the aspirations of Ugandans to construct democratic institutions and mechanism for ensuring that persons and institutions that exercise state powers are subjected to effective controls. This may be achieved through casting the new constitution in the mould of the principles of constitutionalism. Further studies need to be carried out on how to establish effective constitutional institutions and to ensure that state powers are exercised within acceptable constitutional limits not only in Uganda, but also in many other African countries.

In the case of Uganda, with regard to the presidency, a new constitution may be adopted to achieve these aims. Alternatively, provisions relating to the presidency in the 1995 Constitution could be reviewed and amended. However, amending the Constitution in order to reconstruct the presidency therein may amount to rewriting it because of the domineering nature of the

presidency in therein. Also, in relation to emending any of the major provisions relating to the presidency, the 1995 Constitution only allows the involvement of the citizenry in the provision relating to the length of the term that a president may serve⁴ which is five years. ⁵ All other provisions relating to the presidency may be amended by Parliament.⁶ Given its record of subservience to President Museveni, it is impossible to envisage how Parliament could agree to amend the Constitution with the aim of circumscribing the powers and privileges of the presidency. Similarly, it is impossible to imagine that President Museveni, to whom the country and the power of government have become personal possessions, would surrender to any attempt to limit his authority. Nevertheless, reviewing the 1995 Constitution in order to develop effective mechanisms for ensuring that those who exercise state powers are subject to effective checks and balances represents a more cost effective option.

Ideally, the new constitutional reform exercise should be insulated from the overriding influence of a single person, government, or political party. This is because history has demonstrated that as a result of having been sponsored by ruling governments or dominant individuals, fundamental laws in Uganda have tended to allocate excessive powers to their sponsors.

3.2 Conduct public debates on constitutional reforms

In order for the constitutional reforms to acquire the support of the public, Ugandans should be educated through public debates about the motivations behind the fundamental laws under which

⁴ The 1995 Constitution (n 3), arts 259(2) (f) and 261.

⁵ *ibid* art 105 (1).

⁶ *ibid* art 261.

the country has been ruled since its borders were drawn up. Civil society could take up the role of raising public awareness. Universities and other institutions of education could also provide courses on constitutional law with a specific focus on constitutionalism and constitution-making. Debates and courses on constitutional reforms could include how to develop mechanisms which insure that holders of public office do not abuse their authority. It is noted that the government is likely to invoke the Public Order and Management Act 2013⁷ to prohibit public debates on constitutional reforms. However, any such attempts would present civil society with an opportunity to test the constitutionality of the Act before the Constitutional Court.

3.3 Recommendations on the new design of a president

In order to ensure that future presidents are not allocated inordinate powers and that they require the will of Ugandans to hold power, several recommendations are submitted for consideration. These recommendations may also be very relevant for other African countries trapped in a similar situation of presidential dominance. First, the traditional instruments of power such as the armed forces, the police force and the Electoral Commission, as well as the other arms of government, such as the judiciary and the legislature should be insulated from the domination of the presidency. For example, under the new presidential design, members of the Electoral Commission could be appointed by a president from a list of recommended nominees submitted to Parliament by all registered political parties, in order to protect the integrity of the electoral

⁷ Section 5 (1) of the Act requires an organiser of a public meeting or his or her agent to give a notice of intention to hold a public meeting to an authorised officer at least three days but not more than fifteen days before the proposed public meeting. Under s 4(1) of the Act, a public meeting includes a gathering, assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing a view on a matter of public interest. S 8 (1) allows the Inspector General of Police, any police officer above the rank of inspector or any other authorised officer to stop or prevent the holding of a public meeting.

process. Second, a Constitutional Court with supervisory powers over the functions of all arms of government including the presidency, similar to the one in the Republic of Benin should be established.

Third, caveats that seek to provide checks and balances on presidential authority such as those that provide for the appointments of heads of public service bodies should be fastened sufficiently in order to ensure that democratic constitutional bodies, such as Parliament and expert constitutional bodies such as the Judicial Services Commission are empowered to perform their constitutional duties. This could be achieved in several ways. First, a president's powers of appointment should be exercised 'following the advice of' an expert constitutional body to ensure that a president is bound by the advice of such bodies. For example, in relation to judicial appointments, a president may be constitutionally authorised to appoint two of the eleven justices of the Supreme Court who may not include the chief justice, and one of the seven members of the Constitutional Court who again may not be the head of the court. A president's role in judicial appointments is justified by the mandate that the electorate have given him or her as the head of the administration of the country. However, such a mandate should not allow for the creation of a judiciary that is beholden to the president. The other justices of the Supreme Court and members of the Constitutional Court could be appointed by the Judicial Services Commission. To insulate expert constitutional bodies from the influence of a president, their members could be appointed by a president 'following the advice of' the Parliamentary Committee on Public Service Appointments which is made up of all political parties in Parliament, and on which every political party is equally represented. The term 'following the advice' denotes that such appointments may be made in adherence to the advice of the

Parliamentary Committee on Public Service Appointments. Therefore, it would be for the Parliamentary Committee to forward the names of the nominees to a president for appointment. Where a president finds that a candidate nominated by the Parliamentary Committee is not suitable for appointment, he or she may refer the matter to the Constitutional Court to determine.

The new constitution should provide for the qualifications and other requirements for judicial appointments and for the membership of expert bodies such as the Judicial Services Commission. Persons nominated for the position of the chief justice should be approved by the Constitutional Court, while those nominated for the head of the Constitutional Court should be approved by the Supreme Court.

Fourth, under the new designation of the president, the office holder should have the overall command of the armed forces; however its operations should be approved by a Parliamentary Committee on Security Agencies. As the leader of the administration of the country, whose responsibilities include protecting the citizens and the territorial integrity of the country, a president's command of the armed forces is justified because of the nature of the national security issues and operations that the armed forces may be involved in. The Parliamentary Committee, which again is made up of all political parties in Parliament and on which every political party in Parliament is equally represented, should appoint the head of the armed forces. The constitution should provide for the qualifications and other requirements for the head of the armed forces. It should also provide that the ethnic composition of the armed forces must reflect the population of Uganda. This could be achieved through ensuring that the recruitment processes stipulates the number of persons who may be recruited into armed forces from the

different regions of the country. These procedures should also apply to the police and prison and other security services. Fifth, to void partisan approaches to issues of national importance, the constitution should provide that a member of Parliament may only once in a year be required to vote on any motion in Parliament in support of his or her party.

Sixth, a president should not be provided with immunity from legal proceedings on account of acts or omission carried out as an individual. She or he may, however, be granted immunity for acts committed while acting in her or his capacity as a president. Acts and omissions carried out in the presidential capacity are those that relate to a president's constitutional role. However a president should be impeached for acts carried out in the exercise of his constitutional role which violates the constitution and domestic law. A motion of intention to seek legal proceedings against a president should be filed with the Constitutional Court and it should be approved by the Court. Legal proceedings against a president may also be commenced in the Constitutional Court. Parliament, the Constitutional Court on its own motion and the citizenry may initiate impeachment proceedings against a president for acts amounting to violation of domestic law or the constitution.

Impeachment proceedings against the president initiated by the Constitutional Court may be supported by at least three of the seven members of the Court and should be heard by the Supreme Court. A parliamentary motion seeking to impeach the president should be supported by half of the members of Parliament, while that of the citizenry should be supported by at least one-hundred thousand registered voters and both should be approved by the Constitution Court. Impeachment proceedings against a president initiated by Parliament and the citizenry may also

be heard by the Constitutional Court. A decision of the Constitutional Court not to impeach or to commence legal proceeding against a president maybe appealed by the citizenry or Parliament, whichever of the two initiated the proceedings, and the president to the Supreme Court. While decisions of the Supreme Court may not be appealable. A president may not be suspended from office while impeachment or legal proceedings are being investigated by the Constitutional Court or the Supreme Court unless either Court deems it necessary to do so in the interest of justice. The decision of the Constitutional Court to suspend the president may be appealed by the president to the Supreme Court. A president may also temporarily, on own accord; stand down pending the outcome of legal or impeachment proceedings. Where a president is suspended from office, or where he or she stands down temporarily, the constitution should provide for a procedure for an acting president to take over the office of the president.

3.4 Adopt constitutional limits on the re-election of a president

In order to facilitate fair competition for the presidency and to avoid incumbency perpetuation, the constitution could provide for a maximum of two term limits of five years each on the re-election of a president. This is because a five year term renewable once allows a president sufficient time to carry out the mandate for which he or she has been elected. While answering the on-going calls by civil society in Uganda to restore the two-term limits in the 1995 Constitution⁸ would improve political contestation among other things, it will not address the

⁸ See Citizens' Coalition for Electoral Democracy in Uganda, 'Beyond 2011: The Citizens Electoral Reform Agenda' (Citizen's Coalition for Electoral Democracy in Uganda, 20 December 2011) www.ccedu.org.ug/downloads/CERA%20Handbook%20-%20pdf.pdf accessed 20 March 2015; Civil Society Coalition for the Restoration of the Presidential Term Limits, 'Together We Must' (Civil Society Coalition for the Restoration of the Presidential Term Limit, 15 November 2012) http://ccgea.org/documents/Term%20Limits_Flyer_III1.pdf accessed 13 April 2015; Foundation for Human Rights

overall domineering nature of the presidency. Under the new constitution, a proposal to repeal the term limits on the re-election of a president should be supported by two-thirds of the registered voters and approved by the Constitutional Court.

3.5 Modify the principles for adjudicating presidential electoral complaints

The international principles for adjudicating electoral complaints which assume that the results of elections all over the world reflect the true will of the people regardless of how electoral laws and systems are structured in different jurisdictions should be revised. For example, a civil but not a criminal standard of proof should be employed in the adjudication of complaints resulting from elections. Furthermore, electoral laws in Uganda should seek to protect the quality of elections in order to safeguard the outcome of the elections. One way of achieving this would be to allow for elections to be annulled where they have been conducted so badly, in violation of electoral laws. Correspondingly, section 59(6)(c) of the Presidential Elections Act 2005 should be amended to allow for elections to be invalidated where a person declared president gains unfair advantage in elections as a result of non-compliance with mandatory provisions of electoral laws such as those that prohibit voter bribe and voter intimidation. In these circumstances, elections should annulled even where the non-compliance with electoral laws was not committed by the victorious candidate or with the approval or knowledge of the candidate by his or her agent.

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